To: Fiona Marshall - Secretary to the Aarhus Convention Compliance Committee
From: Pat Swords, Neil Van Dokkum and David Malone
Date: 1st December 2014
Re: Your letter of 21st November 2014

Attachment 1: The Draft Offaly County Development Plan, 2014-2020 Amendments to Draft Plan Chief Executive's Report to Members, of 19th August 2014

Contents

Dear Fiona

With regard to the set of questions prepared by the Committee for our attention, please find below and in the attached our replies to these issues. If you require any further clarifications on these issues, please do not hesitate to respond to us.

1. AT WHAT STAGE ARE THE PROCEEDINGS OF PAT SWORDS V. MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES 2013/4122 P

As was clarified in the letter to yourselves of 22nd August:

- 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'.

However, this date of 11th November had to be vacated on request of the State's legal team, as their Senior Consul had to undergo an eye operation. The Court has now scheduled[1] this hearing for the 3rd March 2015, provisionally for 10 days. The Motion from the Plaintiff to be heard comprises:

1. A Protective Cost Order
2. Alternatively an Order pursuant to s.7 of the Environmental (Miscellaneous Provisions) Act[2] that s.3 of the Act applies to these proceedings; the costs of this application.
3. The costs of this motion
4. Such further or other Order as this Honourable Court may deem fit.

The Notice of Motion to be heard from the State comprises:

1. An Order to have the within proceedings dismissed for reason of laches[3] and/or unreasonable, inordinate and or inexcusable delay in commencing judicial review proceedings under Record No. 2012/920JR and in bringing these proceedings.
2. Such further or other Order as this Honourable Court may consider just or necessary.
3. An Order providing for the costs and expense of this application.

There has been a recent High Court judgement which helps clarify some of the above issues, namely [2014] IEHC 522, by Hogan J of 11/07/2014[4]:

6. The Aarhus Convention (or, to give it its full title, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) is an international agreement which was negotiated under the auspices of the UN Economic Committee for Europe. Although it is in strictness simply a regional agreement, it is quite possibly the most influential international agreement of its kind in the sphere of international environmental law. Perhaps one of the reasons that the Convention has proved to be so influential is that it has been ratified by the European Union and that it has been transposed into certain key areas of EU environmental law, on which the latest version of the Environmental Impact Assessment Directive (2011/92/EU) is only the most prominent example.

7. Save for the special case of where the Aarhus Convention has been transposed into EU law (which I will consider presently) and, by that process, has become part of Irish domestic law as a result, it is clear that, having regard to the provisions of Article 29.6 of the Constitution, the Convention is otherwise only part of domestic law to the extent to which such either has been or may be determined by the Oireachtas. This point is doubtless beyond controversy, but a recent application of these well-

[1] Details can be found at: http://highcourtsearch.courts.ie/hcslive/cslogin

[2] http://www.irishstatutebook.ie/2011/en/act/pub/0020/index.html

[3] Laches: A defence to an equitable action, which bars recovery by the plaintiff because of the plaintiff's undue delay in seeking relief.

[4] http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/b23057a9c7fdbc1a80257d8c0052240e?OpenDocument

established principles in the context of a different international convention (namely, the Strasbourg Convention on the Transfer of Sentenced Persons) may be found in the judgment of the Supreme Court in Sweeney v. Governor of Loughan House Open Prison[2014] IESC 42.

8. The relevant provisions of the Aarhus Convention so far as costs are concerned are those contained in Article 9(3) and Article 9(4):

- *"3. In addition…..each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*

- *In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."*

9. So far as the Aarhus Convention and domestic law is concerned, the relevant statutory provisions are to be found in the Long Title and Part 2 of the Environment (Miscellaneous Provisions) Act 2011 ("the 2011 Act"). The Long Title recites that one of the objects of the 2011 Act is "to give effect to certain articles" of the Aarhus Convention and for judicial notice to be taken of the Convention. Section 8 of the 2011 Act provides that judicial notice of the Convention shall be taken. Sections 3 to 7 then modify the traditional costs order regime by "displacing the ordinary rules regarding the award of costs in litigation": McCoy v. Shillelagh Quarries Ltd. High Court, 16th July 2014 per Baker J. The modified rules may be taken to ordain a procedure whereby, normally, the default order in cases coming within this part of the 2011 Act is that each side must abide their own costs.

10. It is nonetheless striking that the Oireachtas did not make the Aarhus Convention part of our domestic law as such. As I pointed out in Kimpton Vale Developments Ltd. v. An Bord Pleanála [2013] IEHC 442 it would, of course, have been open to the Oireachtas to do just that. Thus, for example, s. 20B of the Jurisdiction of Courts and Enforcement of Judgments Act 1998 (as inserted by s. 1 of the Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012) provides that the Lugano Convention of 2007 "has force of law in the State." In that latter example the Lugano Convention was thereby given an autonomous, directly applicable status in Irish law, so that, for example, the relevant provisions of the Convention could be invoked appropriately on a free standing basis in all categories of litigation without further ado.

11. The Aarhus Convention was not made part of the law of the State in quite that sense. What happened instead was that the Oireachtas sought to approximate our law to the requirements of Article 9(3) and Article 9(4) of the Aarhus Convention by providing in ss. 3 to 7 of the 2011 Act for the modified costs rule in the manner in which I have described. If, however, it were subsequently to transpire – and I say this on a purely hypothetical basis – that these provisions of the 2011 Act did not sufficiently approximate to the requirements of Article 9(3) and Article 9(4) of the Aarhus Convention, then the only remedy in that situation would be for the

Oireachtas to amend the law. Any disappointed litigant seeking to protect himself or herself against an excessive costs exposure could not, as it were, seek directly to invoke the provisions of Article 9(3) and Article 9(4) of the Convention for this purpose, precisely because, unlike the example given of the provisions of Lugano Convention, the provisions of the Aarhus Convention are not themselves part of the law of the State.

12. So far as the 2011 Act is concerned, it is clear that the modified costs rule in s. 3 is applied by s. 4 to the following category of cases:

- *"4(1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3), instituted by a person – for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in subsection (4), or in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,*

- *and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment.*

- *(2) Without prejudice to the generality of subsection (1), damage to the environment includes damage to all or any of the following:*

    (a) air and the atmosphere;

    (b) water, including coastal and marine areas;

    (c) soil;

    (d) land;

    (e) landscapes and natural sites;

    (f) biological diversity, including any component of such diversity, and genetically modified organisms;

    (g) health and safety of persons and conditions of human life;

    (h) cultural sites and built environment;

    (i) the interaction between all or any of the matters specified in paragraphs (a) to (h).

- *(3) Section 3 shall not apply –*

    (a) to proceedings, or any part of proceedings, referred to in subsection (1) for which damages, arising from damage to persons or property, are sought, or

(b) to proceedings instituted by a statutory body or a Minister of the Government.

- *(4) For the purposes of subsection (1), this section applies to –*

  (a) a licence, or a revised licence, granted under section 83 of the Environmental Protection Agency Act 1992,

  (b) a licence granted pursuant to section 32 of the Act of 1987,

  (c) a licence granted under section 4 or 16 of the Local Government (Water Pollution) Act 1977,

  (d) a licence granted under section 63, or a water services licence granted under section 81, of the Water Services Act 2007,

  (e) a waste collection permit granted pursuant to section 34, or a waste licence granted pursuant to section 40, of the Act of 1996,

  (f) a licence granted pursuant to section 23(6), 26 or 29 of the Wildlife Act 1976,

  (g) a permit granted pursuant to section 5 of the Dumping at Sea Act 1996,

  (h) a licence granted under section 40, or a general felling licence granted under section 49, of the Forestry Act 1946,

  (i) a licence granted pursuant to section 30 of the Radiological Protection Act 1991,

  (j) a lease made under section 2, or a licence granted under section 3 of the Foreshore Act 1933,

  (k) a prospecting licence granted under section 8, a State acquired minerals licence granted under section 22 or an ancillary rights licence granted under section 40, of the Minerals Development Act 1940,

  (l) an exploration licence granted under section 8, a petroleum prospecting licence granted under section 9, a reserved area licence granted under section 19, or a working facilities permit granted under section 26, of the Petroleum and Other Minerals Development Act 1960,

  (m) a consent pursuant to section 40 of the Gas Act 1976,

  (n) a permission or approval granted pursuant to the Planning and Development Act 2000.

- *(5) In this section –*

  - *"damage", in relation to the environment, includes any adverse effect on any matter specified in paragraphs (a) to (i) of subsection (2);*

- *"statutory body" means any of the following:*

  (a) a body established by or under statute;

  (b) a county council within the meaning of the Local Government Act 2001;

  (c) a city council within the meaning of the Local Government Act 2001.

- *(6) In this section a reference to a licence, revised licence, permit, permission, approval, lease or consent is a reference to such licence, permit, lease or consent and any conditions or other requirements attached to it and to any renewal or revision of such licence, permit, permission, approval, lease or consent."*

13. To complete the picture, it is necessary to note that s. 6(a) of the 2011 Act further provides that the modified costs rule contained in s. 3 applies to judicial review proceedings in this Court concerning those matters which fall within the scope of s. 4.

14. However, it is equally plain that the licensing regime which obtains under the Fisheries (Amendment) Act 1997 – and which was the subject of the present judicial review application - simply does not come within the scope of the special costs rules contained in ss. 3, 4 and 6 of the 2011 Act. If it does not, then that is the end of the matter so far as domestic law is concerned, since for the reasons I have already set out, neither the Aarhus Convention nor Article 9 of the Convention can be regarded as having a free standing autonomous status in Irish law. It is true that Irish law has been modified and amended to take account of the requirements of Article 9 of the Convention, but the Oireachtas has not elected to go any further than this. Specifically, Article 9 has not, as such, been made part of the law of the State.

15. It follows, therefore, that this Court has not been given any jurisdiction by the 2011 Act to apply the modified costs rules contained in Part II of that Act to licensing applications coming within the scope of the 1997 Act or to applications for judicial review in respect of those licensing decisions.

With regard to Pat Swords v. Minister for Communications, Energy and Natural Resources 2013/4122 P, the hearing scheduled for 3rd March 2015 is still limited to preliminary issues, as was highlighted in previous correspondence to UNECE. The matter of costs was never resolved at the leave stage for the initial Judicial Review proceedings on No. 2012 /920JR in November 2012 or for the day and a half of proceedings in front of the President of the High Court in April 2013. Furthermore, as previously documented in the Communication, the State is seeking in excess of ten days in the High Court to address the substantive issues, when and if that point is reached. As the substantive proceedings are inherently linked to the NREAP, the findings and recommendations on Communication ACCC/C/2010/54 and Article 7 of the Convention, it is now clear from the position of Hogan J that no form of modified costs rules will apply to these proceedings. Clearly the proceedings on the substantive issues on Pat Swords v. Minister for Communications, Energy and Natural Resources 2013/4122 P will be outrageously prohibitively expensive, not to mention the considerable cost burden already incurred to date on the Judicial Review proceedings No. 2012/920JR.

One can only conclude that the Aarhus Convention's obligations in respect of 'not prohibitively expensive' simply do not apply, as there was never any intention to

ensure they comply, despite it now being nearly a decade since the EU ratified the Convention and it became part of Community Legal order and hence Irish legal order.

2. WAS THE NREAP AMENDED AFTER THE AARHUS CONVENTION ENTERED INTO FORCE FOR IRELAND?

The NREAP was adopted by Ireland on the 30th June 2010. There has not been a new NREAP since. However, Member States are obliged under Directive 2009/28/EC to submit a NREAP progress report to the EU every two years. An evaluation of these reports clearly demonstrates that quite significant amendments to the 2010 NREAP are occurring. For instance, if we consider the *"National Renewable Energy Action Plan (NREAP), Ireland, Second Progress Report, Submitted under Article 22 of Directive 2009/28/EC, February 2014*[5]", then this postdates the entry into force of the Convention. The Annex of this document clarifies in respect of Renewable Energy Supply from Electricity (RES-E) and the State aid funding for environmental protection under the Renewable Energy Feed-In Tariff (REFIT) scheme:

- *Renewable electricity is now the largest contributor to renewable energy consumption and is expected to contribute most to our 2020 target. The largest contribution in the electricity sector is expected to be made through generation from wind technologies, followed by biomass technologies. More biomass generation is expected to contribute to our RES-E target than was set out in the NREAP as REFIT 3, dedicated specifically to RES-E (and cogeneration) from biomass from a range of sources was opened in early 2012. The REFIT scheme for electricity generation supports the increase in renewable electricity from a number of different technologies (onshore wind, small hydro and various biomass technologies, including anaerobic digestion and high efficiency CHP.)*

- *The change in the contribution in biomass (now expected to be 274 MW, up from 153 MW in the original NREAP) is due to the inclusion of additional high efficiency biomass CHP, in view of the introduction of a new REFIT scheme for biomass technologies.*

- *Wind generation will provide the bulk of Ireland's renewable energy in 2020. To meet the RES-E target, it is expected that between 3,000 MW and 4,000 MW of wind needs to be connected. This is down from the 4,649 MW of wind generation envisaged to be required in the original NREAP.*

- *The National Renewable Energy Action Plan (NREAP) indicated a particular expected breakdown in the trajectory between onshore and offshore wind. In the current economic circumstances and in light of advice from various sources, including the Economic and Social Research Institute, the Government has decided that in meeting our legal obligation to deliver the 2020 renewables target, onshore rather than offshore wind should be pursued in the first instance, in order to minimise any support scheme costs borne by electricity consumers. This is a change from what was indicated in the original NREAP.*

[5] http://ec.europa.eu/energy/renewables/reports/2013_en.htm

These are quite significant amendments, 3,000 MW as opposed to originally 4,649 MW of wind energy is only 65% of what was originally planned. Furthermore, the original 2010 NREAP called for 555 MW of the 4,649 MW of wind energy, i.e. 12%, to be built offshore. This is now clearly scrapped in favour of the onshore alternative.

If we consider that there is now an additional 121 MW of renewable electricity to be generated from biomass, then assuming a typical electrical efficiency of 35% for this type of facility, the corresponding thermal heat input would be 345 MW. Comparison with Annex I of the Convention: *"Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more*" places the significance of the increase in biomass generation into context. Alternatively, one could present this 121 MW of increased biomass renewable electricity into the context that since wind energy in Ireland only delivers at best 30% of its design output, if the same amount of electricity were instead to be delivered through the use of wind energy; it would require approximately 400 MW of wind energy to be installed. In other words about 200 onshore turbines.

Additionally the February 2014 Progress Report clarified:

- *Expert advice has identified Ireland's potential to produce renewable electricity significantly beyond the level required by the 2020 target, along with the capacity to meet that 2020 target from onshore renewable generation alone. The 2009 EU Renewable Energy Directive (2009/28/EC), outlined targets for Member States for renewable energy penetration, but also provided the option of co-operation mechanisms to enable a Member State to contribute to another Member State's targets.*

- *Ireland has the capability to achieve its national targets for renewable electricity from onshore renewable generation alone, with capacity to spare. This means that there is potential for projects of scale onshore that are aimed at export markets. It also means that our offshore wind resource can be developed as an export opportunity.*

- *It is in this context that the opportunity to harness Ireland's onshore, and offshore, renewable energy resources for the export market, and realise their potential for investment, job creation and economic growth, has been identified and is being pursued with the UK Government.*

- *A memorandum of Understanding was signed by Minister for Communications, Energy and Natural Resources, Pat Rabbitte, and UK Secretary for Energy and Climate Change, Edward Davey, on 24th January 2013.*

- *Work is progressing with a view to entering an Inter-Governmental Agreement (IGA) with the UK in early 2014. Regarding the development of the IGA, significant workstreams are on-going in the areas of project management; the IGA itself; European Union (EU) liaison, communications and stakeholder engagement; economic analysis; policy on renewables export, grid issues; regulation, legislation; and land and planning.*

This contrasts with the position in the original 2010 NREAP[6], in which it was clarified in Section 4.7 "Planned use of statistical transfers between Member States and planned participation in joint projects with other Member States and third countries"

- *Directive 2009/28/EC provides an overall framework for the use of co-operation mechanisms under the Directive. Member States and the European Commission are not yet entirely clear how the co-operation mechanisms will work on a practical level. Under the Intelligent Energy Europe Programme, the co-operation mechanisms in the Directive are the subject of concerted action by Member States who will look more closely and in-depth at the co-operation mechanisms including practicalities, procedures etc.*

Furthermore in Table 10 Non-Modelled 'Export Scenario':

- *The 'Export Scenario' table set out below is not a modelled scenario. The table illustrates Ireland's potential to become an exporter of RES-E to other EU Member States between now and 2020, were the appropriate conditions (economic, technical and environmental) to develop to allow this to happen and subject to a comprehensive cost benefit analysis. Developing this level of electricity from renewable sources is currently limited technically by grid infrastructure. In order for this export scenario to be realised, significant further infrastructural investment in the period to 2020 would be needed, including build of additional interconnectors and offshore grid and deep reinforcement onshore. The potential for this level of development in the export scenario arises from: offshore wind projects that currently have either foreshore leases or a grid connection offer; onshore wind projects already built, contracted with the TSO or due to receive a grid connection offer in Gate 3; potential for geothermal, pumped storage and solar and Ireland's 500MW 2020 ocean (wave and tidal) target.*

Please refer to Sections 4.3 and 4.4 of the original Communication on Articles 4 and 5 of the Convention, in relation to the huge wind energy export projects now being advanced for the Irish midlands and the failure to provide the cost benefit report for this export programme.

In conclusion therefore, there are very significant amendments to the original 2010 NREAP when compared with what was submitted to the EU in February 2014 as a NREAP update.

3. REQUESTED INFORMATION ON GREENHOUSE GAS SAVING AND ASSOCIATED ENVIRONMENTAL BENEFITS

Extensive requests for information and associated proceedings have been instigated at both National (Irish) and EU levels with regard to "*what are the actual greenhouse gas emissions to be saved and what are the environmental benefits associated with saving a tonne of greenhouse gases".* First to recap the origin of the 2009/28/EC renewable energy Directive[7] and the resulting NREAPs, in that as Recital (15) of the Directive documents, the 20% overall EU renewable target was shared out to the Member States based on their existing levels of renewable energy and a factor

[6] http://ec.europa.eu/energy/renewables/action_plan_en.htm
[7] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0028

based on Gross Domestic Product (GDP). The EU never knew what actual greenhouse emissions were to be saved and what was the associated environmental benefit.

Under Directive 2001/77/EC[8], the first renewable Directive of the EU, the EU Commission had a clear obligation under Article 8 of this Directive to assess the externalities associated with non-renewable generation and present a report to the European Parliament and the Council, no later than 31 December 2005 and thereafter every five years. The issue of externalities can be best explained by reference to the European Investment Bank in their 2010 publication on: "Public and private financing of infrastructure. Policy challenges in mobilizing finance Infrastructure and infrastructure finance[9]", which clarified:

- *Environmental externalities are multiple – in terms of greenhouse gases, other forms of air pollution, water pollution and runoff, noise and land use and biodiversity. For example, a new runway or airport will raise greenhouse gas emissions, increase local air pollution, result in significant water runoff, create significant noise affecting local people and their house prices, and take up land which can often include areas with considerable biodiversity value, such as marshes and open spaces.*

- *In theory, the "correct" solution is to price each and every externality. In practice, this is impractical and politically impossible. The result is that decisions are based on politics and planning, and very much open to political and regulatory failures.*

In other words, internal costs are the direct costs we pay on our bill, while the externalities are the indirect costs we pay, such as through environmental degradation. As the specific report under Article 8 of Directive 2001/77/EC in relation to externalities of non-renewable degradation could not be found, it was formally requested from the EU. The resulting reply was that it did not exist. This was one of a number of issues that the European Platform Against Windfarms (EPAW) complained to the EU Commission about and which then lead to a formal complaint to the EU Ombudsman in September 2012[10]. The formal position of Hans Van Steen of DG Energy[11] was that this report wasn't completed as required by Directive 2001/77/EC as;

(a) the Member States did not provide the information on externalities (Note; they weren't required to) and;

(b) this information on externalities was available from other EU documentation.

[8] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0077

[9] http://www.eib.org/attachments/efs/eibpapers/eibpapers_2010_v15_n02_en.pdf

[10] http://www.epaw.org/legal.php?lang=en&article=c4

[11] http://www.epaw.org/documents/Attachment%202%20-%20Reply%20from%20EU%20Commission%2012-08-31_16-29.pdf

The latter was completely untrue, as Attachment 3 of the EPAW complaint to EU Ombudsman documents in more detail[12]. To explain, while in the late 1990s and early 2000s, the EU Commission funded a project assessing the external costs of energy technologies - named ExternE, the project singularly failed when it came to assessing the 'damage' cost of greenhouse gas emissions. ExternE finally recommended[13] the use of a 'central estimate' (2.4 €/t CO_2, with a 'minimum' value of 0.1 €/t CO_2, and a 'maximum' value of 16.4 €/t CO_2; Tol and Downing, 2000). To put this external cost in context, it has already been calculated in Ireland that it is costing over €135 to reduce a tonne of CO_2 by replacing fossil fuel generated electricity with wind energy[14].

Note: The Extern-E analysis on climate change quoted extensively the work of Professor Richard Tol, who in a more recent 2009 publication on the "Economic Effects of Climate Change[15]", when he was working for the Irish Economic Science and Research Institute, stated:

- *"Projections of future emissions and future climate change have become less severe over time—even though the public discourse has become shriller".*
- *"The quantity and intensity of the research effort on the economic effects of climate change seems incommensurate with the perceived size of the climate problem, the expected costs of the solution, and the size of the existing research gaps. Politicians are proposing to spend hundreds of billions of dollars on greenhouse gas emission reduction, and at present, economists cannot say with confidence whether this investment is too much or too little".*

In essence then we simply don't know what the external cost of greenhouse gas emissions are, i.e. we don't know what environmental damage they are doing and the cold fact is that since the EU started it's renewable energy programme in 1998, there has been no increase in global temperatures. All we know for sure is that we are being forced to fund a hugely disproportionate amount of money for an 'alleged environmental benefit', which has never been quantified.

As regards the development of the EU's 20% renewable energy Directive, the EU Commission's official position in their "*Renewable Energy Road Map Renewable Energies in the 21st Century: building a more sustainable future COM (2006) 848 final[16]"* was that:

- *"The additional renewable energy deployment needed to achieve the 20% target will reduce annual CO_2 emissions in a range of 600-900 Mt in 2020. Considering a CO_2 - price of €25 per tonne, the additional total CO_2 benefit*

[12] See in particular Section 2.3: http://www.epaw.org/documents/Attachment%203%20-%20Failures%20to%20Comply%20with%20EU%20Law.pdf

[13] http://www.dlr.de/Portaldata/41/Resources/dokumente/institut/system/publications/Do_the_answers_match_the_questions.pdf

[14] See Section 9.4: http://www.iae.ie/site_media/pressroom/documents/2011/Apr/06/IAE_Energy_Report_Web2_05.04.2011.pdf

[15] Journal of Economic Perspectives – Volume 23, Number 2, Spring 2009, Pages 29-51 https://www.aeaweb.org/articles.php?doi=10.1257/jep.23.2.29

[16] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0848:EN:NOT

can be calculated at a range of €150 - €200 billion. Actual CO_2 prices will depend on the future international climate regime".

So where did this cost-benefit analysis come from? It has to made clear that this is not a cost-benefit analysis, it is a political statement. The €25 per tonne was based on the expected trading price for carbon dioxide. What dictates that price? It is dictated by the number of allowances, which are available in the EU Emissions Trading Scheme. How is the number of allowances determined? This is determined by a political decision.

If we consider the other claim above that the additional renewable energy deployment needed to achieve the 20% target would reduce annual CO_2 emissions in a range of 600-900 million tonnes (Mt) in 2020. The source of this claim was the PRIMES computer model used by the Commission, a computer model which has caused a lot of controversy, as it remains the private property of the National Technical University of Athens. While assumptions are published, independent parties cannot replicate the results. In the EU Commission's consultation on the "Energy Roadmap for 2050"[17], it is reported that a few organisations from diverse sectors criticised the PRIMES model regarding its transparency. Note: Only a few organisations would have the technical skills to evaluate the function of such a model.

Furthermore, careful examination of the Commission Staff Working Document in relation to the Renewable Energy Roadmap provides an insight into the key assumption of the PRIMES model in relation to assessing greenhouse gas emissions, namely "*the assumption that CO_2 savings per percentage point increase of renewable energy's share is constant*". In other words there is no allowance being made for the significantly increased inefficiencies, which are occurring on the grid, with resulting higher fuel consumption and emissions, as more and more intermittent renewable energy is placed on the grid.

However, as was documented in Section 6 of the Communication, the EU Ombudsman simply failed to address this complaint by EPAW in case 1892/2012/VL[18]. A particular issue was Section 5.3 of the NREAP template, see below, which related to impacts, the EU ombudsman simply concluding that this assessment was optional, as it was not documented as being otherwise in Directive 2009/28/EC, despite there being a general obligation under the Convention to fully integrate "*environmental considerations in governmental decision-making*".

5.3. Assessment of the impacts (Optional)

Table 13: Estimated costs and benefits of the renewable energy policy support measures:

Measure	Expected renewable energy use (ktoe)	Expected cost (in EUR) – indicate time frame	Expected GHG reduction by gas (t/ year)	Expected job creation

[17] SEC(2011) 1569 Part 3/3: http://ec.europa.eu/energy/energy2020/roadmap/doc/sec_2011_1569_3.pdf

[18] http://www.ombudsman.europa.eu/de/cases/decision.faces/de/51946/html.bookmark

An access to information on the environment request was sent in to the Irish Department of Communications. Energy and Natural Resources in July 2011 in relation to the failure to complete the above section of the NREAP template and the basis for emission savings claims made in the State Aid for Environmental Protection application in 2006 for the REFIT scheme. As per the reply documents[19], not filling in the above Section of the NREAP was apparently 'justified' on the basis that 19 Member States did likewise and a verbal decision had been reached by the Department and Sustainable Energy Authority of Ireland (SEAI) not to so.

Furthermore, it is clear from the reply received to the above, and indeed in Irish NREAP progress reports to the EU, that a false method of calculation is being used to assess the greenhouse gas savings, which are claimed to occur when wind energy displaces convention fossil fuel generation plants, i.e. no allowance is being made for the considerable inefficiencies which now occur due to the fossil fuel plants operating in highly variable, stop, start mode. As the February 2014 Irish NREAP Progress report documents in the section on greenhouse gas savings:

- *There are clear limitations in this analysis but it does provide useful indicative results. The limitations and caveats associated with this methodology include that it ignores any plant used to meet the associated reserve requirements of renewables. These open cycle plants will typically have lower efficiency and generate increased CO_2 and NOx emissions compared with CCGT and these emissions should be incorporated into the analysis. The purpose of presenting a simplified analysis here is to provide initial insights into the amount of fossil fuels that are displaced by renewables and the amount of emissions thereby avoided.*

In 2012 it was sought to further challenge this aspect and to seek information on what was the environmental justification for the extension of the REFIT State Aid Programme for the funding of an additional 4,000 MW of renewable electricity in Ireland. The reply from the EU[20], to the request for information under the Aarhus Regulation 1367/2006, was that the transparency of information relating to the claimed for emission savings was ensured by posting the NREAP progress reports on the 'transparency platform' (EU website). Furthermore, the environmental justification for the additional funding under REFIT turned out to be simply a 'one pager' from the Irish Department of Communications, Energy and Natural Resources stating that this additional REFIT State Aid Funding would assist in helping to reach a target of 40% renewable energy in the electricity supply. No other quantification of this 'environmental protection', which was to be provided with this State Aid worth several billions of Euros, existed.

In the initial Judicial Review application by Pat Swords under 2012/920/JR, for which leave was granted in the High Court on the 12th November 2012, the Statement of Grounds included that; *a number of Access to Information on the Environment*

[19] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20communicant/frCommC54Annex_Reply_from_DCENR_5Sept2011.pdf

[20] See documentation submitted on 13.03.2012: http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html

Requests to the Department of Communications, Energy and Natural Resources have shown[21]:

25. No ranking system was ever prepared in relation to the different renewable technologies and their ability to meet the objectives of the renewable Directive. In other words the relative abilities to achieve greenhouse gas savings and the resulting cost basis was never assessed;

26. No verification of emission savings with the wind energy installed to date has been completed;

27. No estimation of greenhouse gas savings has been completed with regard to Ireland's National Renewable Energy Action Plan, which is to implement the EU's 2009/28/EC Directive on achieving an EU 20% renewable energy target by 2020;

28. The funding mechanisms for the renewable energy programme (REFIT) are to ensure delivery of an EU obligation in relation to renewable energy and not part of a commitment to contribute to any quantifiable environmental target related to quantified carbon dioxide savings.

The Statement of Grounds also made reference to Decision CEI/09/0016 of the Commissioner for Environmental Information, in which it was documented that no Strategic Environmental Assessment for the renewable energy programme in Ireland has ever been completed, a ruling which lead to the adoption of Communication ACCC/C/2010/54 by UNECE. Simply put, the requirements of Strategic Environmental Assessment would have forced the authorities to identify and assess the objectives of programme, the likely state of evolution of the environment without implementation of the programme and assess reasonable alternatives to reach those objectives.

Unfortunately, as previously documented in Question 1, we have reached a situation where the substantive issues in the case above have never been heard.

Finally on this subject matter it is worth pointing out the conclusions on appeal CEI/12/0005 of Pat Swords with the Commissioner for Environmental Information[22], which was issued on the 30th September 2013. In particular that a refusal of the request was justified on the basis of article 9(2)(a)and (b) of the Regulations, i.e. the request was 'manifestly unreasonable'[23]. This request for information related to the Climate Change Consultation, which the Department of Environment were conducting in March 2012[24] and comprised four parts:

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[21] http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,12832,en.htm and http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20communicant/frCommC54Annex_Reply_from_DCENR_5Sept2011.pdf

[22] http://www.ocei.gov.ie/en/Decisions/Decisions-of-the-Commissioner/Mr-Pat-Swords-and-the-Department-of-Environment-Community-and-Local-Government-.html

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

[24] http://www.environ.ie/en/Environment/Atmosphere/ClimateChange/ClimatePolicyDevelopmentConsultation/

- "Environmental information relating to public participation on climate change plans and programmes, which were conducted when all options were open and effective public participation in decision-making could take place."

- "Environmental information on how due account of the public participation will be taken in the decision-making in relation to climate change plans or programmes."

- "Cost-benefit and other economic analysis and assumptions used in the environmental decision making for the climate change plans or programmes being proposed."

- "With regard to the statement above in relation to 'Science tell us . . . .', the request relates to environmental information in which the transparency of that statement is ensured."

With regard to the first two parts, these were straightforward, in particular for the second, the procedures which would be followed for the public participation being conducted. As regards the third part, as was pointed out in the request: *The Irish Government has published detailed guidelines on Regulatory Impact Analysis, with a detailed section on the analysis of cost, benefits and options, which states:*

- *"Identify costs, benefits and other impacts of all identified options. Monetise or quantify these impacts. For significant proposals, conduct a robust and structured analysis and use formal Cost-Benefit Analysis where possible".*

Not only is Regulatory Impact Analysis repeatedly referred to in documentation from Irish authorities, such as in the Section on Article 7 of the Aarhus Convention National Implementation Report of Ireland[25], but as this documentation clarifies, there is a requirement to conduct a Regulatory Impact Analysis (RIA) before any policies (both regulatory and non-regulatory) are officially adopted[26].

The final and fourth part of the request for information related to what was the sole justification for the proposed climate change measures, namely in the consultation[27] a reference to the EU Commission's webpage on Climate Action and a roadmap to a low carbon economy by 2050, which stated on the webpage:

- *"Science tells us that all developed countries would need to reduce emissions by 80-95% in order to have a fair chance of keeping global warming below 2°C".*

This final part of the request for information also clarified in relation to 'transparency' and the obligation for public authorities to possess and update environmental information, which is relevant to their function:

- *The Aarhus Convention Implementation Guide defines this as: "Transparency means that the public can clearly follow the path of environmental information,*

[25] http://www.environ.ie/en/Publications/Environment/Miscellaneous/FileDownLoad,34986,en.pdf

[26] http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Revised_RIA_Guidelines_June_2009.pdf

[27] http://www.environ.ie/en/Environment/Atmosphere/ClimateChange/ClimatePolicyDevelopmentConsultation/ConsultationNotice/

understanding its origin, the criteria that govern its collection, holding and dissemination, and how it can be obtained". As the relevant EU legislation states, Directive 2003/4/EC as implemented by S.I. No. 133 of 2007, Member States have to ensure that information on the environment is up to date, accurate and comparable[28].

In other words, what was being sought was the due diligence which had been completed on the claims above, given that they are being used to justify enormous financial costs, and in relation to their renewable energy component, huge adverse impacts on the environment. Clearly from a scientific perspective, given our current level of data and scientific understanding, it is actually pure and utter arrogance for any organisation to claim to the public that they can model, not to mention predict, the complexity which is occurring within the earth's ecosystem.

Not surprisingly, the evidence is increasingly mounting that the mathematical models used for predicting climate change effects are not an accurate reflection of the complex dynamics, which are occurring, and that their predictions do not reflect what is actually happening, such as the fact that there has been no increase in global temperatures for more that eighteen years. It is not surprising that in China[29], where technology is valued, there is a call for a complete review of climate change science by 2015, as a precondition for entering any possible negotiated agreement post 2020. As the Chinese Academy of Science has accurately put it:

- *In recent decades, there have been a number of debates on climate warming and its driving forces. Based on an extensive literature review, we suggest that (1) climate warming occurs with great uncertainty in the magnitude of the temperature increase; (2) both human activities and natural forces contribute to climate change, but their relative contributions are difficult to quantify; and (3) the dominant role of the increase in the atmospheric concentration of greenhouse gases (including CO_2) in the global warming claimed by the Intergovernmental Panel on Climate Change (IPCC) is questioned by the scientific communities because of large uncertainties in the mechanisms of natural factors and anthropogenic activities and in the sources of the increased atmospheric CO_2 concentration. More efforts should be made in order to clarify these uncertainties.*

Engineers don't use design models, which 98% of the time don't support the real world[30] – it's too dangerous. We need a track-record of at least twenty years of successful prediction of climate change, before we use model data as a guide for investing in the global future. We are not even remotely near that position and it will take several decades of careful observation and research, as the planet goes through its natural cycles, before we get there. So the actually reality is, that despite the claims made so forcefully in the consultation, that science is not telling us that we have to dramatically reduce our greenhouse gas emissions by 80-95%.

Instead, at the moment we are in a giant political experiment, with huge sums of money being spent with no accountability, people being impoverished, and the benefits of development retarded. We should have a reason and justification for this,

[28] For Institutions and Bodies of the EU Regulation 1367/2006 applies.

[29] http://www.springerlink.com/content/w342k240350n4564/fulltext.pdf and http://scienceandpublicpolicy.org/images/stories/papers/reprint/human_induced.pdf

[30] http://www.spiegel.de/international/world/interview-hans-von-storch-on-problems-with-climate-change-models-a-906721.html

not just collective groupthink and beliefs, and this reason and justification has to be made available to the public on request.

If we consider the appeal on CEI/12/0005, while this was submitted on the 10th May 2012, shortly before the Convention entered into force, nothing was heard from the Commissioner of Environmental Information until a letter was received on 27th August 2013 from Ms Melanie Campbell, Investigator, which was then replied to shortly after on the 8th September 2013. So the processing of the appeal and its final decision by the Commissioner on the 20th September 2013 occurred after the entry into force of the Convention. As the decision on the appeal concluded:

- *In her letter to the appellant, Ms. Campbell noted that there were indications that the appellant did not seek access to environmental information per se, but rather sought through his request to challenge the validity of the national climate policy review process. She considered that the request was not made in good faith in the circumstances and that it was therefore liable to refusal under Article 9(2)(a) on the basis of being manifestly unreasonable. In his reply, the appellant points out that the Aarhus Convention Implementation Guide states in relation to the "manifestly unreasonable" refusal ground:*

    - *"If a Party decides to provide for this exception it will need to define 'manifestly unreasonable' so as to assist public authorities in determining when a request is so unreasonable that it may be refused under this exception, and protect the public's interest that the test will not be applied arbitrarily."*

- *The Implementation Guide is a very useful reference tool, but it does not purport to be legally binding, a position which was confirmed by the European Court of Justice in Solvay and Others, Case C-182/10 (16 Feb. 2012). The lack of clarity in a number of the provisions of the Regulations is just one of the many practical difficulties my Office has encountered in dealing with the AIE regime, but I do not find that Article 9(2)(a) is too ambiguous to apply in a fair and equitable manner. The inclusion of the word "manifestly" itself clarifies that the unreasonable nature of the request must be clear or obvious. While it is not my purpose here to describe the full range of circumstances in which Article 9(2)(a) may apply, I consider that the term "manifestly unreasonable" is sufficiently clear to denote, without further explanation, any request of broad or indeterminate range which has been made in bad faith or which otherwise appears to have been made for some purpose unrelated to the access process. Thus, in Case CEI/09/0014, Mr. Tony Lowes, Friends of the Irish Environment (3 May 2012), involving a request for all records held by the Office of the Attorney General (AGO) relating to two sets of infringement proceedings brought against the State, I noted that the request seemed to be more about how the AGO dealt with the infringement proceedings on behalf of the State than it was about access to environmental information in its own right. In the circumstances, I found that the request was manifestly unreasonable by its very nature.*

- *In this case, it is readily apparent to me from the commentary included with the appellant's request, and in his submissions to this Office, that he does not seek access to any identifiable environmental information which he genuinely believes may be held by the Department. Rather, he seeks to challenge the Department's reliance on the mandatory greenhouse gas mitigation targets underlying the national climate policy and legislation development programme*

and to raise questions about the Department's intention to take "due account" of "all" submissions made in the context of the public consultation exercise being carried out at the time his request was made. I acknowledge that there is controversy over the commitments which have been made at national and EU level to reduce greenhouse gas emissions, but nevertheless, I find that the appellant's request represents a misuse of the right of access under Article 6 of the AIE Regulations. In the circumstances, I concur with Ms. Campbell's view that the request is subject to refusal under Article 9(2)(a).

If we consider again the European Investment Bank, who were not only referred to in the start of this section, but have allocated in excess of €2 billion in funding to the renewable energy programme in Ireland, in their 2007 document on: "An efficient, sustainable and secure supply of energy for Europe"[31], it clearly states:

- *In general, when designing environmental policies in the presence of uncertainty about the costs of environmental damages, one cannot reason simply in terms of cost-benefit analyses or second-best optimal tax policies. Rather, it is more appropriate to conceive policies that achieve a targeted reduction in pollution in a cost-effective manner.* ***This is also true when it comes to designing policies in support of renewable electricity, mainly because of the enormous difficulty of reliably estimating the benefits of such policies, i.e., the economic value of emissions avoided and other benefits of using renewables for electricity generation.***

So one can only conclude from the above statement and the content in this section before it, that funding for renewable energy really hasn't got anything to do with cost benefits at all, but is just throwing money at whatever is the latest political fashion in town. Unfortunately, when one seeks to request information and challenge these issues, the door is slammed shut. One can quote the fundamental requirements of the Aarhus Convention, see below, and the obligations inherent in Articles 3 to 9, but in practice they are simply ignored.

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

4. DECISIONS ON THE ALL-ISLAND GRID STUDY, THE GATE 3 PROCESS AND THE ADOPTION OF THE 40 % RENEWABLE ELECTRICITY TARGET

The Department of Communications, Energy and Natural Resources website refers to the All-Island Grid Study being published in January 2008[32].

The Commission for Energy Regulation's CER/08/260 "Criteria for Gate 3 Renewable Generator Offers & Related Matters – Direction to the System Operators" was

[31] http://www.eib.org/attachments/efs/eibpapers/eibpapers_2007_v12_n02_en.pdf

[32] http://www.dcenr.gov.ie/Energy/North-South+Co-operation+in+the+Energy+Sector/All+Island+Electricity+Grid+Study.htm

published on the 16th December 2008[33]. The list of renewable projects is provided in the Appendix.

The following announcement was made on the 15th October 2008 in the Oireachtas (parliament) during the course of the debate on the 2009 Budget[34]:

- *Minister for Environment, John Gormley T.D. has announced a revised ambitious target for renewable penetration in the electricity sector. The new target of 40% is a significant increase from the previous goal of 33% and exceeds considerably both current EU targets of 20% and the UK's current target of 15%.*

  The Minister said: "One of the most effective ways of reducing our national greenhouse gas emissions is to generate as much electricity as possible from renewable sources rather than from fossil fuels. The previous Government adopted a target that 33% of electricity consumed would be from renewable sources by 2020. Today I can confirm that the Government has now agreed, on the recommendation of my colleague, the Minister for Communications, Energy and Natural Resources, Eamon Ryan, T.D. to increase this target to 40%. The target is underpinned by analysis conducted in the recent All Island Grid Study which found that a 40% penetration is technically feasible, subject to upgrading our electricity grid and ensuring the development of flexible generating plant on the electricity system."

5. PLANNING DECISIONS AND ARTICLE 6

5.1 General

It is considered appropriate to first clarify the legal jurisprudence, which relates to the decision making of An Bord Pleanala, the planning appeals board in Ireland. The Bord, comprising nine members[35], are Government appointees. The Board is the legislatively appointed decision maker in appeals in planning matters. Its decisions are not liable to being quashed on review, where there was evidence before the Board on which it could have made its decision. In O'Keeffe v An Bord Pleanála [1993] 1 I.R. 39, at page 72 Finlay CJ, (according to Kearns J in Murphy v Wicklow County Council [1999] IEHC 225) "*established the high threshold which is required to be passed by an Applicant when making a judicial review on the grounds of unreasonableness*"[36]:

- *I am satisfied that in order for an Applicant for judicial review to satisfy a Court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the Court can intervene and quash its decision, it is necessary that the Applicant should establish to the satisfaction of the Court that the decision-making authority had before it no relevant material which would support its decision.*

[33] http://www.eirgrid.com/media/CER_08_260.pdf

[34] http://www.eirgrid.com/media/Carbon%20Budget.pdf

[35] http://www.pleanala.ie/about/members.htm

[36] http://www.bailii.org/ie/cases/IEHC/1999/225.html

The detailed decision of Charleton J in Weston Limited v. An Bord Pleanála [2010] IEHC 255 clarifies further the burden of proof[37]:

- *The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston the applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere. Furthermore, where, as a colourable device, a reason is chosen for refusing permission which does not give rise to an entitlement to compensation under the legislation, the burden of proving that a decision choosing such an incorrect reason for that improper purpose rests on the applicant. The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanála, the report of the inspector, of any material which could rationally justify a refusal on a noncompensatory ground is sufficient to support the lawfulness of a decision. Of course, in an appropriate case, it might be possible to prove that a decision was made for an improper purpose or that a conclusion or recommendation in an inspector's report was not arrived at in good faith. That burden however, rests on the applicant for judicial review who seeks to impugn such a decision. Some material ground, upon which such an attack might reasonably be regarded as being capable of being mounted, must be shown in evidential terms before even leave to argue such ground would be granted. In accordance with the legislative circumscription of judicial review appeals against planning decisions, substantial grounds would have to be shown to justify granting leave on such a point.*

It is also necessary to clarify the role of the An Bord Pleannala planning inspector and that of the Board. As a matter of practice the Board appoints an inspector (who may be either an employee or a consultant) to report to it on every appeal or other application that comes before the Board. The Board is statutorily obliged to consider the inspector's report and the recommendation made by the inspector before making its decision. Thus, although the decision in any case is the decision of the Board, it is made by the Board having considered, amongst other matters, the statutory report of its inspector[38].

Consequently, it is well established that the Court may look to the Inspector's Report in an appropriate case to see and understand the evidence which was before the Board[39]. The Board may accept the inspector's recommendation and rationale or may accept the recommendation whilst disagreeing with some of or the entire inspector's reasoning. The Board might also disagree with the inspector's recommendation whilst accepting some (but not all) of his reasoning or may simply disagree with both the recommendation and the reasoning behind it. However, in the absence of a complete rejection by the Board of the inspector's recommendation and

[37] http://www.bailii.org/ie/cases/IEHC/2010/H255.html

[38] See Sections 120, 124, 146 of the Planning and Development Acts: http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/EN_ACT_2000_0030.PDF

[39] See Point 5.1: Maxol Limited -v- An Bord Pleanála & ors [2011] IEHC 537 http://www.courts.ie/Judgments.nsf/0/3AB07B972494C9F180257A08003C1E9D

rationale, the Courts have long held that the inspector's report and the Board's decision can be read together[40].

If we consider Articles 6(8) and 6(9) of the Convention:

- *8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.*

- *9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.*

The appeal decisions of 'An Bord Pleanala' under consideration in this Communication [41] , namely PL16. 241592, PL16. 241506, PL27. 241827, PL05B.240166 and PL05E.242074 are highly representative of the Board's decision making process. In the decision of the Board (Order) it will be stated in relation to Reasons and Considerations: "*Having regard to: … the submissions on file and the Inspector's report*". This is in order to comply with Section 34 (3) of the Planning and Development Acts (as amended):

- *(3) A planning authority shall, when considering an application for permission under this section, have regard to—*

  (a) in addition to the application itself, any information relating to the application furnished to it by the applicant in accordance with the permission regulations,

  (b) 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.

However, there is simply never anything in the documentation produced by the Board itself to document how those submissions have been reviewed and due account of them taken in the decision making. If such information is requested under the Aarhus provisions, the reply is invariably, what is already available to you on the file. If we refer to the Section 4.5.3 of the original Communication, which in relation to Article 6(8) of the Convention quoted the findings and recommendations on Communication ACCC/C/2008/24 (Spain):

- *Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account. ... The Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.*

One can only conclude with respect to established practice with An Bord Pleanala that the only 'assessment' of the public participation and as to how it is taken into

[40] See for instance [2009] IEHC 202 Points 27 to 34: http://www.courts.ie/Judgments.nsf/0/CBF14C7C19DB0D15802575EC00361E42

[41] See Search Function top Right: http://www.pleanala.ie/

account is contained within the inspector's report, which as previously highlighted with respect to Irish Case Law, the recommendations of the inspector are not legally binding on the decision maker. Then there is also the fundamental question, does the public participation exercise influence the reasoning and recommendations of the inspector's report?

5.2 PL16. 241592

This appeal demonstrated a failure to comply with Articles 6(8) and 6(9) of the Convention. The original Communication already addressed on pages 27 and 28 how the assessment of this project in the Inspector's report in relation to climate change impacts, the only alleged benefit of the development, was only what could be described as irrational. The manner, in which the public participation on this Inspector's report was assessed, could also only be considered as bizarre.

Section 6.1 of the Inspectors report related to "Third Party Appeals" and clarified:

- *A total of 2 No. third party appeals have been lodged against the decision of the Planning Authority to grant permission for the proposed development and the grounds of appeal contained in each of these submissions can be summarised as follows:*

A three and a half page summary of the grounds of appeal then followed. In Sections 7.2.1 and 7.2.1, the applicant (developer) is provided the opportunity to respond to these third party appeals, in total amounting to seven pages of the inspector's report. We then come in section 12 on 'Assessment' and in particular Section 12.1 on 'Third Party Appeals', which has the following 'introduction':

- *From my reading of the file, inspection of the site and assessment of the relevant local, regional and national policies, I conclude that the key issues raised by the appeals are:*
    - *The principle of development*
    - *Environmental impact assessment*
    - *Appropriate assessment*
    - *Other issues*
- *These are assessed as follows:*

The inspector then goes off on what can only be described as a complete tangent, with a 'discourse' running from pages 39 to 60 of his report, basically ignoring the specific issues raised in the third party appeals, while he completes what he sees as a systematic 'de novo' assessment of the project. For instance, two pages of this discourse are dedicated to traffic issues, while Section 6.1 of the report, which summarises what is contained in the third party appeals, makes no reference to traffic issues. Similarly there is half a page on dust emissions, which were not raised in the third party appeals. On the other hand when the third party appeal raised relevant matters with respect to the cabling / grid connection to the wind farm, see below, these were just completely ignored by the inspector in his Section 12.1 on third party appeals.

- *The undergrounding of the proposed electrical cabling on site would impinge on turbary rights both during and after construction and, therefore, it is difficult to accept the applicants claim that they do not have any control over turbary rights.*

- *Furthermore, the applicants have not obtained permission from the owners of the turbary rights to obstruct access over the existing floating roads in the unlikely event that cable trenching were to take place along said roads.*

- *Inadequate details have been provided of the location of the cabling serving the proposed turbines and this raises concerns over the extent of the site to be developed.*

- *Inadequate details have been provided with regard to the availability and route etc. of a grid connection to serve the proposed wind farm. In the absence of indicative proposals for a grid connection which would be acceptable to the Planning Authority permission for the proposed development should be refused.*

It is clear from reading Section 12.1 of the inspector's report, which he claimed is about third party appeals, that it is in fact instead an assessment of the developer's documentation, to which multiple references are made. Yet there is zero reference made to the two third party appeals at any point in this section of his report, save for his 'introduction' above.

The inspector then concludes in Section 13 on his recommendation:

- *Having regard to the foregoing I recommend that the decision of the Planning Authority be upheld in this instance and that permission be granted for the proposed development for the reasons and considerations and subject to the conditions set out below:*

- *Reasons and Considerations:*

- *Having regard to :–*
  a) the national policy with regard to the development of alternative and indigenous energy sources and the minimisation of emissions of greenhouses gases,
  b) the guidelines issued by the Department of Environment, Heritage and Local Government in 2006 on Wind Energy Development,
  c) the provisions of the current Mayo County Development Plan,
  d) the character of the landscape and the topography surrounding the site,
  e) the distance to dwellings or other sensitive receptors from the proposed development, and
  f) the nature and scale of the proposed development,

Note: There is no reference made at all to the public participation, which is actually a truthful reflection of what went on, as, save for their analysis of the situation being notationally summarised in the report, the third party appellants were never at any point involved in the actual decision-making on the project.

5.3 PL16. 241506

This appeal demonstrated a failure to comply with Articles 6(8) and 6(9) of the Convention. The original Communication already addressed on pages 27 and 28 how the assessment of this project in the Inspector's report in relation to climate change impacts, the only alleged benefit of the development, was only what could be described as irrational. The same An Bord Pleanala inspector prepared the report for

this appeal as was previously highlighted for appeal PL16. 241592 above. Equally the report was just as bizarre, with the same layout, the same failures to address the issues raised in the third party appeals and in Section 13 exactly the same wording used to justify a recommendation to dismiss the appeal and uphold the original decision of the planning authority to grant permission.

With regard to a specific example of this behaviour, the irrational conclusions of the inspector on climate change impacts have already been highlighted. However, the following valid points were raised by the appellants and were just completely ignored by the inspector in his report.

- *Whilst the EIS does contain a section on climate it fails to refer to or address the emissions arising from peat extraction on the site. Section 2.9 of the EIS which seeks to justify the climate benefit of the project does not address the continuing impact of peat extraction on site.*

- *The objective of any renewable energy proposal would be nullified if peat extraction were allowed to continue on the site in question. Any development application affecting peatland areas should include for a parallel peatland conservation and management strategy, however, in the subject case the achievement of such an objective is undermined by the continuation of unquantifiable peat sod extraction and the lack of a full and properly integrated peatland rehabilitation strategy for the site.*

5.4 PL27. 241827

This appeal demonstrated a failure to comply with Articles 6(8) and 6(9) of the Convention. The original Communication already addressed on pages 27 and 28 how the assessment of this project in the Inspector's report in relation to climate change impacts, the only alleged benefit of the development, was only what could be described as irrational. While a different inspector wrote the report on this appeal, the same traits can be seen in its preparation. Section 5 of the report summarised the grounds for appeal. While the An Bord Pleanala 'de novo' assessment of the project is completed by the inspector, there is no section which specifically relates to an assessment of the issues raised as grounds for appeal in Section 5. For instance the following relevant issues raised in Section 5:

- *The appeal submitted by Pam Kerr, Broomfield Equestrian Centre may be summarised as follows:*

    - *Hers is one of the closest businesses to the proposal- located 800 metres away, and in direct sight line at the base of the hill*

    - *Turbine No. 6 will be directly above her place of residence- it will cause serious hazard and safety issue for continuing her business*

    - *Noise from blades, tonal hum from engine and shadow flicker will make it hazardous for horses- will make the arena extremely dangerous to introduce beginners to the prospect of becoming riders*

These are valid issues, horses are temperamental animals, it is their very nature to take fright and bolt once disturbed – they do not behave like humans. Yet the inspector just ignored the issues raised above and did not address them. Finally, his

reasons and considerations for dismissing the appeal and recommending that the original planning decision be upheld comprised:

- *Having regard to:*

  (a) the national policy with regard to the development of sustainable energy resources, including the targets for renewable energy set out in the Government White Paper entitled Delivering a Sustainable Energy Future for Ireland, published by the Department of Communications, Marine and Natural Resources in March 2007,
  (b) the Wind Energy Development Guidelines for Planning Authorities issued by the Department of the Environment, Heritage and Local Government in June, 2006,
  (c) the general suitability of the site for a wind power electricity generating facility due to the wind resource available,
  (d) the general topography and landscape features in the vicinity of the site,
  (e) the separation distance of the proposed turbines from any inhabited dwellings,
  (f) the planning history of the site, and
  (g) the screening assessment submitted in relation to the Slaney River Valley candidate Special Area of Conservation,

Note: Once again no reference made at all to the public participation.

5.5 PL05B.240166

This appeal related to the Straboy wind farm in Co. Donegal. The original Communication referred to it as demonstrating **non-compliances with Articles 6(4), 6(8) and 6(9) of the Convention**, in particular in pages 27 to 28 that there was an inability to assess the alleged benefit of the wind farm, namely its climate change impacts. Section 6 of the Inspector's report provided a summary of the third party appeals. These appeals included that:

- *The planning authority did not assess the environmental impact of the scheme in accordance with the requirements of the EIA Directive.*

- *A request is also made that Strategic Environmental Assessment be undertaken.*

In Section 10 of the Report the Inspector introduces his assessment in the terms of:

- *A very significant number of issues have been raised by third parties and observers. I propose to address most of the principal planning concerns under the following headings:*

  - *Compliance with Policy*
  - *Impact on Public Health*
  - *Landscape and Visual Impact*
  - *Ecological Impact*
  - *Considerations on Peat*
  - *Noise*
  - *Cultural Heritage*
  - *Traffic Impact*

- *It is intended that focusing substantively on these issues invariably addresses the main concerns of all. In acknowledging the range of other concerns by many individuals, the Board will note that I have also attempted to offer considerations on many of these. I am satisfied that the range of issues covered in my assessment adequately relates to the extent of submissions made by third parties and others and I wish it noted that any failure to acknowledge and openly consider any other issue raised is unintentional.*

The inspector then completely ignored the main issue raised with compliance with policy, in that no Strategic Environmental Assessment (SEA) was completed for the programme. Indeed, in his summary of the oral hearing which followed in Appendix I, he recorded twice those appealing raising the issue of SEA: "*The need for SEA for the renewable energy programme was also stressed"*. So in effect the decision making from the 'previous tier', where the Strategic Environmental Assessment should have been done, was now closed and effective public participation could not take place as 'options were no longer open'. The policy was in place and that was what the decision-making would be based upon. This can be seen clearly in the approach adopted in his report, which can be best described as 'going through the motions':

- *Turning to the Wind Energy Guidelines, the inadequacy of guidance on this issue is well demonstrated therein. This is despite the clear responsibility under European law in relation to EIA to assess this issue in the context of impact on human beings. The Guidelines, in my opinion, fall far short of that needed for assessment on public health.*

- *However, I must also note that the guidance to which the Board would ultimately be required to have due regard when considering this application remains that set out by the Department of the Environment at present in the Wind Energy Guidelines.*

- *I note that much detail and discussion was provided at the Oral Hearing into the provisions of ETSU-R-97 "Assessment and Rating of Noise from Wind Farms" for guidance on the assessment of wind turbine noise. This is UK planning policy guidance that has been referenced in the Wind Energy Guidelines. With this understanding, I must determine that the prevailing guidance on noise at present is that set out in the current national Wind Energy Guidelines. This is not to suggest that much cannot be learned from international best practice or relied upon but that the guidance to which the Board would ultimately be required to have due regard to would be that set out by the Department of the Environment.*

One can only wonder at the state of affairs of the Donegal County Planners, who originally approved this project, when his report has to admit:

- *"The Environmental Impact Statement accompanying the application was a most deficient document. There was a great lack of essential information of material significance and substance, notably in relation to humans, flora, fauna, soils, geology and water".*

But so too was his own environmental impact assessment of the project when it came to assessing its alleged benefit, which he documented as: *"Climate Change - Application of the project and consequent carbon savings."* Were those carbon savings, given what is already recorded on page 28 of the original Communication

from his report, actually going to make the slightest bit of difference? As it turned out the development was refused by the Board based solely on adverse impact in relation to fresh water mussels and considerable removal of peat which was required.

5.6 PL05E.242074

This appeal related to the Corkermore wind farm in Co. Donegal. The original Communication referred to it as **demonstrating non-compliances with Articles 6(4), 6(8) and 6(9) of the Convention**, in particular in pages 27 to 29 that there was an inability to assess the alleged benefit of the wind farm, namely its climate change impacts. The inspector, who was different to those above, recorded the grounds for appeal in Section 8 of his Report, recording among other that the NREAP had failed to comply with the Aarhus Convention and the Directive on Strategic Environmental Assessment. Section 11 of the Inspector's report deals with his assessment, which is again a 'de novo' analysis of the situation. His position on policy is already recorded on page 29 of the original communication was very clear in that such matters were closed and should be dealt with by the applicants directing themselves to the Courts. *"If some illegality, unreasonableness or gross unfairness arises from a policy, then it can be challenged and set aside by a court".*

The same approach was taken when it came to issues on noise, as is documented in pages 36 and 37 of the original Communication, where it was stated in his report:

- "*However whether the recommended limits are appropriate is a matter for the policy maker who gave us the guidelines, i.e. the minister. It would be arbitrary and unreasonable for the board to decide in this particular case not to apply the relevant statutory guidelines".*

So in essence the whole content of the appeal was ignored, as it was 'incompatible' with their already established policies and guidelines.

5.7 Foylatature Wind Farm

This was a local authority approval, in a similar manner to Inspector in An Bord Pleanala, a planners report is produced containing a recommendation, which then leads to an order from the County Manager to grant, or as the case may be not grant, planning permission. Appendix A of the original Communication in pages 54 to 56 documents how the submission contesting the development, highlighting among others the legal failures with the NREAP, was simply ignored. There was also a failure by the planning department to complete an environmental impact assessment of the development including the alleged climate benefits of the programme, its sole justification. For instance if one reviews the recommendation below for grant of approval, it just ignores the public participation completely.

- *Recommendation*

- *Having regard to the planning history, the submissions, the Environmental Impact Assessment and the Natura Impact Statement and the application documents, the provisions of the Development Plan and all other material considerations, it is considered that, subject to the following conditions, the proposed development would not create a traffic hazard or be prejudicial to public health and would not have any adverse visual or environmental impacts and would be in accordance with the proper planning and sustainable development of the area.*

- *I recommend that Planning Permission be Granted subject to the following conditions.*

Therefore the failings of this Local Authority planning procedure relate to Articles 6(4), 6(8) and 6(9).

5.8 GDNG Renewables

The Local Authority approval process for this project was documented in Appendix I of the original Communication, pages 57 to 58. The issues which occurred related to Article 6(4) in that as regards the failures of the national policy raised, namely no Strategic Environmental Assessment and compliance with the Aarhus Convention, 'options were no longer open' and the appellant was directed instead to go to the courts with respect to the matters raised. Neither did the planner's report contain any environmental assessment of the alleged benefit of the project, the climate change impacts, nor an evaluation of the content of the submission in this regard. The County Donegal Manager's Order granting permission contained zero reference to the public participation, while the recommendation in the planner's report to grant permission likewise made no reference to the public participation.

This permission to approve was appealed to An Bord Plaenala, appeal number PL05E.241596, and the final conclusion of the Board in refusing planning permission was related to unacceptable visual impact in an area of sensitive landscape adjacent to a designated National Park. If we consider this appeal and the inspector's report, then some of the issues contained were raised in page 23 of the original Communication in relation to Article 6(4), in that the appellant, having once again raised the issues of legal non-compliance of the Irish renewable energy programme, was directed once again to the Courts. Clearly the An Bord Pleanala inspector did not consider that 'all options were open' and as she documented in the section of her report related to assessment:

- *I note that the appeal by Ms Sharkey focuses on the lack of consideration of alternatives in terms of climate change impacts. She raises concerns that the developer has not considered any alternatives that could achieve similar savings in greenhouse gas emissions, reduction in fossil fuel usage etc. In this regard, I note that wind energy is just one of a number of renewable energy sources promoted by the Government to contribute towards mitigating global problems such as climate change by the expansion of renewable energy. Clearly this upland site would not be suitable for other forms of renewable sources promoted by the Government such as wave, tidal or hydro-power.*

- *Whilst I accept that there is merit in some of the arguments put forward by Ms Sharkey and a need for further research into the overall environmental costs/gains associated with wind energy development, these are matters which are beyond the scope of this appeal.*

Furthermore, despite it being extensively addressed and quantified in the appeal documentations, all she could write in the section of the report on Environmental Impact Assessment with respect to quantifying the only alleged benefit of the project was: "*Climate Change: Development of the windfarm as renewable energy resource and consequent carbon saving*."

Therefore the failings of this planning procedure at both Local Authority (County) level and An Bord Pleanala level relate to Articles 6(4), 6(8) and 6(9).

5.9 Corkermore Wind Farm

The Local Authority approval process for this project was documented in Appendix I of the original Communication, pages 58 to 59. Failures in relation to Article 6(4) occurred in that while the Submission raised the legal failures of the national policy, namely no Strategic Environmental Assessment and compliance with the Aarhus Convention, 'options were no longer open' and the appellant's submission was simply summarised and then ignored. No analysis of the submissions occurred in the planner's report. Furthermore, the planner's report did not contain any environmental assessment of the alleged benefit of the project, the climate change impacts, nor an evaluation of the content of the submission in this regard. The County Donegal Manager's Order granting permission contained zero reference to the public participation, while the recommendation in the planner's report to grant permission likewise made no reference to the public participation.

Therefore the failings of this planning procedure at Local Authority Level relate to Articles 6(4), 6(8) and 6(9).

5.10 Cloghan Wind Farm

The Local Authority approval process and subsequent An Bord Plenala appeal were documented in Appendix I of the original Communication, pages 60 and 70. In both cases the appellant raised the issues of the legal failures of national policy. In the local authority planning process, the submission was simply recorded in short bullet points and then ignored. Furthermore, the planning authority failed to complete its own Environmental Impact Assessment, the only reference to such being Section 10.04 of the Planner's report which sets out what was in the submitted developer's Environmental Impact Statement, which in itself was deficient in many respects. Therefore, an assessment of the alleged benefit of the project, namely the climate change impacts, did not occur to justify the reasons for granting permission.

An appeal was lodged with An Bord Pleanala PL 19.242354. As regards the inspector's report this summarised the appeals in Section 8, including the issues related to the non-compliance of the national programme on renewable energy. In Section 13 of the inspector's an assessment of this appeal documentation and responses was completed. In essence 'all options were not open' as it was clearly documented with regard to policy considerations:

- *"None of these policies are open to review by the board".*
- *"If some perceived illegality, unreasonableness or gross unfairness arises from a policy, then it can be challenged and set aside by a court. Regardless of the appellants opinion on the adopted policies the board may not change or set aside adopted policies. It must apply the policy as best it can".*

Section 11 of the inspector's report dealt with Environmental Impact Assessment.

- *Air, Climate: Given the nature of the proposed development, it is considered that the wind farm would be expected to have a positive impact on the global climate by reducing the emission of greenhouse gases (mainly carbon*

dioxide) and emissions contributing to acid rain (sulphur dioxide and oxides of nitrogen) that would otherwise be released to the atmosphere through the burning of fossil fuels. It is estimated that the development will benefit the environment, due to the fact that 91.43GWh of renewable energy will be generated which displaces fossil fuel energy, which will lead to an annual avoidance of 49,108 tonnes of CO_2, 56.14 tonnes of NOx and 1.99 tonnes of CH4 in terms of emissions. Given the nature of the proposed development, I consider that development will impact positively on air quality, and through supporting the reduction in the emission of greenhouse gases, will impact positively on climate.

Firstly, the displacement figures used for CO_2 savings were false as they failed to account for the considerable inefficiencies on the grid, while the conclusion on a positive impact on climate are as previously documented is irrational.

Therefore the failings of this planning procedure at both Local Authority (County) level and An Bord Pleanala level relate to Articles 6(4), 6(8) and 6(9).

5.11 Current status of each decision

Case	Current Status
PL16. 241592	Final (i.e. no more appeal rights) – permit approved
PL16. 241506	Final (i.e. no more appeal rights) – permit approved
PL27. 241827	Final (i.e. no more appeal rights) – permit approved
PL05B.240166	Final (i.e. no more appeal rights) – permit refused;
PL05E.242074	Final (i.e. no more appeal rights) – permit approved
Foylatature Wind Farm	Final (i.e. no more appeal rights) – permit approved
GDNG Renewables	Final (i.e. no more appeal rights) – permit refused;
Corkermore Wind Farm	Final (i.e. no more appeal rights) – permit approved
Cloghan Wind Farm	Final (i.e. no more appeal rights) – permit refused; However, the developer resubmitted the same project with a lower height of turbine. This was approved by Offaly County Council and has now gone to appeal to An Bord Pleanala

The are two main problems with instigating a Judicial Review of a planning decision to the Irish Courts, which can be taken within three months of the decision being made. First, there is a major hurdle with financial costs, which are recognised as even being higher than that of Judicial Review in the UK Courts, legal representation alone will amount to more than €50,000. Secondly, the jurisprudence of the Irish Courts is for an extremely narrow interpretation of review in planning appeals, such that essentially the substantive issues are not addressed unless it can be demonstrated that the decision-maker acted irrationally (the so-called "Wednesbury test"). See Section 5.1.

Despite this, particularly in the latter half of 2014, a number of Judicial Reviews of An Bord Pleanala decisions have been given leave in the High Court[42]. While some are

[42] See summary at: https://cawtdonegal.wordpress.com/2014/11/16/wind-farms-in-the-irish-high-court/

based primarily on compliance issues related to the Natura legislation, others have a stronger focus on matters related to public participation. It is likely that some increased clarity over Aarhus related issues will occur as these and other similar cases work their way through the Irish courts in the coming months.

Indeed, in late November 2014, the Judicial Review taken by the Ratheniska Timahoe and Spink (RTS) Substation Action Group against An Bord Pleanala's decision, to approve a giant high voltage substation for renewable energy upgrades (2014/340JR), was heard for two days in the High Court. While the case is now adjourned as the Judge became unavailable, the pleadings of An Bord Pleanala senior counsel on the second day can be described as informative; namely that the almost 200 submissions made by the local people and the RTS group were notices of concern, which did not bring forward any scientific information / evidence. Essentially the remit of scientific information / evidence for analysis by the Board in its decision-making, remains with the developer, the Board and other Statutory Bodies.

Incidentally, when the inspectors' reports previously highlighted are read in this light, it does become obvious that this is somewhat a 'modus operandi' of An Bord Pleanala, i.e. when issues raised in the public participation are referred to, they are referred to as 'concerns'. In PL05B.240166, the planning appeal on the Straboy wind farm, this use of language is very evident, in particular what was already quoted from the inspector's report in Section 5.5 of this reply and as to how he introduced his assessment of the public participation.

6. ARTICLE 7 OF THE CONVENTION

6.1 Westmeath County Development Plan

The County Development Plan 2014-2020 came into force on the 18th Feb 2014, but was the subject of a Section 31 Draft Direction from the Minister. As was documented in UNECE's question, the Ministerial Direction was issued on the 10th July 2014. This was then complied with; the relevant amendments to the County Development Plan were removed. The formal notice of the County Development Plan (as altered) was then made on the same day[43].

6.2 Offaly County Development Plan

The Offaly County Development Plan 2014-2020 was adopted by Members of Offaly County Council on 15th September 2014 and was effective from 13th October 2014[44].

6.3 The County Development Plans and Article 6

Article 7 of the Convention engages Articles 6(3), 6(4) and 6 (8). It is not considered that that Article 6(3) was violated in the initial phase of the Country Development

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[43] http://www.westmeathcoco.ie/en/media/Notice%20of%20the%20making%20of%20the%20Ministerial%20Direction%20in%20relation%20to%20the%20Westmeath%20County%20Development%20Plan%202014-2020.pdf

[44] http://www.offaly.ie/eng/Services/Planning/County_Development_Plan_2014_-_2020/

Plan public participation for County Westmeath. However, after the Ministerial Direction was invoked for the Westmeath County Development. As the original Communication documents, in relation to the two week consultation which followed the Ministerial Notice of Intent:

- *Notwithstanding the extraordinary pressure Minister Jan O'Sullivan is applying on the Council to delete P-WIN6 expeditiously, the two week consultation period provided to the community is inadequate, which is a position upheld by UNECE against Ireland (ACCC/C2010/54).*

Therefore a failure to comply with Article 6(3) occurred at this point, as the public were not provided with a reasonable time-frame for this phase, allowing sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making.

With regard to the Offaly County Development Plan, no Ministerial Direction occurred in this manner and it is considered that the timeframes were adequate and in compliance with Article 6(3).

However, the public participation on both County Development Plans violated Articles 6(4) and 6(8), in that 'all options were not open' and 'due account of the public participation was not taken in the decision'.

If we consider the Westmeath Country Development Plan, the supporting evidence for this is contained in Section 4.6 of the original Communication and Section 1.5 of the reply to UNECE of 3rd September 2014[45]. In essence the public participation exercise was simply 'pro forma', it took place when all options were closed. When the decision makers at County Council level sought to open these matters up by adopting amendments to the plan through Policy P-WIN6, they were overruled by the Minister, as existing national policy and guidelines were the only criteria to be used in the decision making. No reference was made in this final decision, i.e. Ministerial Direction, to the content of the extensive public participation which occurred.

The failures in relation to Article 6(4) evident in the Manager's report on draft Offaly County Development Plan are also documented in Section 4.6 of the original Communication and as to how on the 28th April 214 a 3.2km buffer distance was included by the Councillors as an amendment to the draft Plan[46]. This amendment was then subject to public participation over a four week period.

The "Draft Offaly County Development Plan, 2014-2020, Amendments to Draft Plan, Chief Executive's Report to Members, of 19th August 2014", see Attachment 1, clarifies the resulting situation with respect to Articles 6(4) and Article 6(8), in that the submissions received related to wind energy were summarised in Section 5. The Chief Executive claimed in her report that in accordance with the Aarhus Convention:

- *The submissions relating to the material amendments to the draft plan were summarised and responded to in this document.*

[45] http://www.unece.org/fileadmin/DAM/env/pp/compliance/Pre-admissibility_communications/Ireland_European_Platform/fmComms_03.09.2014.pdf

[46] See Section 3.5.1: http://www.offaly.ie/eng/Services/Planning/County_Development_Plan_2014_-_2020/Material-Alterations-to-the-Draft-OCDP-2014-2020.pdf

This didn't actually happen, the submissions were summarised and there was quite a considerable amount of technical information provided, but they were not responded to in the document as per Articles 6(4) and 6(8). In particular with regard to "Issues with National and European Policy" it was stated:

- *European Directives, National Guidance legislation and Government Policy all require that the Offaly County Development plan includes the provision for wind energy development. Certain submissions have raised questions about important procedural aspects of EU and National level policy adoption including the absence of SEA. The submissions indicate that if National and European legislation and guidance is deemed unsound then it is unwise to be consistent with this.*

- *I advise the Members that such doubts are not for their determination or are they a material consideration in this decision.*

- *I advise the Members that it is prudent to have policy in relation to wind energy development in County Offaly, which has been assessed for its impact on the environment, so that wind energy proposals that are coming forward as part of the development management process can be adequately assessed.*

Effectively, the public participation did not take place 'when all options are open'. The above also directly contradicts the previous sentences in the Chief Executive's Report, namely that: "*the adoption procedure of a development plan must comply with the relevant legislation*". Furthermore, claims above that wind energy development in County Offaly had been assessed for its impact on the environment, were not only extremely wide of the mark, as the public submissions were pointing out, but contradicted by the Chief Executive herself in the later page where she pointed out:

- *The submission from the Department of the Environment, Community and Local Government, made on behalf of the Minister stated that the proposed amendments at Section 3.5.1 and Policy EP-03 should be omitted and that the section should instead include a statement to the effect that the policies and objectives in relation to wind energy will be reviewed in the light of the completion of the focused review of the Wind Energy Guidelines by the Department. The Department states that the specification of any minimum separation distance is premature pending the finalisation of the revised Guidelines.*

Proper assessed guidelines, whether through a process of Strategic Environmental Assessment or by means of general National guidelines, simply didn't exist and still at this point in time in early December 2014, don't exist.

At their meeting in 15th September 2014 to adopt the County Development Plan and acting on the advice of their Chief Executive, the Councillors voted to remove the 3.2 km buffer zone, restricting it instead to an earlier proposal of a 2 km buffer zone[47], see below, as per the Chief Executive's recommendation.

[47] http://www.offalyindependent.ie/news/roundup/articles/2014/09/19/4032600-minister-could-still-overrule-latest-windfarm-restrictions-/

- *A minimum of 2km from Town and Village Cores, European designated sites, including Special Areas of Conservation (SAC) and Special Protection Areas (SPA), and national designations, Natural Heritage Areas (NHA).*