Comhshaol, Pobal agus Rialtas Áitiúil
Environment, Community and Local Government

UNITED NATIONS
ECONOMIC COMMISSION FOR EUROPE

Ms. Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
Palais des Nations, Room 429-4
CH-1211 GENEVA 10
Switzerland

Your Ref: ACCC/C/2014/112

RE: COMMUNICATION TO THE AARHUS CONVENTION COMPLIANCE COMMITTEE CONCERNING ACCC/C/2014/112

Dear Ms. Marshall

We refer to your correspondence dated 29th June 2015 relating to the above and our response is set out below:

1. INTRODUCTION

1.1 A communication has been received from Mr. Pat Swords, Mr. David Malone and Mr. Neil Van Dokkum acting on behalf of 7 named environmental Non-Governmental Organisation concerning alleged non-compliance by Ireland with the Convention on Access to Information, Public Participation in Decision Making and access to Justice in Environmental Matters as signed at Aarhus, Denmark, 25th June 1998 (hereinafter 'the Convention'). The Convention was signed by Ireland on 25th June 1998 and ratified by Ireland on 20th June 2012, entering into force in September 2012. It is noted that while the three named individuals are described as the persons responsible for the communication, it is, in fact, signed by different individuals and not the Communicants. It might also be noted that the Communicants, both individuals and organisations, are linked by their common opposition to the development of wind

farms and operate as anti-wind farm campaigners at a local, national and now international level.

1.2 While the communication is framed in an extremely broad manner it is nonetheless possible to discern a number of central complaints. The central theme of the communication is an alleged failure to provide for public participation in accordance with the Convention. The Communicants allege that Ireland has failed to comply with Articles 3(1), 4, 5, 6, 7, 8 and 9 relating to the current renewable energy programme and in particular in relation to the development of wind farms. The complaints can be expressed in a general manner as follows:

(i) Alleged failure to address the findings and recommendations on Communication ACCC/C/2010/54

(ii) Alleged failure to enable public participation in relation to:

- Approval of projects falling under Annex 1 of the Convention
- Approval of regional Development Plans
- Approval of guidance documents

(iii) Alleged failures to comply with the Convention in the manner in which proceedings entitled *Swords v. Minister for Communications, Energy and Natural Resources* have been defended.

1.3 Subtending most of these complaints is the Communicants' allegation that the adoption of Ireland's National Renewable Energy Action Plan[1] (NREAP) pursuant to Directive 2009/28/EC was in breach of Article 7 of the Convention and of Directive 2001/42/EC on Strategic Environmental Assessment. For example, the complaints made about the failure to enable public participation in individual decisions approving projects falling under Annex 1 of the Convention or in the approval of regional Development Plans or guidance documents do not in reality point to any lack of public participation but instead complain that the decision maker in each case did not revisit the substantive merits of the existing policy as reflected in the NREAP and related policy in response to public submissions.

[1] ITEM 1, Appendix

1.4 Leaving aside for a moment issues concerning the status of the NREAP and the extent to which it represents merely a restatement of pre-existing policy in the form required by Directive 2009/28/EC, Ireland's NREAP was adopted in June 2010 some two years prior to Ireland becoming a Party to the Convention in 2012. Under Article 18 of the Annex to Decision I/7 members of the public may communicate with the Committee "*concerning [a] Party's compliance with the Convention*". The Committee does not have jurisdiction to consider whether Ireland's NREAP was adopted in compliance with the Convention in circumstances where Ireland was not a "*Party*" to the Convention within the meaning of Article 2 of the Convention at the time the NREAP was adopted. It is accepted that the questions posed by the Committee to the Communicants on 21st November 2014 appreciate the significance of this timing[2]. The Committee is also referred to its decision in Communication ACCC/C/2004/06 (Kazakhstan) 16th June 2006.

1.5 Insofar as the Communicants assert that the Convention formed part of European law from the date of its ratification by the EU in 2005, this is irrelevant to the Committee's jurisdiction in respect of a complaint against Ireland since Ireland did not become a "*Party*" to the Convention by virtue of the EU's ratification. A separate act of ratification by Ireland was required. The Committee does not have jurisdiction to determine the extent to which Ireland may or may not have complied with obligations imposed upon it by European law nor indeed the nature or extent of those obligations.

1.6 The Convention imposes prospective obligations and does not require that decisions made by a Party prior to ratification be re-visited for the purposes of enabling public participation post-ratification. This is the case even where the decision in question would fall within the scope of the Convention were it applicable. Nor does the Convention require that decisions made by a Party prior to ratification be treated as legally invalid post-ratification because different procedures might apply were they to have been adopted in light of the Convention. Existing policy did not become defunct on ratification of the Convention.

1.7 These issues are important as the thrust of the complaints made by the Communicants as regards both individual planning decisions and the adoption of Development Plans subsequent to Ireland's ratification of the Convention, really concern the

[2] In particular questions 2, 3, 4 and 6 all query the dates of the decisions in issue.

unwillingness of decision-makers to revisit the substantive merits of existing policy such as the NREAP adopted prior to the ratification of the Convention or alternatively to treat such policy as invalid or inapplicable in light of the Convention.

1.8 Without prejudice to the fact that the NREAP was adopted prior to Ireland's ratification of the Convention, it is not accepted that there was a failure to consult with the public in relation to its adoption. The Department of Communications Energy and Natural Resources which was responsible for drawing up the NREAP undertook a targeted consultation between March and June 2010 with the bodies listed at Appendix 6 of the NREAP. These represent some 47 different bodies with an interest in the sector. The Department also appeared before the Joint Oireachtas Committee on Climate Change and Energy on 26th May 2010 to debate the NREAP and the debate was as a matter of public record posted to the Department's website. Finally. the draft NREAP was open for consultation on the Department's website from 11th June to 25th June 2010 and 58 responses were received as part of this public consultation.

1.9 Unfortunately, the manner in which the complaints are expressed by the Communicants is not helpful, particularly the use of broad, sweeping statements that are unsubstantiated. In particular, the Communicants place emphasis on proceedings entitled *Swords v. Minister for Communications, Energy and Natural Resources 2013/4122P*, proceedings which are currently before the Irish High Court. As the proceedings have not yet concluded and judgment in two preliminary matters is awaited, it is inappropriate for the Communicants to comment on the proceedings in the manner in which they have done.

2. COMMUNICATION ACCC/C/2010/54

2.1 The Communicants allege a failure to comply with the decision of the Compliance Committee in Communication ACCC/C/2010/54. Ireland was not the Party Concerned in that communication, which related to an alleged failure by the European Union to comply with its obligations under Articles 5 and 7 of the Convention. This distinction is important because the Communicants rely on aspects of that decision in respect of which Ireland did not have the opportunity to state or

defend its position[3]. The findings of the Compliance Committee[4] were that the European Union failed to comply with:

- Article 7 of the Convention by not having in place a proper regulatory framework and/or clear instructions to implement Article 7 with respect to the adoption of NREAPs by its Member States, and, by not properly monitoring the implementation by Ireland of Article 7 of the Convention, its adoption of Ireland's NREAP;
- Article 3 of the Convention, by not having in place a proper regulatory framework and/or clear instructions to implement and proper measures to enforce Article 7 with respect to the adoption of NREAPs by its Member States.

2.2 The Compliance Committee recommended that the European Union adopt a proper regulatory framework and/or clear instructions for implementing Article 7 of the Convention with respect to the adoption of NREAPs. It was recommended that the European Union ensure that arrangements for public participation in Member States are transparent and fair and that within those arrangements the necessary information is provided to the public. In addition, it was recommended that the regulatory framework and/or clear instructions must ensure that the requirements of Article 6, paragraphs 3, 4 and 8 of the Convention are met including reasonable time frames allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation. It was finally recommended that the European Union adapt the manner in which it evaluates NREAPs.

[3] For example it is clear from paragraph 75 of the Findings and Recommendation that the finding that Ireland's NREAP constituted a plan or programme relating to the environment subject to Article 7 was made in circumstances where the Communicant asserted that this was the case and the Party Concerned (i.e. the EU) confirmed this in oral and written submissions. Ireland did not get to express a view and did not make this concession.

[4] Paragraphs 97 and 98 of ECE/MP.PP/C.1/2012/12

2.3 In compliance with the said recommendation, the European Commission wrote to all Member States on 12 September 2013 informing them of the findings and reminding them to respect the provisions of the Convention relating to public participation should the need to submit an amended NREAP arise. Following from this correspondence the Compliance Committee invited the European Commission to submit periodic progress reports on implementation in July 2014, July 2015 and July 2016. Note that Ireland disputes the Communicants' contention in their reply of 1st December 2014 that the progress reports submitted constitute an amendment of the original 2010 NREAP.

2.4 On 14 October 2015 the European Commission wrote to Ireland to ask for details to be included in the next national progress report on the NREAP, to be submitted by end of 2015, of measures and procedures in place to ensure public participation in relation to decision making. Ireland is currently preparing a response to this request.

2.5 Where Ireland was not the Party Concerned in that communication, there can be no question of a failure of Ireland to comply with the Decision of the Compliance Committee. It is submitted, that a complaint of this nature is invalid and ought be dismissed by the Complaints Committee as it does not relate to compliance by Ireland with the Convention within the meaning of Article 15 of the Convention.

3. PAT SWORDS V. MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES 2013/4122P

3.1 Throughout the communication, the Communicants rely on proceedings issued by Mr. Swords against the Minister for Communications, Energy and Natural Resources in the High Court of Ireland challenging the NREAP and Energy Policy Framework and in which he seeks declaratory relief that Ireland has failed to conduct a Strategic Environmental Assessment (SEA); has failed to have in place proper public participatory procedures contrary to Article 7 of the Convention and EU law and has adopted the National Renewable Energy Plan (NREAP) of July 2010 in contravention of the Convention (hereinafter referred to as "*the Swords proceedings*").

3.2 These proceedings are currently pending before the High Court of Ireland and no determination as to the validity of the claims made by Mr. Swords has been issued by the High Court of Ireland. Ireland is defending the claim brought by Mr. Swords and denies the allegations made in the proceedings. On 3rd, 4th, 5th, 6th, and 12th March 2015 the High Court heard two preliminary applications in the proceedings – an application by Mr. Swords for a Protective Costs Order and an application by the State to have the proceedings dismissed by reason of unreasonable, inordinate and inexcusable delay in their commencement. The proceedings stand adjourned to 16th December 2015 wherein it is hoped that the High Court will deliver judgment on the preliminary applications.

3.3 In light of the fact that these proceedings are pending before the High Court of Ireland, it would be inappropriate for this Committee to engage in any analysis of the matters that arise for consideration therein. This would amount to an impermissible interference by the Committee with proceedings that are pending before domestic courts. Strikingly, the Communicants quote (selectively) from the pleadings and affidavits filed in the High Court on behalf of the Minister to contend that in defending the proceedings Ireland is acting contrary to the Convention. It is inappropriate for the Communicants to raise complaint relating to the pleadings filed by Ireland before the High Court and seek to use these as the basis of a communication to this Committee.

3.4 In the communication, a number of allegations are made with regards to the manner in which these proceedings have been defended by the State before the High Court. It is unfortunate that the Communicants have chosen to engage in rhetoric of this nature in respect of proceedings that are currently pending and have not yet been determined. It is unfortunate that the Communicants have chosen to make wild and unsubstantiated allegations about the manner in which Ireland has dealt with the proceedings before the High Court.

3.5 In particular, it is denied that there is any intent on the part of Ireland not to comply with the recommendations of the Committee on the decision issued in

ACCC/C/2010/54[5]. As already outlined the Party Concerned in that communication was the European Union and there can be therefore no question of Ireland not complying with the decision.

3.6 It is further denied that the Irish State Solicitor is *"actively trying to re-write the international jurisprudence of the Convention in the High Court"*[6]. There is no basis for such allegation to be made. Similarly, making an allegation relating to matters stated at the hearing of an application by Mr. Swords is not appropriate and the allegation made by Mr. Swords should not form part of the considerations of this Committee. At this point in time, the allegations made by Mr Swords in the domestic proceedings have not been either legally or factually upheld by the Irish High Court and the mere fact that he has made these allegations cannot constitute evidence of non-compliance with the Convention by Ireland before this Committee. However, it is relevant in the context of Article 21 of Decision I/7 that the Communicants (of which Mr Swords is one) have made this complaint whilst at the same time invoking a domestic remedy before the national courts.

3.7 By way of general submissions, it is the position of Ireland that this Committee ought not consider any issue that relates to the Swords proceedings as this would amount to an impermissible infringement on the jurisdiction of the High Court of Ireland.

4. RENEWABLE ENERGY TARGETS

4.1 By way of background, it is important to explain the role played by renewable energy in the context of Irish energy policy. In 2007 the European Commission determined that the European Union would pursue a joint energy and climate approach whereby Member States would be given a renewable energy target that would serve policy objectives in terms of both climate change and security of energy supply and competitiveness. It was agreed that by 2020 the European Union would achieve a 20% reduction in greenhouse gases, that 20% of the European Union's energy consumption would be from renewable source and that a 20% energy saving would be achieved.

[5] Page 8 of the Communication
[6] Page 8 of the Communication

4.2 Arising from that decision Directive 2009/28/EC was published on 23rd April 2009 in which each Member State was set a binding target for a percentage of all energy consumed to be from renewable sources by 2020. In the case of Ireland a target of 16% was set. Arising from Directive 2009/28/EC it is for each Member State to choose the manner in which it will achieve the set target across the electricity, heat and transport sectors save for a non-discretionary minimum target for transport being set at 10%.

4.3 Pursuant to Article 4 of Directive 2009/28/EC, Ireland adopted its National Renewable Energy Action Plan and submitted it to the European Commission on 30th June 2010. The NREAP took the form of the completion of a 40 page template adopted by the Commission and provided to all Member States. In accordance with its obligations, the NREAP set out the trajectory for increasing the share of energy from renewable sources consumed in transport, electricity and heating and cooling in 2020 in order to demonstrate how Ireland would meet the binding target of 16% of all energy being from renewable resources. It is important to note that the NREAP did not set new targets but instead drew together existing Government policy into one document. It is noted that the NREAP was prepared and submitted to the Commission before the Convention was ratified by Ireland.

4.4 At a broader level, Government energy policy is set out in the White Paper published by the Department of Communications Energy and Natural Resources in 2007 entitled "*Delivering a Sustainable Energy Future for Ireland – the Energy Policy Framework 2007-2020*"[7], which was preceded by and underpinned by a Green Paper and associated public consultation "'*Towards A Sustainable Energy Future for Ireland*"[89]. It contained a biofuels penetration target of at least 10%, a target of 12% renewable heat

[7] ITEM 2 Appendix
[8] ITEM 3 Appendix
[9] It might be noted that in Ireland the formation of Government policy in any sector may take place through a non-statutory process involving the publication of Green and White Papers. A Green Paper is a discussion document intended to form the basis of a public consultation procedure either generally or with relevant stake-holders. The publication of a Green Paper may itself be preceded by wide-ranging public consultation. Subsequent to the consultation on a Green Paper, the resulting policy may be published in the form of a White Paper which may include general policy statements or proposals for legislative reform. Although the process is non-statutory and therefore not legally binding, public consultation is a key feature of this policy formation process.

market penetration, and 33% of electricity consumption from renewable resources by 2020. Following the *All–Island Grid Study*[10], an increase in the Government renewable electricity target from 33% to 40% was announced by Minister John Gormley on 15 October 2008 as part of the 2009 Carbon Budget. The three existing targets together amount to 16% overall energy consumption i.e. the target assigned to Ireland under Directive 2009/28/EC.

5. COMPLIANCE WITH ARTICLE 3 OF THE CONVENTION

5.1 Ireland denies that there has been any failure on its part to comply with Article 3 of the Convention. The Communicants have failed to either particularise or substantiate any allegation that Ireland has failed to comply with Article 3 of the Convention. Given that Article 3 is described as containing "General Provisions" and imposes obligations at a very general level many of which are designed to ensure effective compliance with Articles 4 to 9 inclusive, in order for Ireland to be able to fairly defend these allegations it is essential that detailed particulars of any alleged breach of Article 3 are provided. It would appear that the allegation that Ireland has failed to comply with Article 3 of the Convention centres on alleged non-compliance with the decision in ACCC/C/2010/54 and the manner in which arguments have been made in the Swords proceedings.

5.2 As already outlined, it is not appropriate for this Committee to consider matters related to the Swords proceedings when these proceedings remain to be determined by the High Court of Ireland and therefore any complaint that Ireland has failed to comply with Article 3 by reason of anything related to the said proceedings ought to be dismissed. Insofar as any argument is sought to be made that the manner in which the NREAP was formulated did not comply with the Convention, it is submitted firstly that this issue is currently pending before the Irish High Court and therefore should not fall to be considered by this Committee and secondly that as the NREAP was adopted before Ireland became a Party to the Convention this complaint should be dismissed *in limine*.

[10] ITEM 4 Appendix

5.3 Similarly, any complaint arising out of an alleged failure by Ireland to comply with the decision in ACCC/C/2010/54 is misconceived. That decision was not directed at Ireland but instead was directed at the Party Concerned, the European Union.

5.4 Ireland denies that there have been systematic failures of public authorities in Ireland to comply with the Convention. The allegation made by the Communicants has no basis in either fact or law. As evident from the complaint mechanisms utilised by the Communicants there exists a robust legal framework through which the rights guaranteed by the Convention can be realised. It is respectfully submitted that the core of the complaint made by the Communicants is that they have been unsuccessful in the *merits* of the complaints they have raised.

6. COMPLIANCE WITH ARTICLE 4 OF THE CONVENTION

6.1 In general, Article 4 has been implemented in Ireland by the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007)[11], the European Communities (Access to Information on the Environment)(Amendment) Regulations 2011 (S.I. No. 662 of 2011)[12] and the European Communities (Access to Information on the Environment) (Amendment) Regulations 2014 (SI No 615 of 2014)[13] which transpose Directive 2003/4/EC on Public Access to Environmental Information.

6.2 The *Access to Information on the Environment Regulations*[14] enable members of the public to make requests of public authorities for the release of environmental information. A request must be complied with within one month[15]. Article 8 and 9 of the 2007 Regulations establish the reasons that may be invoked to refuse a request for information, which said reasons are in line with Article 4(3) and Article 4(4) of the Convention. Where an applicant is dissatisfied with the response of the public authority, he or she may request an internal review under Article 11 and further may

[11] ITEM 5 Appendix
[12] ITEM 6 Appendix
[13] ITEM 7 Appendix
[14] ITEM 8 Appendix – *unofficial consolidated version*
[15] Article 7(2)(a) of the European Communities (Access to Information on the Environment Regulations 2007. Article 7(2)(b)(ii) allows an extension of time in cases of complexity.

appeal to the Commissioner for Environmental Information in accordance with Article 12 of the 2007 Regulations. Any party who is affected by a decision of the Commissioner for Environmental Information may appeal to the High Court on a point of law arising from a decision of the Commissioner[16]. The legal costs regime for appeals taken to the High Court under Article 13 of the 2007 Regulations is governed by Part 2 of the *Environment (Miscellaneous Provisions) Act, 2011*[17]. Section 3 of the 2011 Act provides that that in proceedings to which the section applies each party shall bear its own costs and costs may be awarded in favour of an applicant to the extent to which the applicant is successful in obtaining relief against a respondent. Section 5 of the 2011 Act provides that section 3 applies to civil proceedings instituted by a person relating to a request for access to environmental information referred to in Article 6 of the 2007 Regulations.

6.3 The precise nature of the complaint being made by the Communicants is not entirely clear. In so far as complaint is made relating to the merits of specific requests for environmental information made under the 2007 Regulations, it is submitted that this Committee ought not interfere with determinations made on the merits of requests by domestic authorities. The Communicants draw attention to 3 requests made under the 2007 Regulations. It is noted that the first request relates to the Sustainable Energy Authority of Ireland and an appeal against this request is currently pending before the Commissioner for Environmental Information. In the second case, the requester elected not to appeal the decision to the Commissioner for Environmental Information and it can therefore not form the basis for any allegation of a failure to comply with the Convention as it was the requester's own decision not to engage in the mechanisms provided. It is not clear what has occurred with the third case and whether the requesters determined to continue their appeal or whether a fresh request was made as recommended.

6.4 In so far as complaint is made in relation to the length of time that is taken for appeals to be heard, it should be noted that further resources were recently allocated to the Commissioner for Environmental Information to enable his office to process more

[16] Article 13, European Communities (Access to Information on the Environment) Regulations 2007.
[17] ITEM 9 Appendix

appeals in a timely manner. Unfortunately, until very recently economic circumstances in Ireland since 2008 have resulted in a restriction in the public funds available to fund many public services of which the CEI was one. Dedicated funding has now been made available to the Commissioner to be allocated specifically to the processing of appeals taken under the AIE Regulations. In June 2015 two investigators were appointed to deal with appeals brought under the AIE Regulations and they have been in a position to make progress of processing appeals. The Commissioner for Environmental Information now has a dedicated staff allocated to the processing of appeals brought under the AIE Regulations which is comprised of 2 full time Investigators with part time involvement of a Senior Investigator and an OIC investigator together with clerical support.

6.5 In respect of the comments made by the Communicants relating to wind energy, it is necessary to make a number of general comments. Firstly, Ireland and all Member States have a legal obligation arising from Directive 2009/28/EC to increase the amount of renewable energy used. It is not the case that there is no information available relating to the environmental benefits of this programme. Ireland would draw attention to the publication by the Sustainable Energy Authority of Ireland of the report entitled *"Quantifying Ireland's Fuel and CO2 Emissions Savings From Renewable Electricity in 2012"* [18]which was a specific study to quantify the fuel and CO2 emissions savings from renewable electricity. This report outlines that wind generation in Ireland in 2012 is estimated to have displaced fossil fuels, almost all of which would have been imported, to an estimated value of €177million, with the value of avoided CO2 emissions being a further €11million. This report subsequently informed the methodology used by the SEAI in renewable energy reports and their regular annual report "*Energy in Ireland*". For example the following reports contain up-to-date estimates of avoided fuel and emissions from the use of renewable energy: "*Renewable Energy in Ireland – 2013"*[19] and "*Energy in Ireland 1990 – 2014,2015 Report"*[20](published 26th November 2015).

18 ITEM 10 Appendix
19 ITEM 11 Appendix
20 ITEM 12 Appendix

6.6 Furthermore, information on the cost of the renewable element of the Public Service Obligation is published by the Commission for Energy Regulation in annual PSO Decision papers[21]. Ireland also draws attention to the report of the Council of European Energy Regulators[22] which found that REFIT, which is funded from the Public Service Obligation levy on consumer bills, is a very cost effective tool to support the development of renewable energy.

6.7 The Communicants draw attention to the Memorandum of Understanding (MOU) signed between the Governments of Ireland and the United Kingdom on 24th January 2013. It is not clear from the communication whether specific complaint is made in relation to this MOU. For clarity, it should be noted that a non-statutory public consultation was carried out in late 2013 via the Department of Communications Energy and Natural resources website with a view to framing a Renewable Energy Export Policy and Development Framework in respect of which some 1,400 submissions were received. However, given the complexities involved, it became clear in April 2014 that renewable energy trading was not a realistic proposition by 2020. Consequently, it was decided that it was not possible to conclude an Inter-Governmental Agreement as envisaged by the Memorandum of Understanding.

6.8 Following consideration of the submissions received in the course of the above 2013 consultation process, however, the Minister decided to formulate a Renewable Electricity Policy and Development Framework (which has replaced the intended Renewable Energy Export Policy and Development Framework) with the goal of optimising the opportunities in Ireland for renewable electricity generation development to serve both the all-Ireland single market and possible potential future export markets that might arise post-2020. It is intended that the development of this Framework, which is currently underway, will be informed by the carrying out of a strategic environmental assessment (SEA) and widespread consultations with the public, stakeholders and statutorily designated organisations.

6.9 Ireland denies that there was any breach of the Convention in the manner in which the MOU was entered into. It is emphasised that the MOU simply established a

[21] ITEMS 13 and 14 Appendix

[22] ITEM 15 Appendix, *Status Review of Renewable and Energy Efficiency Support Schemes in Europe in 2012 and 2013*

framework for exploring the relevant legal, regulatory and economic issues. It did not provide for any infrastructure projects. Any infrastructure projects that may have arisen out of the MOU, or any subsequent Intergovernmental Agreement, would have been subject to national planning procedures which provide for extensive public participation. It should be further noted that any commercial agreements that may be entered into by developers and land owners are a matter for those parties and not an issue in which it would be appropriate for the State or this Committee to comment upon.

6.10 The manner in which the complaint is expressed exposes the inherent biases of the Communicants against renewable energy and in particular wind energy. It is disappointing that the Communicants would engage with language of the nature of accusing the State of being a *'profiteer'* in the renewable energy market. It is denied that communities are excluded from deals and presented with any *fait acompli*. Semi-State[23] companies engage in development for the purposes of their broader functions, decisions on which are made on sound commercial grounds and which said developments go towards meeting the legally binding targets imposed on Ireland by Directive 2009/28/EC. Any developments that are proposed by a Semi State company are subject to the ordinary planning process, which provides for extensive public participation and in which decisions are reached in accordance with the environmental law framework established by national and European Law.

7. COMPLIANCE WITH ARTICLE 5 OF THE CONVENTION

7.1 The Communicants complain that Ireland has failed to publish information which is transparent relating to emission savings and fuel savings. This is clearly not correct and some of the information published is referenced at paragraph 6.5 above. It is alleged that the information is inaccurate, a statement that is not supported by any evidence. The Communicants have failed to identify the information with which they

[23] In Ireland a Semi-State Company is usually one in which the relevant Minister retains a significant shareholding on behalf of the State. Such companies may be established by statute with specific statutory objectives and functions but not invariably so. A Commercial Semi-State Company is expected to carry out its functions on a commercial basis and to do so profitably. Of the companies listed on page 14 of the communication, Bord Gais is not involved in wind farms.

take issue as a result of which Ireland cannot fully or fairly respond to this ground of complaint.

7.2 In respect of the Renewable Export Policy and Development Framework, a non-statutory consultation was carried out in 2013. This was considered to be the first stage in a consultation process and was conducted in advance of any consultations that would arise in the context of a Strategic Environmental Assessment or Appropriate Assessment. Nearly 1,400 submissions were received. However, as previously noted, it was determined in April 2014 that renewable energy trading is not a realistic proposition before 2020. In light of that decision and following the consultation process a decision was taken to formulate a Renewable Energy Policy and Development Framework. The goal of this Framework is to optimise the opportunities in Ireland for renewable electricity generation development on land at significant scale, to serve both the All Ireland Single Electricity Market and possible potential, future export markets which may occur post-2020.

7.3 It is intended that the Development of the Framework will be informed by a Strategic Environmental Assessment in accordance with the Strategic Environmental Assessment Directive. This process will include widespread consultation with the public, relevant stakeholders and certain statutorily designated organisations. To that end, a Request for Tenders for the provision of planning consultancy services for the Environmental Report (Strategic Environmental Assessment) and the Natural Impact Statement (Appropriate Assessment) and related services was put out in December 2014. A draft SEA Scoping Report setting out the broad scope of the proposed environmental report is being finalised and is expected to be put out for public consultation shortly.

7.4 In respect of the costs and benefits study referenced by the Communicants, it is the position of Ireland that such study is confidential in light of possible future negotiations with the United Kingdom. Ireland understands that this document was the subject of a request made under the AIE Regulations and is the subject matter of an appeal that is currently pending before the Commissioner for Environmental Information. Ireland understands that the Commissioner for

Environmental Information hopes to have this appeal determined before the end of December 2015.

8. COMPLIANCE WITH ARTICLE 6 OF THE CONVENTION

8.1 The Communicants allege that public consultation undertaken in Ireland relating to the implementation of the renewable programme in Ireland is a *"pro forma exercise in which the options are already closed"*. It must be emphasised again that the renewable programme in Ireland is informed by the legally binding targets set for Ireland by the European Union. Insofar as it is contended that the public consultation required on individual applications for development permits pursuant to Article 6 is *pro forma* the Communicants' real complaint appears to be that the decision making bodies are not prepared to revisit the merits of policy decisions taken at a national level (often prior to ratification of the Convention) or to dis-apply that policy at the behest of members of the public making submissions in the course of the public participation procedure. For the reasons set out at paragraphs 1.3 to 1.7 above this contention is entirely misconceived.

8.2 By way of preliminary objection, it is submitted that this Committee cannot consider any issues relating to the manner in which the NREAP was adopted in Ireland as this forms the basis of proceedings before the High Court of Ireland. In that regard, it is not intended to respond to issues raised relating to the affidavits filed by the State in the Swords proceedings. It is inappropriate for the Communicants to seek to have this Committee interfere with the jurisdiction of the High Court of Ireland.

8.3 The complaints made by the Communicants are unsupported by any evidence. There is no evidence provided by the Communicants to support the assertion that *"as the authorities document in their decision making, their function is to implement National Policy and not consider other factors, no matter how valid they may be"*. In fact when the documentation[24] underlying the decisions in question is examined fairly it is readily apparent that this is not the approach taken.

[24] ITEMS 16 to 30 inclusive Appendix - comprises relevant planning appeals board (An Bord Pleanála) documents pertaining to the cited decisions

8.4 Planning decision makers have to make decisions on whether permission should be granted to individual development proposals having regard to a range of factors. These factors include Government policy and Ministerial guidelines as well as the statutory Development Plans for the area in question (which may be prepared at a regional, county and local level). Where development falling within stipulated categories is likely to have a significant effect on the environment an Environmental Impact Assessment (EIA) must be carried out and where the development is likely to have a significant effect on a European Site an Appropriate Assessment (AA) must be carried out. The over-riding criteria by reference to which the decision must be made is whether the proposal is in accordance with the proper planning and sustainable development of the area on which it is to be located. Thus in each case a wide range of planning and environmental factors are considered which vary depending on the location and nature of the proposed development, the sensitivity of the receiving environment, the underlying planning policy (which will have a local and regional as well as a national component) and the submissions made by the parties to the process including the public.

8.5 Although Government policy as reflected in the NREAP supports the development of wind energy to meet Ireland's renewable energy targets, it by no means follows that any given wind farm proposal will be permitted. Instead the required analysis is site specific and the outcome will depend on the interaction of a number of factors as applied to that particular development at that location. None of the decisions relied on by the Communicants state that the decision maker is applying national policy regardless of other factors or that compliance with that policy is the "sole decision criterion". Indeed that this is not so is clearly evident from the passage of the Inspector's report on the *Corkermore wind farm* PL05E.242074[25] quoted at page 29 of the Communication:

> "*The Board may have to decide how to apply a planning or government policy in a specific case, or it may have to weigh one policy provision against another, or against some clear public interest or established planning principle. It cannot decide however that a particular policy is wrong and so*

[25] ITEMS 31 to 33 inclusive Appendix - comprises relevant planning appeals board (An Bord Pleanála) documents in respect of this Decision

set it aside when considering the planning appeal….The Board may not change or set aside policy on wind energy. It must apply the policy as best it can."

8.6 In addition it is necessary to clarify a number of factual matters relating to issues raised by the Communicants in respect of the allegations of a failure to provide public consultation in relation to the All-Island Grid Study and the Gate 3 process.

8.7 The All-Island Grid Study, published in 2008[26], was a cooperative research study between Ireland and Northern Ireland to assess the technical feasibility and the relative costs and benefits associated with various scenarios for increased shares of electricity sourced from renewable energy in the all island power system. As a research study, and not a strategy, or plan or programme in the context of the Aarhus Convention, no public consultation was required.

8.8 The All-Island Grid Study was used to inform the development of later plans and/or strategies such as the Grid 25 Strategy. The Grid 25 Strategy was Eirgrid's strategy for the development of the National Grid. Eirgrid is a state owned company tasked with operating the national electricity transmission system. It undertook a review of the Grid 25 Strategy and carried out an SEA for the development of the Implementation Plan for that strategy for the period from 2011 to 2016.

8.9 The Gate Process is managed by the Commission for Energy Regulation (CER), who has statutory responsibility for the grid connection process under the Electricity Regulation Act, 1999, as amended. Since December 2004, renewable energy generators wishing to connect to the transmission or distribution systems are subject to group processing of connection applications (Gates) as directed by CER. Of course, the infrastructure in respect of which the connection is sought and through which the connection will be effected, itself requires planning permission and thus will entail public consultation in accordance with Article 6.

8.10 The Gate process is not a plan or programme in the context of the Aarhus Convention. The process is market driven, i.e., it is up to generators to decide to

[26] ITEM 4 Appendix

apply and seek planning permission etc. The Gate process is not about determining who might get a connection offer but rather is a queue or date order approach to the manner in which the applications are processed. It is therefore not necessary to provide public participation in this process.

8.11 Notwithstanding the fact that public consultation was not required under the Convention, the Direction on Gate 3[27] issued by the Commission for Energy Regulation was subject to public consultation before being finalised and published in December 2008.

8.12 National energy policy has been established on foot of extensive policy consideration and in light of the requirements of meeting the targets established by Directive 2009/28/EC. It is denied that the NREAP or any element of national energy policy is biased or unbalanced and the Communicants provide no evidence to support this contention save for their own views against on shore wind energy.

8.13 The allegation that public authorities have abdicated their responsibility is without foundation. Public authorities reach decisions in accordance with the legal framework established by national law, in particular the Planning and Development Act, 2000 as amended. The Communicants' argument is fundamentally flawed as it is premised on an assumption that the Convention somehow requires a planning decision maker with no responsibility under national law for the formation of policy to review, invalidate or dis-apply national policy in individual planning decisions based on submissions made by members of the public who disagree with the substantive content of that policy.

Article 6(8)

8.14 The Communicants allege that there is a failure to take account of submissions made by the public on applications for planning permission. In this context it is important to set out the legal framework in which decisions are taken by Planning Authorities and the planning appeals board, An Bord Pleanála, on planning applications. Section

[27] "Criteria for Gate 3 Renewable Generator offers & Related Matters"

34(3) of the Planning and Development Act, 2000 - 2015[28] as amended places an express obligation on a Planning Authority to consider "*any written submissions or observations concerning the proposed development made to it in accordance with the permission regulations by persons or bodies other than the applicant*". A similar obligation is placed on An Bord Pleanála by virtue of section 37 of the Planning and Development Act, 2000. Where a Planning Authority, or An Bord Pleanála, is required to carry out an Environmental Impact Assessment, section 172(1G) requires the authority, or the Board, to consider "*submissions or observations made in relation to environmental effect*"

8.15 The *Development Management Guidelines for Planning Authorities 2007*[29] are statutory Guidelines issued to planning authorities and An Bord Pleanála under section 28 of the Planning and Development Act 2000; Planning Authorities and An Bord Pleanála are required to have regard to them where relevant when carrying out their functions under the Planning and Development Act 2000. In particular section 6.5 specifically deals with submissions and observations made by the general public, and states:

> *"Submissions and observations on applications made under Article 29 of the Planning Regulations are an important part of an open and transparent planning system. Where such submissions are received,* ***it is essential that every effort is made to record and assess their general thrust in the planning report and to respond appropriately to any concerns or issues raised which are relevant to the consideration of the proper planning and sustainable development of the area****. Efforts in this area can go a long way to addressing local concerns about proposed developments and may in some cases avert subsequent appeals to the Board or applications for judicial review." [Emphasis added]*

8.16 The legal framework in which decisions are made is clear and complies with the Convention. The allegation made by the Communicants relating to the manner in which decisions are taken and recorded is unsubstantiated and not supported by any evidence. It is therefore submitted that it is without foundation. If the Communicants

[28] ITEM 34 Appendix – unofficial consolidated version of the legislation as amended up 2015
[29] ITEM 35 Appendix

genuinely believed that relevant submissions made by the public had not been considered by the decision maker in any particular case there is a right of appeal from the decision of a Planning Authority to An Bord Pleanála and the decision of either body may be challenged before a Court through judicial review. As there is a statutory obligation to consider the environmental submissions made by the public any failure to do so would automatically render the decision invalid. These options do not appear to have been availed of. However, as previously noted the Communicants' real concern does not appear to be the contention that submissions made by members of the public are not considered but that where those submissions challenge and seek the invalidation or dis-application of national policy, the decision makers do not comply with this request on the basis that under statute they must have regard to national policy and do not have the jurisdiction to set it aside.

8.17 The portions of Section 172(1J) of the Planning and Development Act 2000 as amended quoted at page 24 of the Communicants' complaint is misleading by virtue of being incomplete. The quoted portions mirror part of the obligations imposed by Article 9 of the EIA Directive 2011/92/EU[30] . However under Irish law the decision maker is also obliged to make the evaluation of the direct and indirect effects of the project (i.e. the EIA itself) available to the public under Section 172(1J)(b) and to make the Inspector's report available to the public (Section 172(1H) and (1J)(e)). These statutory obligations go further than the requirements of the EIA Directive. The main reasons and considerations ultimately relied on to justify a grant or refusal of planning permission will necessarily be more succinct than the full evaluation of the proposal. However under Irish law the public are entitled to be provided with both. It cannot be assumed that because the decision maker's focus ultimately narrows down to the main reasons and considerations that other matters considered during the evaluation process were regarded as irrelevant.

[30] References are to the 2011 codified version of the EIA Directive as it appears to have been the version applicable to the decisions relied on by the Communicants. The transposition date for the 2014 version of the EIA Directive 2014/52/EU will not expire until 2017.

Article 6(9)

8.18 The complaint being made by the Communicants in relation to Article 6(9) lacks coherence or any clarity. In circumstances where the decisions of An Bord Pleanála quoted set out the reasons and considerations on which each decision is based, there is no basis for an allegation that these decisions breach Article 6(9).

8.19 In so far as the Communicants attempt to impugn the reasons and considerations provided by An Bord Pleanála, it is submitted that this is not an appropriate issue for this Committee to consider. As noted above, there is a statutory obligation on Planning Authorities and An Bord Pleanála to state the main reasons and considerations upon which their decisions are based. This obligation is invariably complied with. As these decisions clearly set out the reasons and considerations upon which they are based, the obligation that arises under the Convention is complied with. Moreover failure to state reasons for an administrative decision is a ground upon which a decision may be declared invalid under Irish law so that there is a remedy available in the event that a planning decision maker does not comply with the statutory obligations imposed upon it. The fact that the Communicants do not agree with the approach adopted by An Bord Pleanála Inspectors in accepting that wind energy will have a positive impact on climate considerations through the reduction of carbon emissions and the displacement of use of unsustainable fossil fuels does not mean that reasons have not been provided for the decisions to grant permission. The reality is that reasons have been provided – the Communicants just do not accept the validity of those reasons. However the actual decisions made and the criteria applied in making them are not issues addressed by the Convention (see communication ACCC/C/2007/22 (France)).

8.20 In so far as it is alleged that there was a failure to properly complete the NREAP by reason of not completing section 5.3, it is noted that by reason of Commission decision C(2009) 5174 – 1 this section was considered as optional. Ireland understands that 8 out of 27 Member States completed this section in their NREAPs.

8.21 It should further be noted that in relation to individual wind farm developments, any environmental information that is relevant to the application for planning permission will be included in the Environmental Impact Statement required by law to be

submitted by a developer. The Environmental Impact Statement is a publicly available document. In addition at the conclusion of the process the evaluation that comprises the EIA must be made publicly available (see Section 172(1J)(b) of the Planning and Development Act 2000 as amended). In practise not only are these documents made publicly available for physical inspection on the relevant planning files but An Bord Pleanála and most Planning Authorities routinely make their decisions and Inspectors' reports available electronically immediately after the decision is taken. Indeed many Planning Authorities make the planning application, the EIS and all submissions received available on-line during the course of the planning process thereby enabling instant and widespread public access. Therefore there is no basis for the allegation that environmental information is non-transparent, irrational and contradictory or that the decision making process is an application of an arbitrary or disproportionate policy.

8.22 In so far as the Communicants seek to impugn individual decisions reached within the framework of national law, Ireland relies on the decision of this Committee in ACCC/C/2008/24 (Spain), and in particular paragraph 82, where this Committee emphasised "*that the factual accuracy, impartiality and legality of screening decisions are not subject to the provisions of the Convention*".. For similar reasons, although the Strategic Environmental Assessment Directive establishes a mechanism through which the requirements of Article 7 can be met as regards the adoption of plans, programmes and policies it is not necessary that an SEA be carried out under that Directive in order for there to be compliance with Article 7 if public participation has been permitted within an appropriate framework and the necessary environmental information has been made available (see further below re Article 7).

9. COMPLIANCE WITH ARTICLE 7 OF THE CONVENTION

9.1 The Communicants make complaint about the manner in which the Westmeath County Development Plan 2014-2020 was developed and determined. By way of background, it is useful to explain the operation of the Planning and Development Act, 2000 in the context of Development Plans.

9.2 The Planning and Development Acts 2000-2015 set the legislative framework for the Irish planning system, including the process of preparing and reviewing Regional

Planning Guidelines / Regional Spatial and Economic Strategies, Development Plans and Local Area Plans as well as the basic framework of the development management and consent system. The Act gives effect to a hierarchy of spatial plans that includes the National Spatial Strategy (NSS), Regional Planning Guidelines / Regional Spatial and Economic Strategies, Development Plans (DP) and Local Area Plans (LAPs).

9.3 The National Spatial Strategy (NSS) 2002-2020 sets out a spatial planning framework for Ireland. It is a requirement of the Planning and Development (Amendment) Act 2010 that Development Plans are consistent with the national development objectives set out in the NSS.

9.4 Regional Planning Guidelines (RPGs) set out a spatial planning framework at a Regional level for the 8 no. former Regional Authority areas[31]. Part II Chapter 3 of the Planning and Development Act 2000 (as amended) sets out the legislative framework for the preparation and adoption of Regional Planning Guidelines by Regional Authorities[32].

9.5 The Planning and Development Act 2000 as amended sets out the statutory procedures for making Regional Planning Guidelines including procedures for consultation with members of the public prior to the making of the draft RPGs (not less than 8 weeks) and following the preparation of draft RPGs (not less than 10 weeks). This included a requirement to give notice of consultation, make information available for inspection and to accept submission in writing from interested parties.

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31 RPGs are in place for the Border; West; Midlands; South-East; South West; and Mid-East and Dublin Regional Authority combined for the period 2010-2022. The Regional Authorities were dissolved and 3 no. new Regional Assemblies formed under the Local Government Reform Act 2014.

32 This section of the Act has been amended by the Local Government Reform Act 2014 to take account of a major reform of Local Government at local and regional level. The amended Act makes provision for the replacement of RPGs with Regional Spatial and Economic Strategies (RSES) for 3 no. newly formed Regional Assembly areas. The RPGs for the period 2010 to 2022 were prepared prior to this legislative amendment and shall continue to have effect until such time as the new Regional Spatial and Economic Strategies are adopted.

9.6 Development Plans set out a spatial planning framework at City and County level. The Planning and Development Acts 2000-2015 set out a legislative framework for the preparation and adoption of Development Plans by Planning Authorities. Planning Authorities are required to prepare a Development Plan for their functional area and to review this plan every 6 years[33]. The process for the making or reviewing of a Development Plan is prescribed under Part II Chapter One of the Planning and Development Act 2000. The legislation sets out the statutory procedures for consultation with the public (i) prior to preparing the draft Development Plan (not less than 8 weeks) (ii) on foot of the preparation of a draft Development Plan (not less than 10 weeks) and (iii) on foot of proposed material alterations to the draft Development Plan (not less than 4 weeks). There is a requirement to notify the public at each stage in the process, to make information available to the public during the consultation periods, to accept submission or observations in writing from statutory bodies and interested parties (including members of the public) and for the elected Council to consider the issues raised in submissions and the response of the officials to same, prior to giving direction in relation to the making of the Plan or adopting the Development Plan.

9.7 The Planning and Development Act 2000, as amended by the Planning and Development (Amendment) Act 2010 requires a Planning Authority to demonstrate that a Development Plan and its policies and objectives are consistent with National and Regional development objectives set out in the NSS and RPGs / RSESs (See Sections 9(6) and 27(1) of the Planning and Development Act 2000 as amended). Previously there was a requirement to have regard to the NSS and RPGs which, under Irish law, required the Planning Authority to consider the NSS and the RPGs but did not require the Planning Authority to follow the policy contained therein or to ensure that the Development Plan was consistent with that policy.

9.8 The Minister for the Environment and Local Government may, at any time, pursuant to Section 28 of the Act, issue guidelines to planning authorities regarding any of their functions under the Planning and Development Act and planning authorities shall have regard to those guidelines when preparing and making the draft

[33] Save exceptions provided for under the Local Government Reform Act 2014, to take account of transitional arrangements for amalgamated authorities.

development plan. The Wind Energy Guidelines for Planning Authorities 2006 were issued under Section 28 of the Act.

9.9 The Minister has powers under Section 31 of the Act to direct a planning authority to take such specified measures as he or she may require in relation to that plan, where the Minister is of the opinion that:

- a planning authority, in making a development plan has ignored or has not taken sufficient account of submissions or observations made by the Minister under section 12, 13 or 20,
- in the case of a plan, the plan fails to set out an overall strategy for the proper planning and sustainable development of the area,
- the plan is not in compliance with the requirements of this Act, or
- if applicable, is not consistent with the transport strategy for the National Transport Authority (NTA).

9.10 The Communicants raise complaint about the manner in which the Westmeath County Development Plan was reviewed. In light of the complaints raised by the Communicants, it is important to set out the timeline that was followed in full:

- On 22nd February 2012 notice of intention to prepare a new County Development Plan was given with a pre-plan consultation undertaken from 22nd February 2012 to 12th April 2012. 89 written submissions were received during this period. Thereafter a report was submitted to Westmeath County Council by the County Manager[34] dealing with the issues raised in submissions. Thereafter, the Manager produced a Draft Development Plan and submitted it to the Council for consideration. The Council agreed the Draft Westmeath County Development Plan 2014-2020. On 1st February 2013, notification of the publication of the Draft Westmeath County Development Plan 2014-2020 was given and the Plan was made available for inspection from 1st February to 12th April 2013. A total of 895 written submissions were received during this period. The County Manager submitted a report to the

[34] Most senior official in a Local Authority.

Council on 5th July 2013, summarising issues raised in submissions. The elected members having considered the report on submissions and the Draft Plan resolved in accordance with Section 12(6) of the Planning and Development Act 2000 (as amended) to alter the Draft Plan. A number of alterations related to Wind Energy policy and reflected issues outlined in submissions.

- As the proposed alterations were deemed to be material it was necessary to give notice of such alteration, which occurred on 18th October 2013. The proposed alterations were available for inspection from 18th October 2013 to 15th November 2013. In this time 3,500 submissions were received. The County Manager submitted a report to the Council on 14th December 2013, summarising the issues raised in submissions and making recommendations to the elected members. The County Manager's report addressed the issues raised in the submission from the Minister for the Environment, Heritage and Local Government and advised that the amendments contravened national policy and recommended that they not be adopted. Notwithstanding the report, the elected members adopted the amendments to the Westmeath County Development Plan.

- On 15th February 2014, the Department of Environment Community and Local Government issued notification of the intention of Minister to issue a Material Direction under Section 31[35] of the Act instructing the Council to take specified measures to amend the plan. Notice of draft Direction was published and submissions were invited from 27th February 2014 to 12th March 2014. 5,624 submissions were received during this period. An independent inspector was appointed by the Minister to review the issue including submissions received from the public. The Communicants' complaint that the inspector failed to ascertain whether proper planning procedures had been complied with in relation to the NREAP is misplaced. Only a Court or the European Commission would have competence to determine whether the NREAP was unlawful or invalid (and all alleged invalidity is denied). The inspector appointed by the Minister could not legally acquire that competence merely

[35] ITEM 36 Appendix

because members of the public made submissions to the effect that the NREAP had not been validly adopted.

- A Ministerial Direction issued on 10th July 2014[36] directing Westmeath County Council to undertake specified measures.

As is clear from the documentation[37] the measures in question required that Westmeath County Council remove certain policies from the Development Plan which, if implemented, would have had the effect of precluding virtually any wind farm development in County Westmeath. This was clearly contrary to national policy and had been accepted by the County Manager as such. In fact this does not appear to be disputed by the Communicants; instead the contention is that the national policy was wrong and that requiring that the Development Plan be consistent with it meant that the public consultation process was "*pro forma*". This argument is premised on the assumption that the only issue for determination in the Development Plan was whether wind farm development should be permitted as a matter of principle. This is clearly incorrect. There was and is significant scope for a Development Plan to deal with the potential for wind farm development within the area covered by the Plan. A Development Plan might identify areas particularly suited or particularly unsuited for wind farm development by reference to objective planning criteria. Land can be zoned for that purpose. Criteria can be set which potential wind farm development must meet (provided of course those criteria do not conflict with national policies or Ministerial guidelines). All of these are issues upon which members of the public can and do make submissions during the statutory process leading to the adoption of a Development Plan.

9.11 The Planning and Development Acts 2000-2015 set out a legislative framework for the preparation and adoption of Development Plans. The making of a Development Plan is a reserved function of the elected members of a planning authority, within the framework set out under the Planning and Development Acts 2000-2015. The Act prescribes procedures for consultation with the public at key stages in the decision making process and requires the members of the authority to consider the issues

[36] ITEM 37 Appendix
[37] ITEMS 38 and 39 Appendix – other submissions / letters to Westmeath County Council from the Department

raised in submissions and observations received from the public prior to issuing directions in relation to the preparation of the draft development plan or resolving to make or amend the draft development plan. The Convention does not require that submissions made by the public be adopted as part of the final plan and there may be strong countervailing reasons in any case why a submission enjoying strong public support is not acted upon.

9.12 In the case of the preparation of the Westmeath County Development Plan, extensive public consultation took place over a two year period and at different stages of the process. Those matters raised by members of the public were considered by the County Manager and by the elected members of the Council. While the Communicants may be disappointed that their precise views were not accepted, this cannot form the basis for an allegation that there has been any breach of Article 7 of the Convention.

10. COMPLIANCE WITH ARTICLE 8 OF THE CONVENTION

10.1 The Communicants make complaints about the manner in which a review of the Wind Energy Development Guidelines 2006 has been undertaken. The Wind Energy Development Guidelines[38] (2006 Guidelines) provide advice to planning authorities on catering for wind energy through the development plan process and in determining applications for planning permission. The Guidelines are also intended to ensure a consistency of approach throughout the country in the identification of suitable locations for wind energy development and the treatment of planning applications for wind energy developments. The 2006 Guidelines were adopted as an update to Guidelines that were first published in 1996. When the 2006 Guidelines were adopted they were the subject of a two month consultation process as draft revised Guidelines prior to their finalisation and issue.

10.2 In order to ensure that Ireland continues to meet its renewable energy targets and, at the same time, that wind energy does not have negative impacts on local communities, the Department of Environment, Community and Local Government (DECLG), in conjunction with the Department of Communications, Energy and

[38] ITEM 40 Appendix

Natural Resources (DCENR), initiated a targeted review of certain aspects of the Wind Energy Guidelines 2006. This was not intended to be a full review and instead it was proposed that a focused review would be carried out to deal with the issues of noise, proximity and shadow flicker.

10.3 On 30 January 2013 a press release issued that commenced a pre-draft consultation process which concluded on 15 February 2013. This preliminary public consultation, intended to inform the preparation of revised draft guidelines, marked only the initial stage in that review process. This consultation allowed for the public and other stakeholders to input into the process at an early stage. A total of 550 submissions from individuals and organisations were received during this pre-draft public consultation phase.

10.4 In conjunction with this process the Sustainable Energy Authority of Ireland (SEAI), on behalf of DCENR, commissioned Marshall Day Acoustics[39] to complete a desk based study to review, and provide advice on, international best practice in relation to onshore wind farm noise which would be a key input into the review. A Report entitled "*Examination of the Significance of Noise in Relation to Onshore Wind Farms"* was produced in November 2013[40]. The Report also reviewed the submissions received in the preliminary public consultation and noted the key noise related topics that had arisen in the submissions received. These issues were also discussed in the body of the report. However it is important to appreciate that this Report was not intended as a complete or indeed the only examination of the submissions made by the public in relation to the review which was on-going at the time the Report was prepared. It was at all times intended that the Report would be made available for public comment as part of the on-going public consultation process in relation to the review.

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39 It is noted that the Communicants refer disparagingly to Marshall Day as "*an obscure private company*" (page 39 of the Communication). Apart from the fact that Marshall Day is an international company providing specialist acoustic services in Ireland, the UK, Australia and New Zealand, it is entirely appropriate in a review targeted at technical aspects of wind farm development that a specialist company with relevant expertise be engaged to provide this type of analysis. Of course one of the difficulties faced by those, such as the Communicants, fundamentally opposed in principle to wind farm development is that the technical evidence frequently does not support the stated basis for the public concern.

40 ITEM 41 Appendix

10.5 Both the preliminary public consultation process and the Marshall Day Acoustics Report informed the preparation of the draft revised Guidelines. The draft revised Guidelines propose, the setting of a more stringent day and night noise limit of 40dB attributable to one or more wind turbines at the nearest noise sensitive property for future wind energy developments, a mandatory minimum setback of 500 metres between a wind turbine and the nearest dwelling for amenity considerations, and the complete elimination of shadow flicker between wind turbines and neighbouring dwellings. These proposals take account of the World Health Organisation's 2009 *Night Noise Guidelines for Europe*.

10.6 The draft revised Guidelines went out to extensive public consultation on 11 December 2013 and concluded 2 months later on 21 February 2014. This process is in line with that undertaken for statutory planning guidelines which issue first in draft form for a public consultation over a period of usually 2 months/8 weeks. Once the consultation period is closed the submissions received on the draft guidelines are considered and taken into account in the final form of the guidelines. This process allows for the public participation required under Article 8 of the Convention, as follows:

a) Times Frames sufficient for effective participation should be fixed; (2 months)
b) Draft rules should be published or otherwise made publicly available; (guidelines issue in draft form for public consultation initially)
c) The public should be given the opportunity to comment, directly or through representative consultative bodies. (Submission are sought on the draft guidelines and considered prior to finalisation of guidelines.)

10.7 DECLG received submissions from 7,500 organisations and members of the public during this public consultation process that concluded in February 2014. This was one of the largest responses ever received on draft guidelines. It is intended that the draft revised Guidelines will be finalised as soon as possible. Account has to be taken of the extensive response to the public consultation in framing the final guidelines. In conjunction with this process, further work is also advancing to develop technical

appendices to assist planning authorities with the practical application of the noise measurement aspects of the Wind Guidelines.

10.8 The Communicants allege that the public consultation process and the draft revised Guidelines do not address the issue of the effect that wind turbines have on public health. It is important to reiterate that the purpose of Wind Energy Development Guidelines is to provide advice to planning authorities on catering for wind energy through the development plan process. Therefore, the following statement in the draft revised Guidelines is accurate: "*concerns of possible health impacts in respect of wind energy infrastructure are not matters which fall within the remit of these guidelines as they are more appropriately dealt with by health professionals. However, the Department of Health has been made aware of the on-going review of the Wind Guidelines and any perspectives that they may have, relevant to the planning process, will be taken into account in finalising the revisions to the guidelines*". The Department of the Environment Community and Local Government has liaised with Department of Health inviting any input they may have on the health aspects, if any, of wind farms. The Department of Health has advised, based on peer reviewed articles and international research[41], that '*there is no reliable or consistent evidence that wind farms directly cause adverse health effects in humans.*'

10.9 A significant element of the complaint raised by the Communicants relates to the merits of arguments for or against a particular type of energy, namely wind energy. The Communicants have a particular viewpoint, which is strongly expressed throughout the communication. However, it is respectfully submitted that it is not the role of this Committee to engage in a merits review of different types of renewable energy or to engage in a review of the merits of different restrictions that may arise for consideration in the context of the Guidelines being reviewed. Rather, the role of the Committee to is consider whether the processes meet the obligations prescribed

[41] Including the 2009 literature review conducted by the National Health and Medical Research Council of Australia. This review was subsequently updated in 2014 to confirm the previous advice that there was "*no reliable or consistent evidence that wind farms directly cause adverse health effects in humans*".

by Article 8 of the Convention. In light of the process outlined above, which is not yet complete, it is submitted that there has been full compliance with Article 8.

10.10 In relation to the specific complaint made in relation to the decision taken by An Bord Pleanála to grant planning permission to the *Corkermore* Wind Farm, it is clear that this decision was taken in accordance with the national legislative framework established by the Planning and Development Act, 2000 (as amended).

10.11 The decision shows that proper planning and sustainable development were considered by the Board prior to making a decision on the Appeal, with full regard to a range of factors including national policy, the 2006 Guidelines, the Donegal County Development Plan, landscape and topography, the location in relation to any Natura 2000 site, development in the area and distance to other dwellings, nature and scale of the development and submissions on file. The Inspector's Report recommended the granting of permission subject to certain conditions. The Board then, having regard to the factors outlined along with the Inspectors Report decided to grant the permission, subject to certain conditions. A number of these conditions were attached to the permission in the interest of residential amenity.

10.12 The Communicants are not correct in their assertion that the sole basis for the decision was the Wind Energy Development Guidelines. While these were considered in the context of the noise limits to be imposed, they were only one factor to be considered. As is the case with all planning applications and appeals, a range of factors are considered by planning authorities in order to arrive at a decision based on the specific merits or otherwise of individual planning applications.

10.13 The Communicants further argue that the Briefing Note of 18 December 2012[42] establishes that public participation in the planning process is *pro forma* as issues are already decided regardless of environmental impact. This is simply not the case and it is necessary for the entire briefing note to be considered, rather than selective extracts.

10.14 It is inaccurate to state that the planning process and associated public participation is *pro forma*. As indicated earlier in this response, the Planning and Development Act

[42] ITEM 42 Appendix

2000, as amended, sets the legislative framework for the Irish planning system, including the process of preparing and reviewing Regional Planning Guidelines / Regional Spatial and Economic Strategies, Development Plans and Local Area Plans as well as providing the basic framework of the development management and consent system. Public consultation is provided for in the preparation of such plans and in the relation to individual planning applications.

10.15 In addition, Part X of the Planning and Development Act 2000, as amended, and Part 10 of the Planning and Development Regulations, set out the requirements for environmental impact assessment. These include, as appropriate to a proposed development, the requirement for an applicant for planning permission to provide an environment impact statement to the planning authority. The planning authority is then required to undertake its own environmental impact assessment of the development, as part of its consideration in making its decision.

10.16 The planning authority reports of the individual wind farm planning applications and appeals referenced in the communication demonstrate this. The obligation arising from Article 8 is to promote effective public participation at an appropriate stage. An examination of the manner in which public participation is allowed in the planning system shows that it occurs at different intervals and stages of the decision making process. While the Communicants may disagree with individual decisions taken in respect of wind farm developments, this cannot form the basis for an allegation that there has been a systemic or individual failure to comply with the Convention.

11. COMPLIANCE WITH ARTICLE 9 OF THE CONVENTION

11.1 The Communicants make complaint in relation to the manner in which funding has been provided to the Office of the Commissioner of Environmental Information. Firstly, it is not correct to assert that semi state companies are *"given billions of euros"* to progress renewable energy programmes. Commercial semi-state companies are expected to manage their assets and to conduct their businesses on a sound commercial basis. Most are competing with private companies in the same sectors and must be able to do so on an equivalent basis.

11.2 By way of background, Ireland has provided a two tier system of review under the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. 133 of 2007). The general nature of this system has already been explained at paragraph 6.2 above. As has already been explained at paragraph 6.2 above, the Environment (Miscellaneous) Provisions Act, 2011 introduced a special costs regime for environmental civil proceedings. Furthermore section 6 of the Environment (Miscellaneous Provisions) Act 2011 authorises the application of the special cost rules for judicial review for proceedings under sections 4 and 5 and for interim or interlocutory relief in such proceedings. Section 7 of Environment (Miscellaneous Provisions) Act 2011 provides that a party to such environmental proceedings can apply to the Court at any time before or during the proceedings for the application of the special cost rules. In respect of decisions taken under the Planning and Development Act, 2000 (as amended), Section 50B of that Act provides in principle each party shall bear its own costs but that the court may award costs in favour of the applicant to be borne by the respondent and/or the notice party where their actions contributed to the applicant obtaining relief. In effect this means that a member of the public who seeks to challenge a decision granting planning permission for a proposed development can do so without the risk that if the legal proceedings are unsuccessful the costs incurred by the public body and/or the developer in successfully defending the decision will be awarded against him[43]. At the same time should the member of the public succeed in obtaining relief he will be awarded his costs in accordance with the normal practise.

11.3 It is not clear why the Communicants make reference to the decision of the High Court in *Klohn v. An Bord Pleanala*[44], in circumstances where such decision pre-dates the ratification of the Convention in Ireland.

11.4 The comments made by the Communicants relating to the level of costs to take legal proceedings in Ireland are speculative and not supported by evidence. As already explained, in circumstances where the 2011 Act applies any applicant will primarily

[43] There are some exceptions to this where the proceedings are an abuse of process or frivolous and vexatious but these would only arise in exceptional cases.
[44] [2011] IEHC 196

be responsible for their own costs unless one of the exceptions apply. The Communicants ignore the fact and nature of the legal system in Ireland whereby litigants can and frequently do elect to represent themselves or can enter into commercial arrangements with legal practitioners to provide representation. Such arrangements are private matters between the litigant and the practitioner. There is also the possibility that a litigant can obtain *pro bono* legal representation or engage such representation on a conditional fee arrangement. Again, both of these practises are common in Ireland with cases being taken in many areas of the law on the basis of either a *pro bono* or a conditional fee arrangement. Article 9 does not require an applicant to be entitled to bring proceedings at no cost but simply requires that any cost that may arise is not prohibitively expensive.

11.5 Further, any analysis of the costs provisions provided by domestic law must be carried out in light of the judicial notice the domestic Court is required to take of the Aarhus Convention under section 8 Environment (Miscellaneous Provisions) Act 2011 and those provisions of the Aarhus Convention implemented by directly applicable European Union law. Therefore, any award of costs that may be made must ensure that those costs are not prohibitive. Notably, the Communicants rely exclusively in this regard on a case determined prior to Ireland's ratification of the Convention and prior to the 2011 statutory amendments to the costs rules to reflect the costs requirements of the Convention.

11.6 The specific complaint raised by the Communicants relates to the application taken for a protective costs order in the Swords proceedings. This application was heard before the High Court of Ireland on 3rd, 4th, 5th, 6th, and 12th March 2015 and a decision is currently awaited. It would be inappropriate for this Committee to engage in any consideration of the issues that fall within the jurisdiction of the Irish High Court.

12. CONCLUSION

12.1 The Communicants make generalised complaints about the manner in which the Convention has been implemented in Irish law. A significant number of the complaints relate to the merits of decisions taken in relation to national energy policy and individual planning applications, rather than the manner in which the

Convention was applied in the processes by which those decisions were reached. The Communicants are dissatisfied with the manner in which onshore wind energy has developed within Ireland but fail to acknowledge the legally binding nature of the targets established by Directive 2009/28/EC.

12.2 It is submitted that Ireland has transposed the Convention in a robust manner that allows for significant public consultation to be undertaken in the course of decision making processes. This allows members of the public to express their views on decisions to be taken while national policy is also developed to ensure that the legally binding targets established by Directive 2009/28/EC are met. In the premises there is no basis for the complaints made by the Communicants.

Please do not hesitate to contact the undersigned if you require any further information.

Yours sincerely,

Marguerite Ryan
National Focal Point- Aarhus

APPENDIX TO

RESPONSE OF IRELAND ON CASE ACCC/C2014/112

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