Reply to questions raised by the Committee on 19 March 2021

From Communicant (ACCC/C/2015/132)

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)

Date of Reply: 16.04.2021

Questions to both the Party concerned and the communicant: (Q's 1-3)

Q 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.

Response:

It is our understanding that the issue of exposure to costs is never fully settled or known while proceedings are ongoing at any level of the Courts. i.e. that in practice, costs cannot be dealt with and closed at each court separately with any finality as, in fact, costs arise from and follow both the substance of a case and the manner in which it is argued. E.g.

– All parties to a case can appeal / cross-appeal a costs order. This, in turn can raise further issues of substance during such appeals requiring expenditure on further expert/legal resources.

  e.g. see **Annex A- McCallig vs ABP-5th day of June, 2014**[1]

  "8. However, where a successful party raises issues improperly or unreasonably which add significantly to the length or to the costs of proceedings, that party may be deprived of some or all of the costs and, depending upon the circumstances, may even be directed to pay a part or all of the other party's costs."

  While not an environmental case, the following example demonstrates that costs orders

  [2020] IECA 310 – 'Court of Appeal: Costs order against State overturned in case brought by murder victim's family'[2]

  "Mr Fox was unsuccessful, and it was argued on behalf of the State that it was a case where there should be no order for costs. However, the judge directed the State to pay 50 per cent of Mr Fox's legal costs.

  ***Court of Appeal -** He appealed and the State cross-appealed the award of costs in his favour. In the Court of Appeal, the State argued that they fully succeeded and that there should be an order for costs of the appeal in their favour. The State suggested that the High Court's costs order should be vacated. In May 2020, the court rejected Mr Fox's appeal, finding that the State could not be compelled to establish the commissions of inquiry. Submissions in relation to costs were received from the successful State respondents in August 2020. "….*

  "The judge said that the State respondents' contention that they have wholly succeeded on this appeal was "entirely correct", and that pursuant to the Legal Services Regulation Act 2015 s.169, or to Ord.99 RSC or a combination of both, costs must follow in their favour.

[1] McCallig vs An Bord Pleanala JUDGMENT of Mr. Justice Herbert delivered the 5th day of June, 2014 https://www.courts.ie/acc/alfresco/6afea21a-1a00-49a3-b536-557cb88f80a3/2014_IEHC_354_1.pdf/pdf#view=fitH

[2] https://irishlegal.com/article/court-of-appeal-costs-order-against-state-overturned-in-case-brought-by-murder-victim-s-family - published 19 November 2020

The judges also ruled that a necessary consequence of Mr Fox having brought an unsuccessful appeal was that he loses the benefit of the order for part-costs that he had received in the High Court.

***Conclusion** - On the cross-appeal, the court set aside the High Court order for 50 per cent costs in Mr Fox's favour, and provided that there should be no order for costs in the High Court. Costs were awarded to the State."*

- There does not appear to be anything stopping an appeal court from overturning a costs order from a lower court, indeed, it is our understanding that appeal courts must overturn errors of lower courts.
- There is the question of how far the 50B cost protection actually goes and how it is assessed. Note the following which indicates a cautious approach to the application of 50B to planning and development matters.

  E.g. see **Annex A- McCallig vs ABP-5th day of June, 2014**[3]

  "1. In this application for certiorari by way of judicial review, the applicant was successful, but not to the full extent of her claim.

  The court determined that given the separate and discreet issues raised by the claim, costs should be awarded on an issue basis rather than on an overall effective success basis, sometimes referred to as the "winner takes all" basis. The court identified five such issues in the case: three exclusively planning and development law issues and, two environmental impact assessment issues arising from the same application for planning permission.

  The court awarded the applicant party and party costs of the three planning and development law issues. By reason of the provisions of s. 50B(2) of the Planning and Development Act 2000, (as inserted by s. 33 of the Planning and Development (Amendment) Act 2010), the court directed that the applicant, the respondent and the second notice party should each bear their own costs of the two environmental impact assessment issues. The first notice party did not participate in the application and no order as to costs was made for or against that notice party.

  See Annex B-McCallig vs ABP-9th day of April 2014 [4]:

  "44. In my judgment "proceedings" as used in s. 50B(1) only refers to that part of judicial review proceedings which challenge a decision made or action taken or a failure to take action pursuant to one or more of the three categories therein specified. "Proceedings" is not defined in the Act of 2010, in the Planning and Development Act 2000, or in the Interpretation Act 2005. It is not a term of legal art and where undefined its meaning falls to be established by reference to the context in which it is used, (see Minister for Justice v. Information Commissioner [2001] 3 I.R. 43 at 45: Littaur v. Steggles Palmer [1986] 1 W.L.R. 287 at 293 A-E).

[3] McCallig vs An Bord Pleanala JUDGMENT of Mr. Justice Herbert delivered the 5th day of June, 2014 https://www.courts.ie/acc/alfresco/6afea21a-1a00-49a3-b536-557cb88f80a3/2014_IEHC_354_1.pdf/pdf#view=fitH

[4] McCallig vs An Bord Pleanala JUDGMENT of Mr. Justice Herbert delivered the 9th day of April, 2014 https://www.courts.ie/acc/alfresco/64f5b186-4f29-48a8-b231-07449f3ff06f/2014_IEHC_353_1.pdf/pdf#view=fitH

In my judgment it cannot be considered that the legislature intended so radical an alteration to the law and practice as to costs as to provide that costs in every judicial review application in any planning and development matter, regardless of how many or how significant the other issues raised in the proceedings may be, must be determined by reference only to the fact that an environmental issue falling within any of the three defined legal categories is raised in the proceedings. Such a fundamental change in the law and practice as to awarding costs is not necessary in order to comply with the provisions of the Directive. It would encourage a proliferation of judicial review applications. Litigants would undoubtedly resort to joining or non-joining purely planning issues and environmental issues in the same proceedings so as to avoid or to take advantage of the provisions of s. 50B(2). This is scarcely something which the legislature would have intended to encourage."

- Under 50B, the courts always retain discretion to award costs against a party in proceedings "if the Court considers it appropriate to do so" because the Court considers that a claim or counterclaim by the party is frivolous or vexatious, because of the manner in which the party has conducted the proceedings, or where the party is in contempt of the Court. These are broad terms that allow wide discretion for the courts but provide little certainty to the public in how they will be interpreted.

  E.g. see **Annex A- McCallig vs ABP-5th day of June, 2014**[5], while costs were not awarded against the applicant for certain arguments which did "*add considerably to the length and, therefore inescapably to the costs of the application*". The judge noted that this broad discretion existed based on whether issues are raised 'improperly or unreasonably':

  "8. *However, where a successful party raises issues improperly or unreasonably which add significantly to the length or to the costs of proceedings, that party may be deprived of some or all of the costs and, depending upon the circumstances, may even be directed to pay a part or all of the other party's costs*"

In our view, this is in addition to the criteria already identified in section 50B (frivolous, vexatious etc.) and that the understanding of issues raised 'improperly or unreasonably' is open to interpretation and, for the most part, these criteria (50B - Vexatious, frivolous, etc. + improperly, unreasonably) can only be assessed after the issues have been argued and largely closed.

- Courts have wide discretion in awarding costs[6]. **See also Annex D – McCoy & anor vs Shillelagh Quarries** [7] where Ms. Justice Baker explained the discretion available to the courts regarding costs:

[5] McCallig vs An Bord Pleanala JUDGMENT of Mr. Justice Herbert delivered the 5th day of June, 2014 https://www.courts.ie/acc/alfresco/6afea21a-1a00-49a3-b536-557cb88f80a3/2014_IEHC_354_1.pdf/pdf#view=fitH

[6] "Each Court has a large degree of discretion as to awarding costs in any particular circumstance, but normally costs will follow the event-this means, essentially, that the winner takes all."
Litigation Costs in Ireland-What You Should Know-November 3, 2016, https://businessandlegal.ie/litigation-costs-in-ireland-what-you-should-know

[7] McCoy & anor -v- Shillelagh Quarries Limited & ors – Judgement 16th July 2014 - Paragraphs 38, 39 and 40 in particular https://www.courts.ie/view/judgments/f137d26d-a861-49cc-9338-3752fe846c9c/c48345ab-033f-4512-8403-a8e1ea26b509/2014_IEHC_511_1.pdf/pdf

"38. The discretion of a court to award costs is wide, and a court may award costs for or in favour of a party further in whole or in part. The jurisprudence with respect to costs has changed significantly in the last number of years and the courts now take a nuanced and broad view of the costs question and frequently do break down the issues and the way in which the trial was run, in order to properly understand how costs are incurred and where they should lie. The court no longer applies a simple test of costs following the event, and the court looks to what the true "event" is and how and by what means a party succeeded and to what extent a party succeeded or failed in establishing the event. This has the effect that on occasions a party may win a case but not obtain all of his or her costs if the court takes the view that some parts of the litigation were unnecessary lengthy and that unnecessary costs occurred as a result thereof should not be awarded in favour of a party causing or contributing to the unnecessary costs. See the often quoted judgment of Clarke J. in Veolia Water UK v. Fingal County Council (No.2) 2006 IEHC 240.

39. Because of this, should the applicants succeed fully or in part in the proceedings, the trial court would, in the absence of a declaration, have a discretion as to where costs should lie, and that discretion could in principle be exercised to award cost of some days to the first applicant and costs of different days to the second applicant. The declaration would in the absence of a finding that one of the exceptions in s. 3(3) applies, benefits the respondents as Mr. McCoy would not take any benefit from such finding. It is for example possible that the trial judge may take the view that all of the evidence on a particular technical question was adduced by the local authority and accordingly that Mr. McCoy should not, absent a declaration, have had all or indeed any of the costs for that part of the case. This result is possible even if the case does not run in a modular way. It is also possible that should the two applicants fail between themselves to agree on the form of the expert evidence and should their two experts give identical or almost identical evidence that the court might regard the conduct of the case as justifying an award of costs against Mr. McCoy notwithstanding the making of a declaration. The order would protect the first personal applicant from an award of costs against him and equally protects the respondents from having to pay Mr. McCoy's costs, but does not prevent the trial judge in making a nuanced and reasoned judgment with regard to costs notwithstanding the existence of a declaration. Further, the court has the power under s. 3(3) to award costs against a party by reason of the manner in which the party has conducted the proceedings and also has power to award costs in favour of party in a matter of exceptional public importance or where "in the special circumstances of the case" it is in the interest of justice to do so.

40. It seems to me that the trial judge's discretion is sufficiently wide to offer protection to both the applicant and the respondents should a declaration be made at this stage in favour of Mr. McCoy, and indeed it seems to me that the making of such a declaration does not prevent an argument that the interest of justice may ultimately mean that a costs order be made in favour of or against Mr.McCoy especially in the context of the addition of an additional party. Thus the interests of the respondents are also protected "

Based on our reading, there is no guidance available to the public (by which we mean lay-people with no background in legal matters) which provides an easily understood framework and certainty regarding their exposure to costs in such matters. Ultimately, there is little certainty regarding protection from exposure to additional costs when entering the court system. (You are already exposed to your own costs for arguing your case which can already be substantial).

- According to the Legal Services Regulation Act 2015 – Section 169 (see extract below). '*costs follow the event'* is the default rule. Planning and Development Act 2000, Section 50B *("Each party (including any notice party) shall bear its own costs"*) is the exception.

  Incidentally, in 169 (2) it specifies that "*where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order*", however, there is no explicit requirement stated in section 50B to provide reasons if costs are awarded against an applicant e.g. that might lead to better understanding of terms such as frivolous or vexatious etc. in this context.

Extract from Legal Services Regulation Act 2015

Costs to follow event

169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

- (a) conduct before and during the proceedings,
- (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
- (c) the manner in which the parties conducted all or any part of their cases,
- (d) whether a successful party exaggerated his or her claim,
- (e) whether a party made a payment into court and the date of that payment,
- (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
- (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.

(3) Where a party succeeds against one or more than one of the parties to civil proceedings but not against all of them, the court may order, to the extent that the court considers that it is proper to do so in all the circumstances, that—

- (a) the successful party pay any or all of the costs of the party against whom he or she has not succeeded, or
- (b) the party or more than one of the parties against whom the successful party has succeeded pay not only the costs of the successful party but also any or all of the costs that the successful party is liable to pay under paragraph (a).

(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment.

(5) Nothing in this Part shall be construed as affecting section 50B of the Planning and Development Act 2000 or Part 2 of the Environment (Miscellaneous Provisions) Act 2011 .

- Costs in the Irish Judicial Review System fall under the 'Superior Court Rules' and specifically 'Order 99 – Costs' [8]. See Annex C which provides no clarity particularly for members of the public who are unfamiliar with court processes of terminology. Section *"2(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively*." There is also mention of processes for adjudication, however, this appears to also be subject to 'discretion'.
- The Citizens Information Board (the statutory body which supports the provision of information, advice and advocacy on a broad range of public and social services) provide

[8] https://www.courts.ie/rules/costs

very short guidance on the issue of costs – see **Annex I – Citizens info Judicial Review in planning-environmental matter.**

– In Summary, the discretion of the courts remains very wide regarding costs, with little certainty provided to the public regarding their exposure to costs.

Q 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.

Response:

Our understanding is that there is no certainty in this regard and no clarity in Irish Law that a verbal contract between 2 parties regarding costs is enforceable or would be enforced by the courts. Even in the case of a written agreement between parties, the courts still maintain discretion to award costs based on the manner in which a case has been run and the type of issues which have been raised and whether they might be cost protected or whether costs should be awarded in the interest of justice. The Court of appeal / Supreme Court have full leeway to vary cost orders and are obligated to do so if necessary.

See **Annex D – McCoy & anor vs Shillelagh Quarries [9] -** paragraph 39 in particular

Also, regarding our own court case, in private legal correspondence from our solicitors on 30th January 2015, we were advised that

– "*We were of the view that the group fell with the criteria of section 50b, but ultimately the applicability of section 50b was a decision for the Judge to make. On Wednesday there was a potential exposure, because we could not completely predict the judge's decision, and for that reason I was obliged to seek the group's instructions on whether they wanted to proceed with the application for a certificate to appeal.*

  An Bord Pleanala were entitled to have an argument on the applicability of Section 50B. I was disappointed that they re-opened it as an issue, when it had appeared settled on the day of the judgment, but the unfortunately the Judge indicated on the 21st January that ABP and Eirgrid would not be bound by what they had previously indicated. Unfortunately, in these matters the Judge has a very wide level of discretion. Eirgrid also indicated on 21st that the matter was not settled."

This, in conjunction with the Letter from EirGrid See **Annex E – EirGrid Ltr to PhelimONeill re. costs (21st Jan2015)** – demonstrates that even with letters of agreement and statements made in court not to pursue costs, the Courts retain discretion over the matter of costs. i.e. there is no certainty of protection from costs from the other parties. (Also bearing in mind that in Ireland, even your own costs can be significant).

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[9] McCoy & anor -v- Shillelagh Quarries Limited & ors – Judgement 16th July 2014 - Paragraphs 38, 39 and 40 in particular https://www.courts.ie/view/judgments/f137d26d-a861-49cc-9338-3752fe846c9c/c48345ab-033f-4512-8403-a8e1ea26b509/2014_IEHC_511_1.pdf/pdf

Q 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.

Response:

It is our understanding that an order for costs can be appealed by either / all parties. (see response to Q1).

See **Annex D – McCoy & anor vs Shillelagh Quarries [10] -** paragraph 38-40 e.g.

> *"40. It seems to me that the trial judge's discretion is sufficiently wide to offer protection to both the applicant and the respondents should a declaration be made at this stage in favour of Mr. McCoy, and indeed it seems to me that the making of such a declaration does not prevent an argument that the interest of justice may ultimately mean that a costs order be made in favour of or against Mr.McCoy especially in the context of the addition of an additional party. Thus the interests of the respondents are also protected"*

Ultimately, it is impossible to see how the issue of exposure to costs can be fully or even reasonably settled or known while proceedings are ongoing at any level of the Courts given the number of variables that can affect the scope of section 50B and the wide discretion afforded to the courts in awarding costs. Indeed, it seems there is nothing preventing the courts from overturning a High Court order.

Based on our reading, there is no guidance available to the public (by which we mean lay-people with no background in legal matters) which provides an easily understood framework and certainty regarding their exposure to costs in such matters and the actions and / or arguments which can .result in or preclude a court from overturning a costs order.

[10] McCoy & anor -v- Shillelagh Quarries Limited & ors – Judgement 16th July 2014 - Paragraphs 38, 39 and 40 in particular https://www.courts.ie/view/judgments/f137d26d-a861-49cc-9338-3752fe846c9c/c48345ab-033f-4512-8403-a8e1ea26b509/2014_IEHC_511_1.pdf/pdf

Questions to the communicant:

Q 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.

Response:
Most of the requests for the pre-consultation documentation was by way of phone calls. ABP do not provide access to documentation regarding ongoing pre-consultations. Current information on the ABP website[11] (April 2021) explains that this restriction is ongoing:
"Keeping the public informed of the pre-application consultations - When An Bord Pleanála receives a request for pre-applications consultations, we will include the request in the weekly list of 'cases received' on our website. When the pre-application consultations are completed, we will include them in the weekly list of 'cases determined' on our website. When the pre-application consultation is completed, you can view the case file through our public access service. The case file will contain the records of any meetings between An Bord Pleanála and proposed applicant held during the pre-application consultation process."

Q 22. Which provision of the Convention do you consider to have been breached by An Bord Pleanala's decision not to award you any contribution to your costs of participating in the oral hearing?

Response:
It appears to us that this is potentially in breach of section 3.2 (i.e. this is the opposite of providing assistance). We consider it may be a breach of 3.8 in that we were treated less favourably than State officials who were already being paid to attend the oral hearing. The lack of award of costs was almost a statement against us in that it stated 'Nil'.
Preambular [12] also appears relevant.
Our treatment was not equitable in that, the 'public concerned' were treated <u>less favourably</u> than State agencies despite the fact that we had less knowledge of the processes, less resources and had to do the work to learn in our spare time.

Further, while we did attend the oral hearing and put much effort into participating in the oral hearing we do not believe that due account was taken of the outcome of our participation i.e. in breach of 6.8

Q 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 "3times the capacity needed" for a 400/110kV substation, a 110kV substation and a 110 kV line between the two.

Response:
This was not a specific measure of electrical capacity but was our non-specialist understanding based on an how many lines was stated by EirGrid as needing to be connected to the large Coolnabacca substation vs the number of bays that were actually going to be provided as part of the project for 'future-proofing'.

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[11] https://www.pleanala.ie/en-IE/Strategic-Infrastructure-Development-Guide/SID-Pre-application-consultations

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One of our ongoing concerns regarding this project has always been that it was a ‘gateway project / Trojan horse / enabling project’, essentially a starting point that would directly lead to further largescale industrial development in our home environmental and would itself and / or in combination with connected projects have a damaging impact on our environment and particularly the highly vulnerable aquifer upon which it would be situated.

Given the difficulties we have already experienced in participating in / challenging the decision-making in just one such project, the prospect of more to come is extremely daunting.

Q 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.

Response:

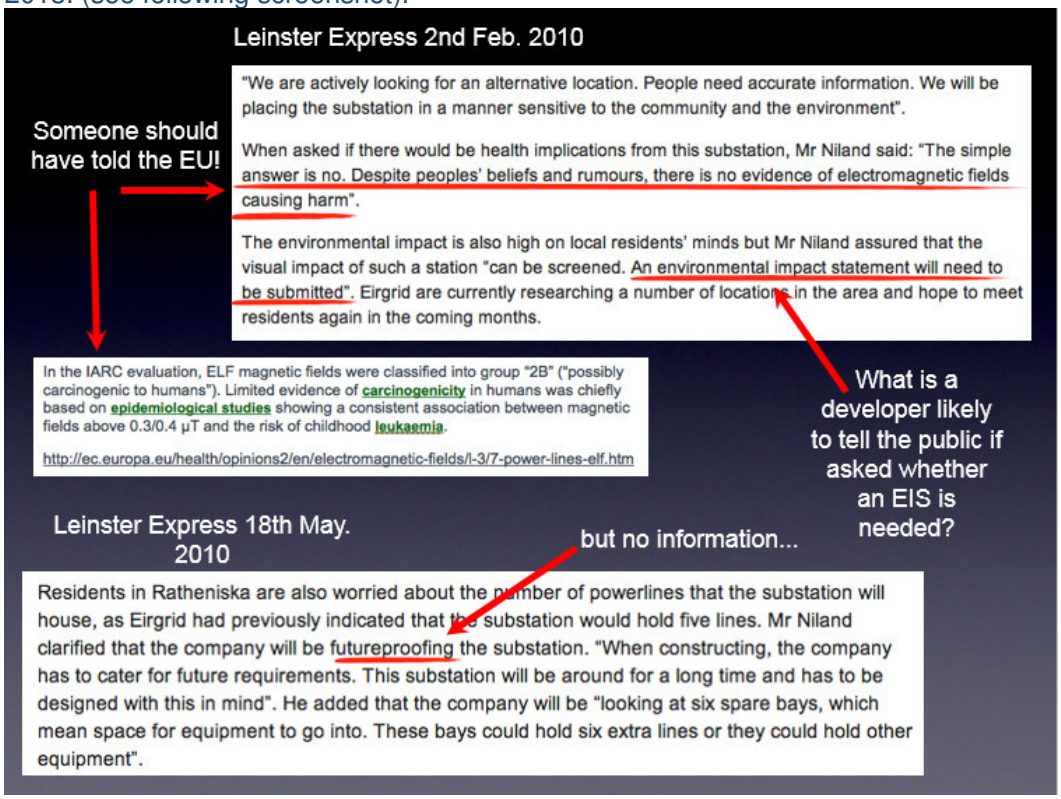
We feel that it is necessary to highlight that we are a small rural community who did not even know about the Aarhus convention or the Environmental Impact Assessment Directive etc. when this project was launched nearly 12 years ago now and have been managing this huge battle in our spare time. We note that you have requested 'All the requests' for information sent and the replies received.

We have endeavored to demonstrate here that the issue has been raised repeatedly over the years but in many cases, the matter was raised verbally by different individuals in many different meetings / circumstances. The following is a sample of the ways in which the matter has been raised repeatedly:

- Note Newspaper Articles referencing future-proofing and extra capacity e.g.
  -See **Annex V1** – Article from June 2010 - see last two paragraphs at bottom page re. future-proofing.

  -See **Annex V2** – Article from March 2013 – "*They also declined to confirm what the substation's spare bays will be used for*".

  -In addition, a further Newspaper article (from 18th May 2010) which mentioned capacity for six spare bays was referenced in my presentation to the oral hearing of 4th November 2013. (see following screenshot).



- Initially and following pre-consultation with the developer, ABP determined[12] (see **Annex-X**) that the project was Strategic infrastructure but did not require an EIS. Around the time of this decision, the preconsultation file became available - November 2012. See following screenshot from the ABP archive showing the dates and the history.

Case Number:	VC0035
Site Address:	(Laois - Kilkenny Reinforcement Project)
Planning Authority Reference:	
Planning Authority:	Laois County Council
Development Description:	Proposed 400/110 KV Substation at Loughteeog, Co. Laois and Associated Line and Station Works.
Case Reference:	VC11.VC0035
Case Type:	Pre-Application Consultation Request
Decision:	Is a Strat. Infrast. Dev.
Date Lodged:	12/06/2009
Date Signed:	21/11/2012
EIAR:	No
NIS:	No
Participants:	EirGrid, (Prospective Appl) Laois County Council (Local Authority)
History:	21/11/2012 Is a Strat. Infrast. Dev. 21/11/2012 All documents in relation to the file are available for inspection at the Board's offices and at the offices of the relevant planning authority. 12/06/2009 Lodged

  Current information on the ABP website[13] (April 2021) explains that:
  "Keeping the public informed of the pre-application consultations - When An Bord Pleanála receives a request for pre-applications consultations, we will include the request in the weekly list of 'cases received' on our website. When the pre-application consultations are completed, we will include them in the weekly list of 'cases determined' on our website. When the pre-application consultation is completed, you can view the case file through our public access service. The case file will contain the records of any meetings between An Bord Pleanála and proposed applicant held during the pre-application consultation process."

- This decision that the project would be Strategic Infrastructure allowed the developer to submit a planning application without an EIS. This was done in January 2013 – please see **Annex S**.

- In response to this, the local community, local county councillors, Local TD's (Members of Parliament) sent in objections to the project raisings concerns about future-proofing etc. and requesting that an EIS be carried out. (Please see **Annexes N, O, P, Q, R**)

- In response, in April 2013 ABP requested that EirGrid supply an EIS.

- RTS wrote to EirGrid seeking to be involved in the scoping of the EIS and noting the unwillingness of EirGrid to meet the community. (See **Annex T)**

- EirGrid supplied the EIS to ABP on 15th August 2013 (See **Annex U**). However, it was supplied as 'additional information' meaning, that the community now had an environmental report (which had not been withdrawn) as well as an EIS in the form of additional information – note the end of the letter which advises that further issues can be addressed via further information or an oral hearing.

[12] https://archive.pleanala.ie/en-ie/case/VC0035
[13] https://www.pleanala.ie/en-IE/Strategic-Infrastructure-Development-Guide/SID-Pre-application-consultations

- ABP set an agenda for the oral hearing, highlighting that among other things, future proofing/extra capacity be addressed at the oral hearing (see **Annex W)**. The capacity issue was partly responded to via the Statement by EirGrid Mark Norton at the oral hearing as per our last submission.

- See also My Closing statement to the Oral Hearing. (**Annex M)**

- The following statement by Colm Fingleton (RTS Group) who attended the meeting referred to below on 8th January 2020 shows that the issue is still ongoing:
  "*On the 8th of January 2020 a meeting was organised by our public representatives for us to meet with the 2 CEOs of Eirgrid and ESB. The meeting was held in Dáil Éireann, in the office of the then Minister for Justice Charlie Flanagan.*

  Present at the meeting were, Minister for Justice Charlie Flanagan(Fine Gael Party), Sean Fleming, Chairman of the public accounts committee (Fianna Fail Party), Brian Stanley, environment spokesperson(Sinn Fein Party), Mark Foley CEO Eirgrid, Pat O'Doherty CEO ESB , Noel Graham and Colm Fingleton RTS.

  We in RTS had requested this meeting with all parties to try and bring this long running dispute to an end and ask the CEO's to withdraw the project due to the scale of the problems associated with this project for the last 11years. It was pointed out to them that the way the companies had treated our community was totally unacceptable and our community had never been told the truth of the scale of the project to this day. We reminded them of the way we were treated throughout the entire planning process and by their legal teams in the courts. The two CEO's wanted to gloss over the past and accept no responsibility for what had happened to us while saying the project was necessary and going ahead.

  Minster Flanagan asked the CEO's why they still had not shown the community the full plans for the substation and that no community could be asked to accept an open ended project with no idea what it would look like in 5 or 10 years time. The 3 representatives stated that Eirgrid/ESB should have packed up and abandoned this project when they broke their planning permission and were subsequently closed down by local authorities. Our representatives told the CEO's no trust existed between the community and ESB/ Eirgrid and that the breach of planning was the final straw. But both CEO's still insisted they were going ahead with the project. Both CEO's were asked by our representatives that all plans and future plans would be sent to us, RTS, immediately and the CEO's gave a firm commitment to ensure that full disclosure of all plans be delivered to us straight away. It's 14 months later and nothing has been supplied to us by either company."

Q 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.

Response:
This was a reference to AIS vs GIS technology and underground cable vs overhead lines i.e.

– **Air Insulated Switchgear (AIS) vs Gas Insulated Switchgear (GIS)**
The EirGrid report dated 28th January 2011 specific to the project presented an analysis of the two 'alternatives' comparing the two technologies and stated: "*This report recommends the use of GIS technology for the 400/110 kV substation required as part of the Laois-Kilkenny Reinforcement Project. This recommendation is based on the reduced size of a GIS compound and also lower overall estimated development cost. The smaller size offers more scope for selecting sites and the costs are similar to an AIS substation, a smaller size compound is also likely to have less impact on the receiving environment*"[14]
In our view, this analysis was meaningless as the technology was already predetermined (see next paragraph) and, as demonstrated previously, the site already selected. i.e. a predetermined outcome being presented to the public as alternatives for comment.

When we researched the technology, we found the following technical document[15] from 2007 which stated in its Summary (emphasis added):

> *"ESB (Electricity Supply Board) Networks has an extensive (15+) programme of 110kV/MV substations to be built within a regulated budget by 2010. A comprehensive cost-reduction study was undertaken which included a review of current practice in a number of other utilities and an enquiry to a wide range of manufacturers based on an open functional specification. The tenders received were evaluated against a full range of cost factors including material cost, installation costs and lifetime costs.* ***<u>The outcome of the study was a decision to standardise on the use of 110kV gas-insulated equipment</u>*** *(either hybrid modules or conventional GIS) for new 110kV substations and also to use this equipment as far as possible in extensions or refurbishment of existing AIS substations"*

This summary was provided by us to ABP at the oral hearing to demonstrate that GIS technology was the predetermined preferred technology, long predating the planning process.
(Notably, the document also recorded "*The network which is owned by ESB contains four 400kV stations, twenty seven 220kV stations and approximately one hundred and thirty 110kV stations.* " highlighting that industrial 400kV substations are a rare feature of the Irish electrical system. If environmental considerations had been at the heart of the project development, as they should have been, it is hard to see how a site was selected on a regionally important aquifer geologically classified 'highly vulnerable').

[14] Laois-Kilkenny Reinforcement Project Technical Comparison of AIS v GIS Substation Options https://www.eirgridgroup.com/site-files/library/EirGrid/Appendix%20B%20Technical%20Comparison%20of%20AIS%20vs.GIS%20Substation%20Opt.pdf

[15] SUBSTATION DESIGN IN A CHALLENGING REGULATORY ENVIRONMENT, C. Twomey ESB International Ireland https://studylib.net/doc/18848097/
where is "ESB International is wholly owned by the Electricity Supply Board, Ireland." https://www.esbinternational.ie/who-we-are/about-esb-international and
"Electricity Supply Board (ESB) was established in 1927 as a statutory corporation in the Republic of Ireland under the Electricity (Supply) Act 1927. With a holding of 95%, ESB is majority owned by the Irish Government" https://esb.ie/who-we-are/about-esb

Q25 - response continued:

- **Underground cable vs overhead lines**
  - In 2011, during the 'consultation process' for the project, the Laois County Development Plan was also under review. In response to a public consultation process (in which EirGrid also participated) a motion[16] was put forward, voted on and adopted by Laois Councillors (elected officials) to include the following text in the Laois County Development Plan "*That Laois County Council re-affirm the commitment that all 400kv lines in the future be placed underground.*" The only project at that time which would have been potentially affected was the Laois-Kilkenny reinforcement project which was proposing approx. 1.4km of new 400kV line.

    EirGrid responded by bringing a court case against the decision[17] arguing[18] that "*the policy, adopted by the council last October as part of its county development plan for 2011-2017, **makes it impossible** for the company to fulfil its function to develop, maintain and operate a safe, secure, economic and reliable electricity transmission system in the county.*"
    "Nuala Butler SC, for EirGrid, said it was much more expensive to put lines underground and to service them. It made no sense to have all such new lines going through Co Laois placed underground while they were overground everywhere else, she said.
    ***The council's policy would make it difficult for renewable energy generation projects such as wind farms to link into the power grid, counsel argued**.*
    However, EirGrid was not opposed to having power lines in urban or places of natural scenic beauty placed underground." (Emphasis added)

    Following legal advice which indicated that the councillors themselves could be exposed to massive legal costs, the judicial review went unopposed and the undergrounding decision was quashed.

  - Two Laois County Councillors explained this story to the Oral hearing, i.e. that the financial risk from the legal challenge was too great to pursue.

  - At the conclusion of the oral hearing (November 2013), the planning Inspector raised the issue of potential mitigations / planning conditions to be applied and the issue of undergrounding was raised. EirGrid again spoke strongly against this.

  - Sean Fleming TD (a member of the Dáil - Irish parliament) also highlighted the issue in a Dáil Éireann debate -Tuesday, 3 Dec 2013[19] regarding electricity infrastructure: *"EirGrid approached this from the beginning on the basis that it is a question of pylons or nothing. Before EirGrid started this, it decided that this was a matter of pylons overground. There are pictures of pylons on the front, in the middle and at the end of its document. Before they ever started, they had a closed mind on this issue. Even if they ever get to lodge an application for planning, such planning will not stand up. It might stand up in An Bord Pleanála, but it certainly will not stand up in the courts because the company will not have considered all the options and it is*

[16] https://www.laois.ie/wp-content/uploads/Minutes-Special-Meeting-October-2011.pdf
[17] Judicial Review – 2011/1157 JR
[18] Irish Times, 6th December 2011 - https://www.irishtimes.com/news/eirgrid-challenges-laois-lines-policy-1.8014
A further article: https://www.leinsterexpress.ie/news/local-news/93685/Eirgrid-brings-council-to-court-.html
[19] Dáil Éireann debate -Tuesday, 3 Dec 2013 - Vol. 823 No. 2
https://www.oireachtas.ie/en/debates/debate/dail/2013-12-03/29/

essential in modern planning that one does so before coming forward with a planning proposal. Their documents have shown from the beginning that they are only dealing with pylons and overhead lines, and they do not consider undergrounding.

The issue of public consultation by EirGrid is important. It has been running a consultation process on a project in Ratheniska substation in County Laois for the past year or two. In tandem with that, Laois County Council was drawing up its new county development plan and in it the council considered the issue of power supply and transmission of electricity. As part of the public consultation by Laois County Council, a large number of submissions were received indicating that the 400 kV cables in Laois should be placed underground. Ultimately, the elected members of Laois County Council, having considered all the submissions, including those from EirGrid which participated in that public consultation process, and those from the council's own planning department, decided to insert the following requirement into the Laois county development plan, namely, "to require that all future 400 kV lines be put underground in County Laois". That is a simple sentence and that was the requirement. It was included in the final county development plan, as adopted by the elected members in accordance with all legal procedures, less than two years ago.

EirGrid did not like that and the reason it did not like it was that it could not control it. It was the people, the elected members and the council who put that requirement into the county development plan. EirGrid took Laois County Council to the High Court to have that sentence deleted from its county development plan.

The individual elected members of Laois County Council were informed by their legal advisers that they could be individually surcharged for any legal costs associated with a High Court challenge if they were not successful. In light of this financial threat to individual members of Laois County Council and to their family homes - that point was made clear to them - the council chose not to mount a defence. EirGrid succeeded in having this sentence deleted from the Laois county development plan by the High Court.

That, to me, sums up EirGrid's attitude to public consultation. If it controls the process and can control the answer, it will go along with it but if the answer is put by somebody else and the process is carried out by somebody else and EirGrid does not like the answer, it will reject it and it will go to every court in the land to overturn what has been decided by way of public consultation. That is the most recent example in the past year or two of what it has done. That is not what it did in the case of an individual who it thought was difficult to deal with but what it did to a local authority. It took it to the High court because it did not like the development plan. That sums up EirGrid's attitude."

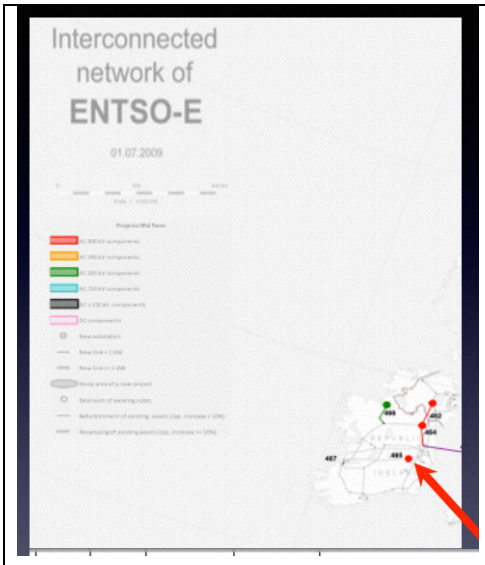
This assessment appears accurate, given that on 9th April 2021, EirGrid have just announced[20] [21] that they have selected 50km of underground 400kV cable as a solution for a different project in a different Irish county.

This further proves the point that these alternatives (underground cables) were never open to us.

[20] **Kildare-Meath project -** https://www.eirgridgroup.com/newsroom/underground-cable-kildare/
[21] https://www.meathchronicle.ie/2021/04/09/kildare-meath-electricity-project-to-go-underground/

Q 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.

Response:
The extracts shown on Slide 4 of Annex 1 to the communication (shown here for clarity) were taken from the ENTSO-E TYNDP2010. (Ten Year National Development Plan)



Extract taken from ENTSO-E TYNDP2010 – Map of pan-European projects 2010-2014[22]
Full map provided in **Annex-F**

REF on map	RGs	Substation 1	Substation 2	Project characteristics	Investment need alleviated	Expected benefits	Progress status	Expected time of commissioning
465	North Sea	Loughteeog (IE)		A new 500 MVA 400/110kV substation connected into the Moneypoint-Dunstown 400kV line and the Athy-Portlaoise 110kV line, and with two 400/110kV 250 MVA transformers. This project also comprises a new 110kV line from Loughteeog to Ballyragget 38kV station and upgrading of Ballyragget station and the Ballyragget-Kilkenny 38kV line from 38kV to 110kV substation.	Demand growth at Kilkenny city and surrounding region.	Improved security of supply for counties Kilkenny, Carlow and Laois; reduce losses.	design & permitting	2014

Extract taken from ENTSO-E TYNDP2010 – 'Table of projects'[23]. (Search excel table for project 465.)
Full excel table provided in **Annex-G**

According to the ENTSO-E site:
"*The TYNDP presents a forward-looking proposal for electricity transmission infrastructure investments across 34 European countries.*"

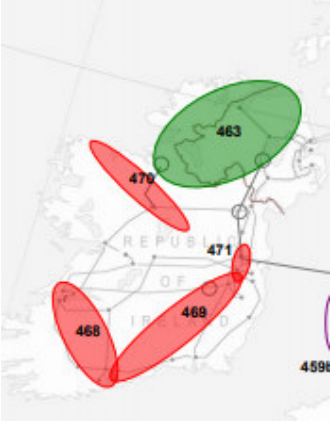
"The objectives of the TYNDP are to ensure transparency regarding the electricity transmission network and to support decision-making processes at regional and European level. The report is the most comprehensive and up-to-date European-wide reference for the transmission network. It points to significant investments in the European power grid in order to help achieve the European energy policy goals:

[22] https://eepublicdownloads.entsoe.eu/clean-documents/pre2015/SDC/TYNDP/MAP_pan_European_Projects_MT.pdf
[23] https://www.entsoe.eu/fileadmin/user_upload/_library/SDC/TYNDP/Table_of_projects_for_publication.xls

- *increasing the use of renewable energy sources (RES) to 20% of total energy production by 2020;*
- *further promoting the Internal Energy Market (IEM) by alleviating congestion on the transmission network;*
- *ensuring security of supply (SoS) and system reliability of an increasingly complex transmission system connecting 525 million citizens across the ENTSO-E area."*

The full suite of TYNDP documents are available here:
https://www.entsoe.eu/publications/tyndp/tyndp-2010/#downloads

Additionally:



Extract from ENTSO-E TYNDP2010 – Map of pan-European projects 2015-2020[24]
Full map provided in **Annex-H**

Note here project 469 which also appears to interface directly with the Laois-Kilkenny Project.
The accompanying ENTSO-E table of projects **(see Annex-G)** explains:
"*This new development is required to facilitate the evacuation of generation from the south-West region. This project will help alleviate constraints on the network in the South-West Region."*

Although specific start and end points are not provided, this project appears to align with the EirGrid proposed project "*Scenario 4 – Drawing power out of the Cork Region*" shown in our final submission Annex 1-[Ref 006].

Extracts from ENTSO-E "Ten Year Network Development Plan 2010-2020" [25]
(emphasis added)
"*5.7.1 CONNECTION AND INTEGRATION OF RENEWABLE ENERGY SOURCES (RES) AND OF NEW CONVENTIONAL POWER PLANTS In order to fulfil both the European and national targets regarding the climate protection, signals were given by national governments to increase the installed Renewable Energy Sources in electricity grids. As a result of that context, many RES projects were initiated within the Region North Sea and they have to be connected to the grid. However, some of them are located in places where the transmission grid was not historically developed. Therefore, TSOs are facing major challenges to extend their grid to get new onshore RES plants connected.*

[24] https://eepublicdownloads.entsoe.eu/clean-documents/pre2015/SDC/TYNDP/MAP_pan_European_Projects_LT.pdf
[25] https://eepublicdownloads.entsoe.eu/clean-documents/pre2015/SDC/TYNDP/TYNDP-final_document.pdf

Onshore plants needing grid extensions can be found in the midterm in the south, west and north of the island of Ireland, in north Scotland, in Denmark, in north Germany, north-western France, and onshore along the Norwegian coast. In the long run, complementary grid extension needs are foreseen as a result of other new additional RES projects in the same areas. ***The extension of onshore grids is a prerequisite to integrate all the new RES infeeds.***

This is even more a concern for offshore wind power plants which have somehow to be connected to the onshore transmission grid. Such power plants can be found in the coastal areas of eastern Ireland, Belgium, north-western France, in the German North Sea coast and in the Baltic coastal zone of Germany and Denmark. In the long run, additional installations are expected in those areas as well as in the coastal areas of United Kingdom and of The Netherlands.

Once connected, due to imbalances in some countries between high RES penetration and low local consumption level, energy has to be transmitted by transmission lines, historically sized in accordance with these low consumption levels and in some cases low local generation levels. As more RES generation plants are connected the energy must be transmitted over more increasing distances. In this context, some parts of national onshore transmission grids, not even but particular in the North Sea Region, have to be strengthened to integrate this wind energy with an adequate level of reliability.

The same phenomenon can be found in a regional perspective. The differences in the national targets and incentives, combined with the various availabilities of renewable resources across the regions in Europe, lead to a greater penetration of some RES technologies in some areas than in others. This effect increases considerably the power exchange opportunities all over the North Sea Region, inducing power flows in the existing grid, mainly, between the northern part of the zone (northern Germany and Scandinavia), Ireland, United Kingdom and the southern part of it (France, Belgium, The Netherlands, southern Germany) and highlighting some needs to reinforce the transmission grid between and within those countries."

Q 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" (Communication, para. 18) than the general court.

(b)The "flexibility to revise or amend grounds is highly restrictive" in the commercial court.(Communication, para. 19.)

(c)A move to the commercial court "greatly shortens the time to go through the court process". (Communication, para. 18.)

(d)"Legal costs are greater" in the commercial court. (Communication, para. 19).

Response:

Regarding a), b), c) and d) please refer to **Annex F - Superior Courts Rules, Order 63A** which relates to Commercial Proceedings[26] which, among other requirements sets out strict requirements relating to how the case must be managed. Commercial proceedings are expected to be dealt with quickly, therefore, any party considered as delaying proceedings exposes themselves to costs (e.g. by making amendments to grounds etc)

"15.At the case management conference the Judge chairing the case management conference may:

(a) fix a timetable for the completion of preparation of the case for trial, and may for that purpose adopt any proposed timetable agreed by the parties if satisfied that it is reasonable;

(b) make any orders or give any directions which he may make or direct under rule 6(1) or (2) of this Order;

(c) if he considers that there is undue delay in, or he is otherwise dissatisfied with, the conduct of the proceedings, and without prejudice to any powers conferred on the Judge by Order 33, rule 11, require the party appearing to be responsible therefor, or the proper officer of or solicitor instructed in the proceedings by that party, to attend before him to explain the delay or other conduct with which he is dissatisfied, and may thereupon make or give such ruling or direction as he may consider appropriate for the purposes of expediting the proceedings or the conduct thereof;

(d) without prejudice to any powers conferred on the Judge by Order 99, rule 37, sub rule 13, disallow the costs of any indorsement of claim, pleading statement of issues or other document in the proceedings which contains unnecessary matter, or is of unnecessary length, and award against that party the costs thereby occasioned to any other party;

(e) without prejudice to any powers conferred on the Judge by Order 33, rule 11 and Order 99, rule 37, sub rule 31, disallow the costs of any party occasioned by a delay or default by that party in complying with a time limit for doing any act or taking any proceeding, and award against that party the costs thereby occasioned to any other party."

[26] https://www.courts.ie/rules/commercial-proceedings

In our case – See **Annex K-Proposed Directions**, , the case management schedule required rapid exchange of documents approx. every 2 weeks in advance of the trial. This rapid turnaround of complex legal issues places great pressure on small community groups who are fitting this in and around work and home. In essence, it appears that the commercial court is the most onerous of the courts to attend due to this time pressure which is also linked to exposure to costs.

Regarding d) According to information provided by The Citizens Information Board (the statutory body which supports the provision of information, advice and advocacy on a broad range of public and social services)

"*Lawyer's charges are based on the following:*

- *the complexity and novelty of the matter*
- *the skill or specialised knowledge needed to deal with the matter*
- *the time spent on the matter*
- *the urgency of the matter and whether priority was given to the matter over other matters*
- *circumstances in which the matter was dealt*
- *the number, importance and complexity of the documents prepared or examined*
- *the amount or value of any transaction involved*
- *whether there is any limitation on a lawyer's liability*
- *the time reasonably spent researching the matter*
- *the reasonable costs of any expert witnesses used"*

i.e. costs increase due to complexity / urgency and specialised knowledge such as in this case.

Q 28. The High Court judgment of 14 January 2015 (Party's response to communication, annex 1) 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.

Response:
On 28th Jan 2015, when threatened with costs we withdrew our application for leave to appeal. Counsel for ABP and EirGrid stated that they would not be seeking their costs. As a result, the judge dismissed the Action with no order as to costs.
Please see attached:

- Correspondence from EirGrid dated 21st January 2015
  See **Annex E – EirGrid Ltr to Phelim ONeill re. costs (21 Jan 2015)**
- witness statement provided at the time by our solicitor:
  see **Annex L – 20150129 TSmyth re costs**

Q 29. At page19 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?

Response:
In light of the threat by ABP to seek costs against us our legal team sought instruction from us whether to proceed or not. This was a verbal cost estimate by our legal team during that discussion.

Q 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?

Response:
In private legal correspondence from our solicitors on 30th January 2015, we were advised that

- "*We were of the view that the group fell with the criteria of section 50b, but ultimately the applicability of section 50b was a decision for the Judge to make. On Wednesday there was a potential exposure, because we could not completely predict the judge's decision, and for that reason I was obliged to seek the group's instructions on whether they wanted to proceed with the application for a certificate to appeal.*

  An Bord Pleanala were entitled to have an argument on the applicability of Section 50B. I was disappointed that they re-opened it as an issue, when it had appeared settled on the day of the judgment, but the unfortunately the Judge indicated on the 21st January that ABP and Eirgrid would not be bound by what they had previously indicated. Unfortunately, in these matters the Judge has a very wide level of discretion. Eirgrid also indicated on 21st that the matter was not settled."

- Please also see attached witness statement provided at the time by our solicitor:
  see **Annex L– 20150129 TSmyth re costs**