

19 March 2021

Ms. Aoife Joyce
Department of Communications, Climate Action and
Environment
Ireland

Ms. Fand Cooney
RTS Action Group
Ireland

Dear Ms. Joyce,
Dear Ms. Cooney,

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland with the Convention in connection with the Laois-Kilkenny Reinforcement Project (ACCC/C/2015/132)

I write to confirm that, after taking into account the views of the Party concerned and communicant on whether a hearing was needed in this case, the Committee has agreed that it will prepare its draft findings on the substance of the communication without holding a hearing.

To that end, the Committee has identified a set of questions, enclosed, for the written reply of the Party concerned and the communicant.

I would be grateful to receive your reply to the enclosed questions by **Friday, 16 April 2021**. Please send your reply to aarhus.compliance@un.org, copying the other party.

Please do not hesitate to contact the secretariat if you have any questions regarding the above.

Yours sincerely,



Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee

Cc: Permanent Mission of Ireland to the United Nations Office and other international organizations in Geneva

Enc: Questions from the Committee to the parties

Questions from the Committee to the parties:

Questions to both the Party concerned and the communicant:

1. Under the Irish system, are costs at each court instance dealt with separately? That is to say, if the High Court makes an order that each party shall bear its own costs under section 50B of the Planning and Development Act, does that order only apply to the High Court proceedings or will it also cover the apportionment of costs before the Court of Appeal if the substance of the case is appealed? Please provide any relevant court rules, guidance or caselaw to support your answer.
2. If, at the stage of the High Court proceeding, the parties agree that each party should bear its own costs and the substance of the case is then appealed to the Court of Appeal, could the respondent ask the Court of Appeal to not only order the claimant to pay the respondent's costs related to the appeal but to also overturn the earlier agreement on costs and order the claimant to pay the respondent's costs for the High Court proceeding also? Please provide any relevant court rules, guidance or caselaw to support your answer.
3. If, at the stage of the High Court proceedings, the High Court makes an order under section 50B of the Planning and Development Act that each side shall bear its own costs and then the substance of the case is appealed to the Court of Appeal, could the respondent ask the Court of Appeal to not only order the claimant to pay the respondent's costs related to the appeal but to also overturn the High Court's costs order and order the claimant to pay the respondent's costs for the High Court proceeding also? Please provide any relevant court rules, guidance or caselaw to support your answer.

Questions to the Party concerned:

4. Please provide the text of any regulations or other guidance that was applicable at the time of the permitting of the Laois-Kilkenny Reinforcement Project with respect to how sections 182A, 182B or 182E of the Planning and Development Act 2000¹ were to be applied in practice.
5. Is every development related to electricity transmission, no matter its nature or size, automatically "electricity transmission" infrastructure under section 182A of the Planning and Development Act 2000 or is there some threshold or criteria that An Bord Pleanála should apply when making this determination? If so, please provide the text of the relevant legal provisions or guidance setting out those threshold or criteria. Please specify under which of these threshold or criteria the Laois-Kilkenny reinforcement project was considered to be "electricity transmission" infrastructure.
6. Is the public entitled to comment on whether a proposed development is "strategic infrastructure development", including electricity transmission infrastructure, under the Planning and Development (Strategic Infrastructure) Act 2006 prior to An Bord Pleanála's determination of that issue?

¹ Party's response to communication, annex 3.

7. At what point does An Bord Pleanála's pre-application file for a strategic infrastructure development become available to the public on An Bord Pleanála's website? For example, does it become available when the developer submits its application? Or when the public participation procedure on the proposed application commences?
8. Both the communicant² and the Party concerned³ refer to the €50 fee for a member of the public to making an observation or submission to An Bord Pleanála. Bearing in mind that the Convention's twelfth preambular paragraph recognizes that the public needs to have free access to the procedures for participation in environmental decision-making, please explain how this fee is consistent with article 3(2) and article 6(7) of the Convention.
9. With respect to a "normal" planning application under article 34 of the Planning and Development Act 2000:⁴
 - (a) Is it necessary to seek leave to appeal the planning permission to An Bord Pleanála?
 - (b) Does An Bord Pleanála review the merits of the planning decision?
 - (c) What are the cost rules for an unsuccessful third party appeal to An Bord Pleanála? Do costs follow the event or does each party bear their own costs?
10. On what date was the Grid 25 Implementation Programme 2011-2016 adopted?
11. On what date was the SEA for the Grid Implementation Programme 2011-2016 finalized?
12. Please confirm whether Eirgrid is recognized under Irish law as being a "public authority" for the purposes of the European Communities (Access to Information on the Environment) Regulations.
13. The Planning Inspector's Report of 31 January 2014 refers to various comments received from the public on the non-technical summary of the environmental impact statement.⁵ In addition to the non-technical summary, was the full environmental impact statement, and its annexes, made available to the public during the 2013 public consultation?
14. At paragraph 4.6 of his statement for the oral hearing,⁶ EirGrid's technology and innovation manager states:

"EirGrid's utilises standard designs of transmission stations to ensure these stations are adequately sized to account for the future but are not of a size which would present a risk to the security and reliability of the network".

Please provide a copy of the documentation on the various "standard designs" of transmission stations, including any accompanying analyses of each design's suitability for the Laois Kilkenny reinforcement project, that was made available to the public during the 2013 public consultations.

² Communication, p. 3.

³ Party's response to communication, para. 20.

⁴ Party's response to communication, para. 21.

⁵ Communicant's final written submissions, 11 January 2021, annex 4, pp. 44 and 71-75.

⁶ Communicant's final written submissions, 11 January 2021, annex 12.

15. Please provide a copy of the documentation made available to the public during the 2013 public consultations on the Laois Kilkenny reinforcement project regarding scenario-planning or other studies or analyses of how much additional capacity should be provided for in the project and why.
16. Paragraph 31 of the Party concerned's response to the communication refers to the "lengthy discussion" on future-proofing held during the oral hearing regarding the Laois-Kilkenny Reinforcement project. Are there minutes or a transcript kept of the hearing? If so, please provide the section of the transcript where Eirgrid explains how the additional capacity was calculated.
17. At the time of the April 2014 planning decision in this case, what guidance or criteria, if any, was to be applied by An Bord Pleanala when determining the payment, if any, to be paid "to any other person as a contribution to the costs incurred by that person during the course of consideration of that application" under subparagraph (5A)(c)(iii) of section 182B of the Planning and Development Act? For what reasons were Laois County Council and Kilkenny County Council awarded €3255 and €821 respectively, while the three groups representing the public concerned were awarded nil costs.
18. Please provide the following judgments:
 - (a) *McCallig v. Bord Pleanala*, 14 April 2014;⁷
 - (b) *Harrington v. Bord Pleanala*, (O'Neill J, 2014 No 297JR).⁸
19. In its letter of 3 October 2014, Eirgrid accepted that section 50B of the Planning and Development Act applied to the communicant's application for judicial review in the High Court. In contrast, An Bord Pleanala refused to agree that each party should bear its own costs regarding the proceeding. When the communicant thereafter filed a motion seeking an order that each party should bear its costs, An Bord Pleanala in response wrote to the communicant on 3 November 2014 stating:

"We should therefore call on you to withdraw your motion. If you notify us before 5pm on Thursday 6 November that you will do so, we will not apply for costs in respect of the motion; but if you do not, we are instructed to apply for costs if successful in opposing".

How is An Bord Pleanala's conduct of first refusing to agree that each side should bear its own costs, and then informing the communicant that it will seek costs against the communicant if it seeks an order to that effect, consistent with the obligations on the Party concerned:
 - (a) Under article 9(4) of the Convention to ensure that procedures for access to justice within the scope of the Convention are "fair, equitable...and not prohibitively expensive"?
 - (b) Under article 3(2) of the Convention to "endeavour to ensure that officials and authorities assist...the public in seeking... access to justice"?
20. How is the alleged threat made by An Bord Pleanala on 28 January 2015, shortly before the hearing of the communicant's application for leave to appeal, that it would seek costs back to

⁷ See communication, annex 4.

⁸ See communication, annex 4.

the beginning of the case if the communicant did not withdraw its request for permission to appeal, consistent with the obligation on the Party concerned:

- (a) Under article 3(2) of the Convention to “endeavour to ensure that officials and authorities assist...the public in seeking... access to justice?”
- (b) Under article 3(8) of the Convention not to penalize persons for seeking to exercise their rights under the Convention, recalling that article 3(8) only allows national courts to award “reasonable costs”⁹ in judicial proceedings?
- (c) Under article 9(4) of the Convention to ensure that procedures for access to justice within the scope of the Convention are “fair, equitable...and not prohibitively expensive”?

Questions to the communicant:

21. Please provide a copy of any requests made by the communicant or its representatives for access to the pre-consultation file on the Laois-Kilkenny reinforcement project, together with the replies received thereto.
22. Which provision of the Convention do you consider to have been breached by An Bord Pleanála’s decision not to award you any contribution to your costs of participating in the oral hearing?
23. On slide 8 of annex 2 to your communication you state:
“What they told us they wanted to build sounded straightforward enough...until we realised they were building a substation with more than 3 times the capacity needed for what was described above”.
Please explain in what way the proposed capacity of the substation was “3 times the capacity needed” for a 400/110kV substation, a 110kV substation and a 110 kV line between the two.
24. At page 7 of your communication you state that “despite a full planning process, repeated questions and a court case – the community have never been given information as to what the future capacity is for”. Please provide a copy of all the requests sent by the communicant or its representatives seeking information regarding the additional capacity described as “future-proofing”, together with the replies received.
25. At page 15 of your communication, you allege the “the technology to be used was effectively predetermined”. Please provide evidence to substantiate your claim.
26. Slide 4 of annex 1 to the communication contains excerpts of documents from the European Network of Transmission System Operators for Electricity. Please provide the full text of the documents from which these excerpts are extracted.
27. Please provide any relevant legal provisions, official guidance, caselaw or legal commentary to substantiate your claims that:
 - (a) The “commercial court takes a stricter interpretation of the grounds of a case”¹⁰ than

⁹ Party’s response, para. 58.

¹⁰ Communication, para. 18.

- the general court.
- (b) The “flexibility to revise or amend grounds is highly restrictive” in the commercial court.¹¹
 - (c) A move to the commercial court “greatly shortens the time to go through the court process”.¹²
 - (d) “Legal costs are greater” in the commercial court.¹³
28. The High Court judgment of 14 January 2015¹⁴ appears to be silent as to the apportionment of costs of that proceeding. Was it ultimately agreed between the parties either before or after that hearing that each party would bear their own costs? Or is there a separate court order with respect to the costs of the High Court proceeding? If so, please provide the costs order or the correspondence between the parties recording their agreement that each party will bear their own costs.
29. At page 19 of your communication, you state that “This threat of costs alone (€500,000-€750,000) forced us to withdraw the request for appeal.” Who was the source of the estimate of €500,000-€750,000 costs? Did An Bord Pleanala cite this figure? Or is this amount an estimate made by your legal representative in the light of An Bord Pleanala’s alleged threat to seek costs back to the beginning of the case?
30. At paragraph 70 of its response to the communication, the Party concerned submits that if the communicant was only given three minutes on 28 January 2015 to consider An Bord Pleanala’s proposal, “it is difficult to understand why they would not have asked the Court for an adjournment if they required any further time to consider any proposal”. Why did the communicant not ask for an adjournment?
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¹¹ Communication, para. 19.

¹² Communication, para. 18.

¹³ Communication, para. 19.

¹⁴ Party’s response to communication, annex 1.