To: Fiona Marshall - Secretary to the Aarhus Convention Compliance Committee
From: Pat Swords, Neil Van Dokkum and David Malone
Date: 3rd September 2014
Re: Your letter of 22nd August 2014

Dear Fiona

As your above letter clarified: *The Compliance Committee decided to defer its preliminary determination of admissibility in order to seek further clarification from the communicants on the following points:*

*(i) Which of the allegations made in the communication relate to events which took place after the Convention entered into force for Ireland?*

*(ii) To what extent have all available domestic remedies been used?*

The Republic of Ireland ratified the Convention on the 20th June 2012 and as such it entered into force on the 18th September 2012. To provide clarification on the above, each Article of the Convention relevant to the allegations in the Communication is described in the following sections.

## 1.1 Article 3 – Section 4.2 of the Communication

The Communication referred to the legal proceedings currently at the High Court *Swords V Minister of Communications, Energy and Natural Resources 2012/920JR.* These proceedings have since been substituted on order of the High Court from a Judicial Review to Plenary Summons: *Pat Swords V Minister for Communications, Energy and Natural Resources 2013/4122P*

The Judicial Review application on 2012/920/JR, which originally grounded these legal proceedings, was based on an ex-parte application to the High Court on the 12th November 2012. It therefore post-dated the entry into force date of the Convention. These proceedings are due back before the High Court on the 11th November 2014. The State is once again making an application for undue delay, repeating the proceedings heard already in April 2013, while Mr Swords is applying for cost provisions related to Article 9(4) of the Convention and 'not prohibitively expensive'. These matters and the huge legal costs involved have already been discussed in the Section 4.8.2 of the Communication.

By way of background Section 4.2 of the Communication also referred to the Irish Ombudsman within the context of domestic remedies. However, it is necessary to clarify here that the example given related to an application made to the Irish Ombudsman prior to the date of ratification of the Convention, although it is illustrative of the effectiveness of that office with regard to domestic remedies.

## 1.2 Article 4 – Section 4.3 of the Communication

In this Section of the Communication three examples of Access to Information on the Environment Requests were provided:

- In relation to the Renewable Export Programme, in which the initial request was made in March 2013 by the Lakelands Windfarm Information Group

- In relation to Coillte, in which the initial request was made by Oilver Cassidy of the same group in April 2013

- In relation to Bord na Mona in which the initial request was made by John Joseph Dooley in October 2013

As such these three requests post-dated the entry into force date of the Convention. As regards the domestic remedies, the situation of the Office of the Commissioner for the Environment will be discussed further in the Section of this Reply related to Article 9(1). The first request above did go to appeal to this office; it has not been resolved as of yet over a year later, although the Office of the Commissioner for Environmental information did make contact recently to inform that they were addressing it.

It was not decided to go to appeal on the second case, as this office has simply proven to be completely ineffective, while on the third case when the Office of the Commissioner for Environmental Information was approached as to making an appeal, they stated, as is documented in the Communication - "*it could be up to two years before your appeal is dealt with*". Basically, it's hard to justify spending €150 to formally lodge an appeal under such circumstances and it was decided not to do so in this third case as well.

### 1.3 Article 5 – Section 4.4 of the Communication

The major environmental policy proposal, which was relevant to this Section, was the Renewable Energy Export Policy and Development Framework, which was initiated on the 23rd October 2013, more than a year after the ratification date of the Convention. As can be seen in the Department's website, where the Submissions made are published, there were a huge number of these Submissions:

http://www.dcenr.gov.ie/energy/sustainable+and+renewable+energy+division/renewable+energy+export/renewable+energy+export+policy+and+development+framework.htm

However, 'taking due account of the public participation' extended no further than to a statement:

- *All submissions to the consultation will now be analysed and taken into account by the Department in the preparation of the proposed policy and development framework and accompanying environmental assessments.*

As regards domestic remedies, if / when this Renewable Export Policy and Development Framework is finalised, one would have to consider a Judicial Review in the High Court, as is discussed further in the Section of the Reply on Articles 9(3) and 9(4).

### 1.4 Article 6 – Sections 4.5 of the Communication and Appendix A

This section references a number of public participation procedures connected with Article 6 and the Irish planning system. These are highlighted below:

With respect to the details in Appendix A:

- Foylatalure Wind Farm – Submission originally made to Kilkenny County Council in 1st September 2012. Subsequent complaint made to the Irish Ombudsman in December 2012, i.e. post the entry into force of the Convention.

- GNDG Renewables County Donegal – Submission on this wind farm originally made to Donegal County Council on 10th December 2012.

- Corkermore Wind Farm County Donegal – Submission on this wind farm originally made to Donegal County Council on 13th August 2012.

- Cloghan Wind Farm County Offaly – Submission on this wind farm originally made to Offaly County Council in December 2012. However, as Appendix A documents, it was also subject to an appeal to An Bord Pleanala PL 19.242354. This appeal was lodged on the 14th August 2013.

The period in Ireland for the public to review the documentation and make a submission on such projects as above is six weeks. Therefore all the above public participation exercises were initiated after the period in which Ireland ratified the Convention, although for two of the above, Foylatalure and Corkermore, initiation of the initial public participation preceded by a few weeks the 'entry into force' date of the Convention. However, for both Foylatalure and Corkermore, the assessment of the application and the public participation procedure by the authorities, which was the subject matter of the Communication, occurred in the period after the Convention entered into force. Furthermore, with the Cloghan Wind Farm project, following its approval by Offaly County Council, this decision subsequently went to an appeal to An Bord Pleanala in 2013.

Reference was also made in Section 4.5 to the 'case law' of the planning appeals board, An Bord Pleanala, in particular decisions on:

- PL05E. 241596: This appeal was lodged on the 8th February 2013 and related to the decision of Donegal County Council to approve the GNDG renewables project above.

- PL16. 241592: This appeal was lodged on the 8th February 2013

- PL16. 241506: This appeal was lodged on the 15th January 2013

- PL27. 241827: This appeal was lodged on the 8th April 2013

- PL05B.240166: This appeal was lodged on the 8th February 2012 and the subsequent public hearing held on the 16th – 18th, 23rd – 25th October, 2012. The submissions made in the public hearing featured in the subsequent inspector's report quoted in the Communication.

- PL05E.242074: This appeal was lodged on 10th June 2013 in relation to the decision of Donegal County Council to approve the Corkermore wind farm above.

For all of the above, with the exception of PL05B.240166, the date of lodgement of the appeal post-dated the entry into force of the Convention. However, on PL05B.240166, the inspector's report, which was referenced in the Communication, was prepared after the entry into force of the Convention.

As regards domestic remedies, anyone applying for planning permission in Ireland and anyone, who made written submissions / observations to the planning authority on a planning application, can appeal a subsequent planning decision to An Bord Pleanála[1]. This appeals process is essentially a 'de novo' review. Once a decision is reached in a planning appeal, the Board will not discuss the pros and cons of the decision. All decisions are final and can only be challenged by Judicial Review in the High Court. This process will judge whether the Board followed due process in reaching its decision and will not include an examination of the planning merits. See the Section of this Reply on Articles 9(3) and 9(4) for further information on Judicial Review procedures.

### 1.5 Article 7 – Section 4.6 of the Communication

This section related primarily to the Westmeath County Council Draft County Development Plan 2014 -2020. As the website of Westmeath County Council confirms[2]:

- *The Draft Westmeath County Development Plan 2014-2020 has been prepared and is on public display from Friday 1st February 2013 to Friday 12th April 2013 inclusive.*

- *The Draft Plan is accompanied by an SEA Environmental Report, prepared in accordance with the Planning and Development (Strategic Environmental Assessment) Regulations 2004 – 2011 and an Appropriate Assessment / Natura Impact Report, pursuant to Article 6 of the Habitats Directive 92/43/EEC.*

The public participation related to this plan therefore post-dated the entry into force of the Aarhus Convention. The current situation on this plan, which is an update since the Communication, is that a Ministerial Direction was issued on the 10th July 2014[3]. Essentially the direction was given to delete the setback distances for wind farms contained in Policy P-WIN6. The Statement of Reasons comprised:

*A written submission on the proposed material alterations to the draft development plan was made to Westmeath County Council on behalf of the Minister for the Environment, Community and Local Government in November 2013. The written submission outlined that the proposed amendments concerning the Planning Authority's policy framework for wind energy projects would be significantly inconsistent with:*

- *The Wind Energy Guidelines, (issued under section 28 of the Planning and Developments Acts, in 2006);*
- *The Midland Regional Authority Planning Guidelines, in relation to the areas identified as suitable for wind energy / renewable energy development;*

[1] http://www.citizensinformation.ie/en/housing/planning_permission/an_bord_pleanala.html
[2] http://www.westmeathcoco.ie/en/ourservices/planning/westmeathcountydevelopmentplanreview/draftcountydevelopmentplan2014-2020/

[3] This can be downloaded from: http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownLoad,38448,en.PDF

- *National targets for generation of energy communication from renewable energy sources by 2020, (as derived from EC Directive 2009/28 on the promotion of the use of energy from renewable sources); and*
- *National Government policy commitments to increase on and offshore wind energy production indicated in the Strategy for Renewable Energy 2012 – 2020.*

*The decision by the members to alter the policies and objectives in regard to the wind energy objectives and the proposed rezoning of land as outlined in this direction does not provide for proper planning and sustainable development and therefore the Westmeath County Development Plan 2014 – 2020 is not in compliance with the requirements of s.10, s.12, s.27 and s.28 of the Planning and Development Act 2000 (as amended)*[4]*.*

Despite, as was documented in the Communication, the huge amount of effort that citizens of Westmeath made in the public participation phase, it was completely ignored. Article 6(8) "*Each Party shall ensure that in the decision due account is taken of the outcome of the public participation"* clearly doesn't apply to such matters in Ireland. Central Government decides on its own and the public administration then implements. The public participation exercise is a sham.

Order 84 of the Rules of the Superior Courts[5] provides a facility for Judicial Review, which has to be initiated within three months from the date when grounds for the application first arose. There is no sign to date that Westmeath County Council is considering initiating a Judicial Review of what is a clear breach of the rights of its citizens. This unfortunately leaves the cost of such an action to the concerned citizens themselves, a process which is described in more detail in the Section of this reply on Articles 9(3) and 9(4) of the Convention.

The Draft Offaly County Development Plan 2014-2020 referred to in the same Section of the Communication was initiated on the 28th November 2012, after the Convention had entered force[6]. While a similar Ministerial Direction is expected, it has not yet been published.

### 1.6 Article 8 – Section 4.7 of the Communication

This Section of the Communication related to the public participation on the Wind Energy Guidelines, which commenced on the 30th January 2013, after the Convention had entered force. As the Communication documented, a second round of public participation was entered into in December 2013[7]. A huge amount of Submissions were again received by the Department on this second consultation, in general these were highly critical of the current situation and the Department's

[4] Note: Unofficial consolidate version available at: http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/EN_ACT_2000_0030.PDF

[5] http://www.courts.ie/rules.nsf/0/a53b0f76ffc6c5b780256d2b0046b3dc?OpenDocument

[6] http://www.offaly.ie/eng/Services/Planning/County_Development_Plan_2014_-_2020/Newspaper_Notice.pdf

[7] http://www.environ.ie/en/DevelopmentHousing/PlanningDevelopment/Planning/News/MainBody,34777,en.htm

proposed guidelines. These Submissions are posted on the Department's website[8]. However, to date, more than six months later, nothing at all has been done about these submissions or the public participation in general.

As regards domestic remedies, if and when these Wind Energy Guidelines are finalised, given the obvious deficiencies, not least in the legal failings with regard to public participation, the only option would be again to seek a Judicial Review under Order 84 of the Rules of the Superior Courts. However, as will be described in the following Section of this reply addressing Articles 9(3) and 9(4) of the Convention, this would require considerable cost outlay by the concerned citizen(s).

### 1.7 Article 9(1) - Section 4.8.1 of the Communication

This Section of the Communication referred to the Office of the Commissioner for Environmental Information and the practical problems related to appeals, i.e. the office simply doesn't get around to processing them. Reference was made to the Aarhus National Implementation Report, which post-dated the entry into force of the Convention. Reference was also made to appeal CEI/12/005, which, while it was lodged in March 2012 before the Convention entered into force, the final decision on the appeal was made in 30th September 2013, a year after the Convention entered into force. The content of this decision was used to illustrate the extremely unsatisfactory situation with regard to the processing of appeals through this office.

With regard to the legal context of domestic remedies, the Regulations which implement Article 4 of the Convention in Ireland, namely S.I. No. 133 of 2007 as amended, provide for[9]:

- An appeal to the Commissioner for Environmental Information - Section 12 of the Regulations

- An appeal to the High Court on a point of law in respect of a decision of the Commissioner – Section 13 of the Regulations

While Article 9(1) and Directive 2003/4/EC are clear in that such an appeal process must be 'expeditious', this requirement was never transposed into the Irish Regulations and most certainly does not exist. This is a critical factor, in that Order 84 of the Rules of the Superior Courts requires a Judicial Review to be initiated within three months, on the other hand it can take well over a year to even have the possibility of obtaining the necessary information in relation to such potential proceedings by means of the Access to Information on the Environment Regulations. This is a gross breach of rights.

Since the Communication was lodged, it is necessary to point out two things which have occurred. Firstly, an examination of the Office of the Commissioner of Environmental Information's (OCEI) website[10] shows that their 2013 report is now published. Furthermore, the last decision published by this office, CEI/12/0004, dates

[8] http://www.environ.ie/en/DevelopmentHousing/PlanningDevelopment/Planning/PublicConsultations/Submissions-WindEnergy/

[9] http://www.environ.ie/en/Legislation/Environment/Miscellaneous/FileDownLoad,30002,en.pdf

[10] http://www.ocei.gov.ie/en/

to 20th December 2013, so after eight months of 2014, not a single 2014 appeal has been resolved. Some of this is clarified by the 2013 report[11]:

*The OCEI has historically been inadequately resourced. Although it is legally independent from the OIC, the OCEI does not receive a separate funding allocation from the State. Rather, Article 12(10) of the AIE Regulations provides that the Commissioner for Environmental Information shall be assisted by the staff of the OIC and "by such other resources as may, from time to time, be available to that office".*

*Ireland, through the Department of the Environment, Community, and Local Government, submitted its first National Implementation Report on the implementation of the Aarhus Convention in Ireland to the secretariat of the Aarhus Convention on 31 December 2013. The Department had prepared two preliminary draft reports and invited comments from stakeholders, members of the public and other interested parties, but this Office was not among the parties that were expressly invited to comment. However, specific issues that were reportedly raised in the context of the submissions received by the Department included the lack of resources of the OCEI and the time taken for appeals to be heard (with the average length of time for an appeal being calculated at 12.3 months).*

*The Implementation Report correctly notes that "the OCEI is funded through the general government allocation to the Office of the Ombudsman and that it is a matter for that Office to allocate the funding to the various bodies under its remit as it deems appropriate". Nevertheless, I wish to clarify that, following correspondence with the Department on the matter, this Office wrote directly to the Department of Public Expenditure and Reform in February 2012 to request a specific financial allocation for the OCEI, particularly in relation to the legal costs that are incurred in the performance of the Commissioner's functions under the AIE Regulations. To date, no such financial provision for the OCEI has been made, which leaves me in a difficult position given the number of complex or novel legal issues that continually arise in applying the AIE Regulations. However, as the Implementation Report acknowledges: "the significant economic challenges facing the State arising from the financial crisis have presented significant funding difficulties for all public service organisations, including the Office of the Ombudsman".*

However, the report then moves on to a more upbeat perspective in that: *"I am pleased that, at the time of writing, four new Administrative Officers are due to join the OIC shortly. The additional staff resources, together with the implementation of reforms arising from the organisational review recently carried out, should significantly improve case turnaround and throughput overall".* Finally, as the Commissioner points out, considerable challenges remain, not least with the backlog of cases and the legal costs associated with some, which is in no little part related to the significant number of public authorities, such as NAMA, the Office of the Taoiseach and Bord na Mona, who refused to comply with the decisions of the Commissioner and instead initiated High Court proceedings.

In conclusion therefore on Article 9(1), while a website might exist and some elements of it, but not all, are transposed into national legislation, in practice the rights don't exist.

[11] http://www.ocei.gov.ie/en/publications/annual-reports/annualreport2013/media/ocei_ar_2013_english.pdf

## 1.8 Articles 9(3) and 9(4) – Section 4.8.2 of the Communication

In theory challenges in relation to Article 6 of the Convention, i.e. a Judicial Review in the sense of Article 9(2) of the Convention can be made through Order 84 of the Rules of the Superior Courts[12]. In practice the issue is the costs of such Access to Justice. In Section 4.8.2 of the Communication, reference was made by example to on-going legal proceedings in the High Court related to Pat Swords, which as previously highlighted were initiated in November 2012 after the Convention had entered into force.

The primary issue here is the cost of the necessary legal representation and the length of time for such proceedings, which in effect render them 'prohibitively expensive'. As illustrative of the costs of such legal representation, the case Klohn V An Bord Pleanala [2011] IEHC 196 was highlighted, even though it pre-dated the entry into force of the Convention. However, it does remain a good example of the scale of costs involved in such High Court proceedings, which is little changed since that period in 2011.

To clarify the current situation in Ireland, cost rules were changed after the Klohn judgement and are now to be found in the Part 2 of the Environment (Miscellaneous Provisions) Act 2011[13]. In essence 'each side shall bear its own costs', with the discretion of the Judge to award costs at the end of the proceedings, based on one of the parties obtaining relief, acting in a vexatious manner or consideration of matters of exceptional public importance. However, it is important that while the risks to the plaintiff of exposure to the other side's costs are reduced, the economic reality as highlighted in the Klohn case of accessing the Courts is still a major barrier.

In addition, these special cost rules are limited to specific areas of legislation; see Section 4(4) of the 2011 Act. Judicial Review proceedings related to Integrated Pollution Prevention and Control, Environmental Impact Assessment and Strategic Environmental Assessment are also now covered under these cost arrangements by Section 50B of the Planning Acts[14]. However, there still remains considerable areas of the scope of the Aarhus Convention not covered by these cost rules, which is a position Pat Swords finds himself in with regard to Article 7 of the Convention and implementation of the NREAPs, which is why additional court proceedings related to cost rules will be required on the 11th November.

It is also necessary to point out that Irish legislation in no area transposes the words 'not prohibitively expensive' into its National legislation and it is simply indisputable, that the cost of access to such High Court proceedings requires an investment in Legal Services of at least €50,000. As a result the number of High Court cases related to Aarhus provisions has been limited to date. Although in the Summer of 2014 some four Judicial Review cases were granted leave in the High Court, as local communities felt they had no option, but to raise these levels of funds and seek to overturn inappropriate planning decisions of An Bord Pleanala related to renewable developments.

It is also necessary to point out, that since the Communication was submitted, there have been two cases in the High Court which have reached judgement stage and will

[12] http://www.courts.ie/rules.nsf/0/a53b0f76ffc6c5b780256d2b0046b3dc?OpenDocument
[13] http://www.irishstatutebook.ie/pdf/2011/en.act.2011.0020.pdf

[14] http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/EN_ACT_2000_0030.PDF

provide a further indication of the magnitude of these costs. The first case related to *Kelly -v- An Bord Pleanála [2014] IEHC 400*[15] was a Judicial Review of a decision made by An Bord Pleanala in September 2013 in relation to a wind farm, for which Article 6 of the Convention applied, as the decision was subject to an Environmental Impact Assessment. Furthermore, this legal case post-dated the entry into force of the Convention by a year.

The Plaintiff won the case based on the Judgement of 25th July 2014; An Bord Pleanala not having complied with the requirements of the Habitats Directive. It is reported on the 1st September '*that costs were awarded today to Mr Kelly*'[16]. However, these costs have yet to be resolved by the taxing master and formally published. When they become publically available, we will update the Compliance Committee accordingly.

The second case of relevance also related to a similar wind farm, to which the Aarhus Convention applied, although some of the Court proceedings related to non-Aarhus issues, namely land title, and were not covered by the Aarhus related Court rules. The original substantive judgement on the wind farm occurred in January 2013: *McCallig -v- An Bord Pleanála & Ors: [2013] IEHC 60*[17]. The applicant did not succeed in obtaining relief in relation to quashing the decision on the wind farm, but there were other reliefs to also to be considered. This lead to two further proceedings in the High Court:

*McCallig -v- An Bord Pleanála: [2014] IEHC 353*[18]*:* This concluded:

- *An order for costs in favour of the applicant will be made against the respondent solely as regards the latter issue, (revival of the decision of the first notice party), and, jointly and separately against the respondent and the second notice party as regards the first and second issues (first, the wrongful inclusion of part of her lands in the application for and in the planning permission and second, that this was irrelevant as the decision to grant permission did not affect any part of her lands).*

McCallig -v- An Bord Pleanála: [2014] IEHC 354[19]: This concluded:

- *The respondent and the second notice party were not successful in the application for judicial review, even though the applicant did not obtain all the relief claimed by her. The effect of the claim made by them in the costs application, if successful, would have been to deprive the applicant of the costs of the planning and development law issues to which she would otherwise prima facie be entitled. In these circumstances, even though I find that the claim of the respondent and the second notice party was not unreasonably or improperly made, in my judgment the respondent and the second notice party, jointly and severally, should pay to the applicant her*

[15] http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/7a4764a297ef3fc080257d35004d2540?OpenDocument

[16] http://www.shannonside.ie/news/south-roscommon-wtag-awarded-costs-after-high-court-win/

[17] http://www.courts.ie/Judgments.nsf/0/A2F3E8FA006C5CD880257B180062165E

[18] http://www.courts.ie/Judgments.nsf/0/516F90A9190AB01580257D1C005179E5

[19] http://www.courts.ie/Judgments.nsf/0/7D9110ED513D516680257D1C0051A77A

*party and party costs (to include the costs of any relevant portions of submissions), of so much only of the application for costs determined by the judgment of this Court delivered on the 9th April, 2014, as relates to their unsuccessful claim. To provide against any misunderstanding, that is the claim by them that the term, "proceedings", was employed in s. 50B(1) of the Act of 2000, (as inserted by s. 33 of the Act of 2010), referred to the entire judicial review application and, not merely, to that part of the applicant's challenge to the decision of the respondent as was based on environmental impact assessment grounds. This claim is considered and determined at paras. 42 to 44 inclusive of the judgment of the court delivered on the 9th April, 2014. While it may reasonably be regarded as a somewhat minor element in the overall costs of the application as to costs determined by the judgment, it is nonetheless not entirely insignificant.*

This is quite complex stuff, but in simple terms; the third High Court case demonstrates how it took three days of hearings to resolve the costs issue and this then required a third judgment to adjudicate the costs of the costs - a great example of the expense of the system in and of itself. Furthermore, despite this third Judgement in June 2014, the actual financial quantum is still not finalised and will have to go through the taxing master for An Bord Pleanala. When these costs become publically available, we will update the Compliance Committee accordingly.

While in theory, the High Court exists as a 'domestic remedy', in practice it has enormous barriers to access to justice and simply does not meet the requirements in Article 9(4) of 'not prohibitively expensive'.

In conclusion, we trust that these above clarifications have addressed the Committee's requirements and if there are any further clarifications required, please do not hesitate to contact us.

Regards

Pat Swords
Neil Van Dokkum
David Malone