To: Fiona Marshall - Secretary to the Aarhus Convention Compliance Committee
From: Pat Swords, Neil Van Dokkum and David Malone
Date: 13th December 2018
Re: Communication C-112 and Judgement of 11th January 2018 in Val Martin v An Bord Pleanala.
Attached: Judgement of Val Martin v An Bord Pleanala in Judicial Review 2017 No.104 JR

Dear Fiona

A central theme of Communication C-112 is that public participation in Ireland in relation to the renewable programme is completely 'pro forma' in that overarching plans and programmes are completely excluded from the scope of the public participation in decision making on major industrial projects. Not only does no environmental information exist in relation to the justification, needs and alternatives in relation to these plans and programmes, but they also bypassed the applicable public participation provisions of Article 7 of the Convention. Subsequent decision making on projects falling under Article 6 of the Convention is based solely on the imperative to implement the political objectives in those overarching plans and projects, in which any consideration of the environmental and economic justification of the project and the reasonable alternatives to the same, plus the input from the public in relation to the such matters, is completely ruled out of the scope of the decision-making.

The Judgement in Val Martin v An Bord Pleanala in the Irish High Court on the 11th January 2018 confirms how the Irish High Court has confirmed this standard of assessment as being completely adequate under Irish law. This judgement related to a Judicial Review of the December 2016 planning approval for the 400 kV North South Interconnector,[1] a project which is also an EU Project of Common Interest, as adopted on their 2013 list (See Communication C-96):

- 2.13. Cluster Ireland – United Kingdom (Northern Ireland) interconnections, including one or more following Projects of 2.13.1: A new 400 kV AC single circuit (OHL) of 140 km and with a capacity of 1,500 MVA between Turleenan 400/275 kV in Northern Ireland (UK) to Woodland 400/220 kV (IE) (onshore).[2]

In total 871 submissions were made by the public at a cost of €50 each, plus attendance at a lengthy oral hearing. A recurring position articulated was the need and justification for this project, as can be seen in the summary of the submissions made and throughout the planning report.[3] The subsequent Judicial Review was based on the principles of Article 6(4) of the Convention and as to how: "Each Party shall provide for early public participation, when all options are open and effective public participation can take place."[4] In particular as to how this project was related to tiered decision making, as it was to support the implementation of the Irish renewable programme, as adopted by the National Renewable Energy Action Plan (NREAP)

[1] An Bord Pleanala case file VA00017: http://www.pleanala.ie/casenum/VA0017.htm

[2] See bottom of page 27: https://ec.europa.eu/energy/sites/ener/files/documents/2013_pci_projects_country.pdf

[3] See for example "Summary of Observations made: Summary of Issues Raised regarding Need" on page 30: http://www.pleanala.ie/documents/reports/VA0/RVA0017A.pdf

[4] As transposed by Article 6(4) of the Environmental Impact Assessment Directive 2011/92/EC

required by Directive 2009/28/EC[5], the associated national plan for the high voltage grid expansion (Grid25) and Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure (Projects of Common Interest).

Reference was then made to the UNECE Maastricht Recommendations in relation to Article 6(4):

- *F. Early public participation when all options are open (article 6, paragraph 4)*
  78. In the case of tiered decision-making (see para. 17 above), in order to ensure early and effective public participation when all options are open:
    - *a. There should be at least one stage in the decision-making process when the public has the opportunity to participate effectively on whether the proposed activity should go ahead at all (the zero option) (see also para 16 above);*
    - *b. In addition, at each stage of a tiered decision-making process, the public should have the opportunity to participate in an early and effective manner on all options being considered at that stage;*
    - *c. Information about the decision-making in the earlier tiers should be available in order for the public to understand the justification of those earlier decisions — including the rejection of the zero option and other alternatives;*
    - *d. When in a tiered decision-making process new information subsequently sheds doubt on decisions made in the earlier tiers or stages or severely undermines their justification it should be possible to reopen these decisions.*

To summarise briefly with respect to the above requirements:

(i) The failure to comply with the public participation requirements of Article 7 of the Convention with regard to the adoption of the NREAP has already led to the findings in Communication C-54 and subsequent Decision of non-compliance V/9g.[6] Furthermore, as has been repeatedly pointed out, the NREAP contains zero environmental data in relation to what alleged environmental benefit it is to achieve and zero information in relation to costs and alternatives.[7]

(ii) The NREAP which contained the Grid25 plan was adopted on the 30th June 2010. Subsequently in 2011 a Strategic Environmental Assessment (SEA) was completed, in which the justification for Grid25 was the 40% renewable electricity target (predominately wind generated) adopted in the NREAP and in which the 'zero option' was automatically ruled out, as it did not allow compliance with this political target. Only twenty four submissions were received on the Grid25 SEA consultation, of which only three could be attributed to members of the public, the rest being statutory consultees. This is in stark contrast to the subsequent thousands who have made submissions on the later stages of the Grid25 implementation, including the planning process on the North South Interconnector itself. The degree of public notice clarifies

[5] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0028

[6] https://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppcc/envppccimplementation/fifth-meeting-of-the-parties-2014/european-union-decision-v9g.html

[7] See for example answer of 1st December to Question 3 of the Committee on Communication C-112: https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2014-112_Ireland/frComm_response_to_Committee_s_questions_01.12.2014.pdf

this position, in that it while it was published in the National press, it was entitled: ""*Notice of preparation of Grid25 Implementation Programme and accompanying SEA".* Nowhere in this Public Notice did it actually explain as to what this Grid25 programme actually entails, what an SEA actually is and its significance with respect to *"setting the framework for future development consent".* Neither was there any publicity for the Grid25 programme, in simple terms any member of the public reading the notice would just see acronyms they did not understand. Despite Grid25 involving 34 km of new 400 kV high voltage infrastructure in N. Ireland, there was no public notice there, as the authorities considered there were no significant environmental impacts.

(iii) The lack of public participation on the adoption of the Projects of Common Interest is already the subject of Communication C-96, but suffice here to point out that Article 7(1) of Regulation (EU) No 347/2013 states: "The adoption of the Union list shall establish, **for the purposes of any decisions issued in the permit granting process, the necessity of these projects from an energy policy perspective**, without prejudice to the exact location, routing or technology of the project". [Emphasis in bold]

As the North South Interconnector was designated Strategic Infrastructure Development, it bypassed a planning procedure at local authority level and was instead fast tracked in to the planning appeals board "An Bord Pleanala", with the only right of review being into the Courts. As the Committee are already aware, an Irish Court will not review a substantive issue, i.e. related to the merit of the decision making, unless it can first be proven that the Government official acted so irrationally that it defied common sense, [8] a standard of review, which inherently falls short of what is required by the Convention. However, the resulting judgement also usefully defines the standard of review and public participation at the prior planning phase, in which any consideration of overarching plans and programmes is strictly ruled out, regardless of whether there is any environmental information available to justify them or not. In other words, planning is purely a 'tick box' exercise, which the public have no ability to influence, as it is based upon previously agreed political decisions, which are essentially made behind closed doors. The public input is simply summarised and then ignored.

In relation to "(iii) Government Policy and An Bord Pleanala" the judgement stated:

- 7. In is not the function of An Bord Pleanala to review government policy or to consider public submissions in relation to government policy. Indeed the court cannot but recall, in this regard, s.143 of the Act of 2000, and the provision at sub-section (1) of same that *"The Board shall, in performing its function, have regard to", inter alia, "(a) the policies and objectives for the time being of the Government, a State authority, the Miniter, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural".* The court references the role of An Bord Pleanala, not because of some transgression that it perceives to arise in this regard on the part of An Bord Pleanala, but because, with respect, Mr Martin's application appeared to the court to be informed by a want of understanding of the foregoing.

[8] This "Standard of Review" in review is described for example in the EU's e-justice portal: https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-ie-en.do?member=1

In relation to "(iv) PCIs and An Bord Pleanala" the judgement stated:

- 9. It is not the function of An Bord Pleanala, whether as a national competent authority or otherwise to review the decision of the European Council and Parliament to adopt the PCI Regulation or to review (let alone accept pubic submission concerning) whether a particular project has correctly been adopted for the purpose of the Regulation. As to what is the role of An Bord Pleanala in this regard, the following text from the written submission of counsel for An Bord Pleanala provides succinct yet informative explanation and is respectively adopted by the court.

  "[T]*he PCI Regulation establishes a methodology whereby 'Projects of Common Interest' are identified. There is no dispute but that the North / South Interconnector has been adopted at European level as such a PCI ….. Article 8* [of the PCI Regulation] *provides that* 'By the 16th November, 2013 each Member State shall designate one National Competent Authority which shall be responsible for facilitating and co-ordinating the permit granting process for projects of common interest.' [In Ireland, An Bord Pleanala, has properly been so designated.] *The function of the competent authority is …. to act as a clearing house or framework co-ordinator for the development consent process. It is not a role that requires any substantive decisions to be taken regarding the acceptability of a proposed development. The role of the competent authority is totally different from the role of the 'project promoter' which is defined in Article 2(6)* [of the PCI Regulation] *and which is this case is Eirgrid…...* [T]*he adoption of* [a]*… PCI* [as a PCI] *is a matter which follows very clear procedures under the PIC Regulation and crucially has nothing to do with the Board. Indeed, Article 7 mandates the Board (when considering a planning application) to accept that the PCI is necessary from the energy policy perspective."*

- 10. It follows from the foregoing and more particularly from the PCI Regulation, that any notion the An Bord Pleanala can re-visit the decision to list the project is wrong.

As is part of the subject matter of Communication C112, in 2013 these PCIs were adopted with any environmental information being available or any consideration of alternatives; their sole justification being to fulfil a previously agreed political target. While alternative configurations to the project were represented in both the Grid25 SEA and the planning procedure, alternatives to the project itself were never assessed at any stage, either at those of the overarching plans or programmes or at the project level itself. Indeed the 'do nothing' alternative, which was not addressed in the documentation produced by the planning authority, was simply ruled out as it did not enable the political target to be met. This can be seen from the judgement.

- 69. Mr Martin submitted that one alternative which was not considered was the 'do nothing' alternative. But An Bord Pleanala stated in its decision that it considered the EIS[9] which was put before it, which statement does consider the following alternative, stating as follows in Section 4.1.2 (under the heading, in enlarged Bold font, "DO NOTHING ALTERNATIVE"):

  "17. It is best practice in Environmental Impact Assessments (EIA) to consider the 'Do Nothing' alternative, i.e. where no development occurs. Under a 'Do Nothing' alternative, the strategic transmission infrastructure and its

[9] Note: The Environmental Impact Statement as supplied by the developer.

associated development would not be constructed. The land upon which such development is proposed to occur – primarily comprising agriculture land – would remain unchanged. As a consequence, the environmental impacts, identified in this EIS, positive and negative, would not occur.

18. Furthermore, under a 'Do Nothing' scenario there would remain a single interconnector between the transmission systems of Ireland and Northern Ireland, with consequent limitations as set out at Chapter 2 of this volume [0f] the EIS. Of particular note, there would remain an inherent risk of system separation, requiring a constraint on the total transfer capacity available on the existing interconnector. This would serve to frustrate the operating of the SEM, as per the Single Electricity Market Directive ….. [I]*t would also significantly frustrate current Government targets for 40% of National electricity consumption from renewable sources by 2020. The 'Do Nothing' scenario would also fail to offset the likely environmental impact of any alternative options to secure the future reinforcement of the transmission infrastructure in the north-east area of Ireland.*

19: Having regard to all of the abve, the 'Do Nothing' alternative is not considered to be appropriate."

In simple practical terms, the island of Ireland has had an electricity system, which has served it reliably and affordably for many decades. Indeed, that same 'legacy system' has to continue to function in periods when the wind speed is less than double the average wind speed, which is a considerable period of time. Both the Single Electricity Market and 40% renewable electricity target are simply political objectives, adopted without any environmental information being available, as to what they are actually to deliver versus the 'do nothing' scenario. So yet again the justification for a project rests on another nebulous plan, for which no information is available as to what it is to actually deliver other than a target agreed by political consensus. If we consider the core principle of the Aarhus Convention:

- *Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information*

Then this does not apply in Ireland, instead An Bord Pleanala's function is to 'rubber stamp' politically agreed plans and programmes, including lists of projects already adopted at EU level. There is no weighing up of the impact of the development versus the benefits (other than political) that it delivers. One simply cannot see the proportionality of the decision making, as not only does the environmental information necessary to weigh up the impacts of the development not exist, but neither is it actually required by the decision-making process itself. Indeed, An Bord Pleanala's 'rubber stamp' role, in which the public participation is reduce solely to a consultation process in which they are being told what is being done, has been affirmed by the judgement in this case. As the sole function of the High Court, is to be a 'rubber stamp' for An Bord Pleanala in this role.

Finally, the Compliance Committee may be interested in Section XIII of the Judgement, which is entitled "The UNECE Compliance Committee" and states:

- 87. Article 15 of the Aarhus Convention on review of compliance, requires the Meeting of the Parties to establish "*optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance*

with the provisions of this Convention". Pursuant to this obligation, the Meeting of the Signatories set in place a scheme of actions that led to the establishment of a Compliance Committee. Reference was made by Mr Martin to Finding ACCC/C/2012/76 of that Committee. That is a finding concerned with systemic over-deference by the courts of Bulgaria and has nothing to do with the PCI Regulation. …..