Questions to both Ireland and the Communicant

1. Questions 1, 2 and 3 are generally directed towards the costs regime in place in Ireland in respect of proceedings raising environmental issues.

2. As outlined at paragraphs 58 to 69 of Ireland's Response dated 11 August 2016 ("**Ireland's Response**"):

    2.1. In High Court proceedings generally, costs are governed by Order 99 of the Rules of the Superior Courts under which the general rule is that costs should "follow the event" and be awarded to the successful party;

    2.2. However, special costs regimes have been put in place in respect of environmental litigation under Section 50B of the Planning and Development Act 2000 ("**Section 50B**") and Part 2 of the Environmental (Miscellaneous Provisions) Act 2011;

    2.3. The special costs rules mean that, in Ireland, the costs of other parties are not imposed upon an applicant in environmental litigation save for limited exceptional circumstances as provided for in the legislation. This protects litigants in the event that they lose but does not prevent them obtaining their costs if they win;

    2.4. Moreover, litigants can seek an order determining that these special costs rules apply to their proceedings at an early stage (a so-called "**Protective Costs Order**").[1] It is standard practice that, where the nature of a given case allows, the parties will reach agreement at an early stage that protective costs measures apply.

    2.5. Separately, although an unsuccessful applicant is bound, in principle, to bear his own legal costs if he chooses to use legal representation, even this risk can be mitigated if representation is obtained on a conditional fee arrangement basis ("no foal no fee").

3. For completeness, since the delivery of Ireland's Response, Part 11 of the Legal Services Regulation Act 2015, which concerns costs in civil litigation, was commenced on 19 October 2019.[2] Section 169 sets out principles governing the award of costs which are similar to those under Order 99 of the Rules of the Superior Courts. Section 169(5) of the 2015 Act provides that nothing in Part 11 shall be construed as affecting Section 50B or Part 2 of the Environment (Miscellaneous Provisions) Act 2011. The commencement of Part 11 of the 2015 Act necessitated consequential amendments to the Rules of the Superior Courts, including significant amendments to Order 99, and these were made in the Rules of the Superior Courts (Costs) 2019 with effect from 3

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[1] In Village Residents Association Ltd. v. An Bord Pleanála [2000] 4 I.R. 321, the High Court (Laffoy J.) accepted that the Court had a jurisdiction to make a pre-emptive costs order early in proceedings under Order 99. However, such an order was held not to be merited in that case. The judgment was delivered on 23 March 2000. In addition to this general jurisdiction, express statutory provision is provided for pre-emptive costs orders in, for instance, section 7 of the Environment (Miscellaneous Provisions) Act 2011, for matters falling within the scope of Part 2 of that Act.

[2] Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019 (S.I. 502 of 2019).

December 2019.[3]

4. The Committee's first three questions refer, in particular, to Section 50B. Since the delivery of Ireland's Response, Section 50B has been the subject of amendments pursuant to Planning and Development (Amendment) Act 2018. The original section 50B and the text of the amending provision are enclosed to this letter for the Committee's convenience. Section 50B currently provides as follows:

"Costs in environmental matters.

…(1) This section applies to proceedings of the following kinds:

(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of —

(i) any decision or purported decision made or purportedly made,

(ii) any action taken or purportedly taken,

(iii) any failure to take any action,

pursuant to a statutory provision that gives effect to —

(I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,

(II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or

(III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies, or

(IV) paragraph 3 or 4 of Article 6 of the Habitats Directive; or

(b) an appeal (including an appeal by way of case stated) to the

[3] S.I. 584 of 2019.

Supreme Court from a decision of the High Court in a proceeding referred to in paragraph (a);

(c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b) .

(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A) , (3) and (4) , in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.

(2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.

(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so —

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.

(4) Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

(5) In this section a reference to 'the Court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the Supreme Court, as may be appropriate.

(6) In this section 'statutory provision' means a provision of an enactment or instrument under an enactment."

5. Separately, the Irish courts are also bound to give effect to EU law, including EU law obligations deriving from the Aarhus Convention. The recent judgment of the CJEU in Case C-470/16 **North East Pylon Campaign Ltd. v. An Bord Pleanála** considered the implications of Article 9(4) of the Convention as a matter of EU law and in particular the requirement that review procedures "*shall provide adequate and effective remedies… and be fair, equitable, timely and not prohibitively expensive*". The CJEU confirmed that, while Article 9(4) of the Aarhus Convention is not sufficiently precise to

have direct effect, it is intended to ensure effective environmental protection. Thus, the Court held Article 9(4) requires national courts to give an interpretation of national procedural law (including costs rules) which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive.

6. This means that Irish Courts are, as a matter of EU law, obliged to interpret Section 50B, and, indeed, where applicable, the general discretion to award costs under Irish law, to ensure that judicial review procedures are not prohibitively expensive. This has since been confirmed by the Irish courts,[4]

7. Additionally, and partially on foot of the Court of Justice's judgment in **North East Pylon**, in **Heather Hill Management Company CLG v. An Bord Pleanála**,[5] the High Court ruled that the costs rules in Section 50B in fact *go further than the requirements of EU law* as stated in Case C-470/16 **North East Pylon**, as they apply the special costs rules to the proceedings as such once they are directed at a decision that gives effect to any one of (a) the public participation provisions of the EIA Directive; (b) the Strategic Environmental Assessment Directive; (c) the Industrial Emissions Directive; or (d) Articles 6(3)/(4) of the Habitats Directive.[6] In that case, the High Court granted the applicant a Protective Costs Order that Section 50B applied to proceedings which had been brought to challenge a strategic housing development.

8. Significantly, the Court in **Heather Hill** held that Section 50B insulated the applicant against the costs of all aspects of the proceedings despite the fact that some of the grounds raised in those proceedings did not arise from EU or national environmental law. This goes beyond the CJEU's ruling in Case C-470/16 **North East Pylon**, which held that the requirement that costs not be prohibitively expensive applies only to the grounds covered by EU's implementation of the Aarhus Convention (in that case, the public participation provisions of the EIA Directive): see §44.

9. In addition, the Court in **Heather Hill** made the alternative finding that, even if Section 50B had not applied to the costs of all aspects of the proceedings, it would have been obliged in light of the interpretative obligation in the Court of Justice's judgment in **North East Pylon** to apply its discretion under Order 99 of the Rules of the Superior Courts to produce a similar outcome.[7] Thus, a Protective Costs Order ensuring that no order for costs would be made against the applicant in respect of those grounds not covered by Section 50B in the event they were unsuccessful would have been made.

10. Copies of the **North East Pylon** and **Heather Hill** judgments are enclosed for the Committee's attention. The Committee should note that the **Heather Hill** judgment is currently under appeal.

11. With these principles in mind, I shall address each of the three questions which the Committee has raised under this heading.

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[4] See, for instance, **North East Pylon Pressure Campaign Ltd. v An Bord Pleanála (No. 5)** [2018] IEHC 622 (Humphreys J); **SC SYM Fotovoltaic Energy Srl v Mayo County Council** [2018] IEHC 245 (Barniville J); **Heather Hill Management Company CLG v An Bord Pleanála** [2019] IEHC 186 (Simons J).

[5] [2019] IEHC 186, (Unreported, High Court, Simons J., 29 March 2019). It should be noted that this judgment is currently under appeal and judgment is awaited from the Court of Appeal.

[6] **Heather Hill**, *§3*.

[7] In this, the Court agreed with a ruling by a separate High Court Judge in **North East Pylon Pressure Campaign Ltd. v An Bord Pleanála (No. 5)** [2018] IEHC 622, (Unreported, High Court, Humphreys J., 30 October 2018).

<u>Question 1</u>

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.

12. In ordinary circumstances, each level of the Irish Court system determines whether, and to what extent, to award any party the costs of proceedings taken before those courts. In theory, this means that a successful party can receive a favourable costs award at first instance but still be the subject of an unfavourable costs order on appeal.

13. However, the position is different where Section 50B applies to the proceedings. This is clear from the structure of Section 50B(1):

    13.1. Section 50B applies to the types of "proceedings" identified in Section 50B(1)(a) to (c);

    13.2. Section 50B(1)(a) identifies categories of High Court judicial review proceedings which come within the meaning of "proceedings" for the purposes of the section; and

    13.3. Section 50B(1)(b) expands the definition of proceedings to encompass: "*an appeal (including an appeal by way of case stated) to the Supreme Court*[8] *<u>from a decision of the High Court in a proceeding referred to in paragraph (a)</u>*".

14. The clear effect of Section 50B(1)(b) is that, if the High Court (correctly) determines that Section 50B applies to proceedings at first instance, the costs of an appeal to the Court of Appeal against the High Court's substantive decision would also be covered by the protections afforded by Section 50B.

15. This proposition is of course subject to:

    15.1. The possibility that the High Court, in a given case, wrongly determines that the proceedings fall within the terms of Section 50B(1)(a) and this determination is the subject of a successful application for leave to appeal which leads to it being overturned in an appellate court (discussed below); and/or

    15.2. The appellate court exercises its discretion to award the costs, or part of the costs, of the appellate proceedings against the applicant on one of the narrow grounds provided for in Section 50B(3) (e.g., vexatious proceedings).

[8] Note, the reference to the "Supreme Court" pre-dates the establishment of the Court of Appeal under the Court of Appeal Act 2014. Section 74(1) of the 2014 Act provides that "*[r]eferences (howsoever expressed) to the Supreme Court, in relation to an appeal, including proceedings taken by way of case stated, which lies (or otherwise) to it in any enactment passed or made before the establishment day, shall be construed as references to the Court of Appeal, unless the context otherwise requires*".

The circumstances in which such an order would be made are evidently exceptional and this is a jurisdiction that has very rarely been invoked by the Irish courts.

16. In relation to the first of these possibilities, for this scenario to arise at all, a party would have had to have successfully applied for leave to appeal on a point of law relevant to the question of whether Section 50B applied to the proceedings. Pursuant to Section 50A(7) of the Planning and Development Act 2000 (as amended), to obtain such leave, a party would have to had demonstrated that the High Court's decision raised a point of law of exceptional public importance and that it was desirable in the public interest that the appeal be taken to the Court of Appeal.[9]

17. Section 50A(11)(a) provides that, on such an appeal, the Court of Appeal shall have "*jurisdiction to determine **only** the point of law certified by the Court under subsection (7) (and to make **only** such order in the proceedings as follows from such determination)*".

18. No judgment of an appellate court to date has overturned a determination of the High Court that Section 50B applied to the proceedings.

19. Against this background, it is important to stress that this issue does not arise on the facts of the Communicant's complaint. The Communicant elected not to pursue her application for leave to appeal to the Court of Appeal.

20. While Ireland was not a party to the proceedings or to the specific circumstances surrounding that decision, it appears from the papers communicated to the Committee to have been motivated by a concern regarding how the manner in which the proceedings had been conducted in the High Court might have affected the Communicant's entitlement to rely on Section 50B. The letter from the Communicant's Counsel dated the 29 January 2015 stated that there was a *"risk the Judge could have awarded a portion of costs for the argument we made outside the leave we were granted"*.

21. This may be a reference to the fact that the High Court Judge specifically referred in his judgment to the fact the Communicant sought at hearing to make arguments which had not been part of her pleaded case.[10] The High Court Judge declined to allow the Communicant to advance new arguments on which leave to seek judicial review had not been granted.[11]

Question 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.

[9] Section 50A(7) of the Planning and Development Act 2000 (as amended).

[10] See the High Court judgment in **Ratheniska Timahoe and Spink (RTS) Substation Action Group v. An Bord Pleanála** [2015] IEHC 18 at §§19 to 23.

[11] Indeed, it appears that the Communicant did not make any application to amend her case to encompass her new arguments.

22. Before addressing the scenario posited by Question 2, Ireland would like to emphasise that this scenario simply does not arise on the facts of the Communicant's complaint as Ireland understands them:

    22.1. The Communicant did not reach an agreement on the issue of costs in the High Court as An Bord Pleanála did not agree that all aspects of the proceedings were covered by the provisions of Section 50B. Rather, as appears from its letter dated 3 November 2014, An Bord Pleanála considered that Section 50B, if it applied at all, only covered part of the proceedings;

    22.2. Despite having been unsuccessful on all issues, no order for costs was made against the Communicant; and

    22.3. The Communicant elected to not pursue an application for leave to appeal to the Court of Appeal. For the scenario to arise at all, a successful leave application would have to have been pursued. As noted above, the legal threshold for leave to be granted is provided in Section 50A(7) of the Planning and Development Act 2000 (as amended), i.e., to obtain such leave, a party would have to had demonstrated that the High Court's decision raised a point of law of exceptional public importance and that it was desirable in the public interest that the appeal be taken to the Court of Appeal.[12] It is noted that counsel for the Communicant's letter dated 29 January 2015, in which he recorded the decision not to pursue the leave application, observed that the threshold for leave to be granted was "*quite high*".

23. In reality, a determination by the High Court that Section 50B applied to the High Court proceedings would, as per Section 50B(1)(b) discussed above, have ensured that Section 50B would cover the costs of any appeal (subject to the exceptional circumstances provided in Section 50B(3), set out above).

24. In response to Question 2, if parties to any proceedings actually reach an unconditional agreement which resolves any issue in the proceedings,[13] including costs, that agreement will be enforced by the Irish Courts. By way of example, in **Mulrooney v. John Shee and Co. Solicitors**,[14] lower court proceedings taken by Mr Mulrooney had been unsuccessful and, while an appeal had been lodged, this had been settled by agreement. Mr Mulrooney became unhappy with the agreement and commenced new proceedings seeking to reagitate the same issues. The Supreme Court (Clarke J.) held:

> *"7.1 The starting-point of any consideration of the issues which arise has to be to note the legal effect of a settlement of proceedings. As the authors of Delany and McGrath – Civil Procedure in the Superior Courts, 3rd ed., point out at para.19-28 'the compromise of a cause of action will extinguish it so that it can no longer be litigated by a party to the compromise or their privies'. The authors cite as an example Mahon v. Burke [1991] ILRM 59 at 63.*
>
> *7.2 As the authors also point out, the rationale for the rule lies in two aspects of public policy, being the need for there to be an end to disputation and the desirability of parties being held to their bargains.*

[12] Section 50A(7) of the Planning and Development Act 2000 (as amended).
[13] As opposed to an agreement contingent on one party not pursuing an appeal.
[14] [2013] IESC 20.

> *7.3 The basic question is, therefore, clear. Where a party settles proceedings then whatever cause of action was raised in those proceedings can no longer be the subject of litigation. A party has, by entering into an agreement to settle, given up their right to whatever claim might have been made in the proceedings in question."*

25. Similar issues would arise in the event that the question of the costs of High Court proceedings were agreed at first instance and incorporated into a consent order but one of the parties sought to reopen that issue on an appeal against the High Court's substantive decision. In general, quite exceptional circumstances would be necessary to revisit such an agreement and such circumstances would, in all likelihood, themselves need to be proven in further separate proceedings.

26. In the scenario where the parties reach an agreement at first instance that the proceedings come within the protections afforded by Section 50B, this would be reflected in the order of the High Court. For similar reasons as those expounded in **Mulrooney**, it would be exceedingly difficult for either party to resile from that agreement on appeal. Furthermore, in this scenario, by operation of Section 50B(1)(b), the appeal would also fall within Section 50B.

Question 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.

27. Ireland would like to emphasise that, like Question 2, Question 3 does not arise from the facts of the Communicant's complaints given her decision to voluntarily withdraw her application for leave to appeal.

28. Without prejudice to that position, as outlined above:

    28.1. If the High Court (correctly) determines that Section 50B applied to proceedings at first instance, the costs of an appeal to the Court of Appeal against the High Court's substantive decision would, in accordance with Section 50B(1)(b), also be covered by the protections afforded by Section 50B;

    28.2. A party that sought to dispute the High Court's determination that Section 50B applied to the proceedings could, in theory, seek leave to appeal on a point of law relevant to that determination. To obtain such leave, the party would have to demonstrate that the High Court's decision raised a point of law of exceptional public importance and that it was desirable in the public interest that the appeal be taken to the Court of Appeal. This would not, however, amount to an appeal of the "*substance of the case*" as raised in Question 3, but rather on the preliminary issue of whether the special costs regime applies.

Questions to Ireland only

29. Questions 4 to 20 are directed to Ireland only and Ireland responds as follows.

Question 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.

30. The applicable regulations were Part 18 of the Planning and Development Regulations 2001 (as amended). We attach a version of the regulations which illustrates the regulations as they were in force between 12 June 2009 (the date on which the relevant developer's request for pre-application consultation was lodged) and 23 April 2014 (the date on which the planning application was approved).

Question 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 Pleanala 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.

31. Section 2 of the Planning and Development Act 2000 (as amended) defines "*Strategic infrastructure Development*" as including – *"(d) any proposed development referred to in section 182A(1)"*. Sections 182A to 182E of the Planning and Development Act 2000 were inserted into that Act by Section 4 of the Planning and Development (Strategic Infrastructure) Act 2006. These sections set out a bespoke procedure for obtaining consent for the developments of electricity transmission or gas infrastructure. Section 182A applies to electricity transmission infrastructure.

32. Subsection (1) of Section 182A of the Planning and Development Act 2000, as amended, provides-

> *"Where a person (hereafter referred to in this section as the 'undertaker') intends to carry out development comprising or for the purposes of electricity transmission, (hereafter referred to in this section and section 182B as 'proposed development'), the undertaker shall prepare, or cause to be prepared, an application for approval of the development under section 182B and shall apply to the Board for such approval accordingly"*.

33. Subsection (9) of Section 182A of the Planning and Development Act 2000 (as amended) provides that-

> *"(9) In this section 'transmission', in relation to electricity, shall be construed in accordance with section 2(1) of the Electricity Regulation Act 1999 but, for the purposes of this section, the foregoing expression, in relation to electricity, shall also be construed as meaning the transport of electricity by means of—*

> (a) *a high voltage line where the voltage* ***would be 110 kilovolts or more****, or*
>
> (b) *an interconnector, whether ownership of the interconnector will be vested in the undertaker or not."*

34. Thus, the term "transmission" for the purposes of Section 182A incorporates the definition of "transmission" under Section 2(1) of the Electricity Regulation Act 1999 by reference. Section 2(1) of the 1999 Act[15] defines "transmission" as:

> *"The transport of electricity by means of a transmission system, that is to say, a system which consists, wholly or mainly, of high voltage lines and electric plant and which is used for conveying electricity from a generating station to a substation, from one generating station to another, from one substation to another or to or from any interconnector or to final customers but shall not include any such lines which the Board[16] may, from time to time, with the approval of the Commission, specify as being part of the distribution system but shall include any interconnector owned by the Board".*

35. Notably, the definition of transmission in Section 182A(9) expands upon the definition under the 1999 Act by adding the elements in Section 182A(9)(a) and (b).

36. As outlined below in connection with Question 6, it is important to note that, while certain prescribed procedures must be followed prior to any application pursuant to Section 182A, including pre-application discussions with An Bord Pleanála concerning the proposed application, any such discussions could not definitively determine the question whether or not the project concerned electricity transmission infrastructure. Rather, that question would only be determined when An Bord Pleanála reaches a decision following an application for approval under Section 182B. This has been confirmed by the judgment of the Supreme Court in the **Callaghan** case, discussed below, which concerned the similar procedural provisions applicable to other forms of strategic infrastructure development.

Question 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 Pleanala's determination of that issue?

37. In answering Question 6, it should be noted that there is a distinction between:

    37.1. An application for permission for a category of strategic infrastructure development specified in the Seventh Schedule of the Planning and Development Act 2000 (as amended);

    37.2. An application for permission for a proposed development of electricity transmission or gas infrastructure which, while also a type of strategic infrastructure development, are governed by Sections 182A to 182E rather

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[15] As inserted by Section 8(1) of the Energy (Miscellaneous Provisions) Act 2006.

[16] Defined under the 1999 Act as the Electricity Supply Board.

than Section 37E.[17]

Electricity Transmission Infrastructure

38. In terms of a proposed development of electricity transmission infrastructure, Section 182A(4) of the Planning and Development Act 2000 sets out the notification process to inform and seek the views of the public, prescribed bodies, relevant local authorities and, where appropriate, transboundary authorities on the proposed development.

39. Section 182E(1) of the 2000 Act requires a prospective applicant, before making an application for approval under 182B or 182D, enter into consultations with the Board in relation to the proposed development.

40. Section 182E(2) provides that in the course of pre-application consultations, the Board may give advice in relation to the proposed application, and in particular on the procedures involved in making the application and what considerations may have a bearing on the Board's decision. As noted in the judgment of Haughton J in the **Ratheniska** arising out of the facts at issue in the present proceedings ([2015] IEHC 18), the objective of these preliminary consultations is essentially, in the case of a proposed large infrastructure project, "*to ensure that the application for approval is well scoped and properly prepared in addition to minimising the risk of false starts*" (at §31).

41. Section 182E(3) (as in force at the time Laois-Kilkenny Reinforcement (Electrical Substation) Project pre-application and approval processes) provided that the prospective applicant may request the Board to give a written opinion on what information should be contained in the Environmental Impact Statement;[18] on receipt of such a request the Board, after consulting the prospective applicant and such bodies as may be specified by the Minister for the purpose, shall comply with it as soon as is practicable.

42. Section 182E(4) provides that for the purpose of pre-application consultation under section (1) and for the Board complying with an EIA scoping request under subsection (3), the prospective applicant shall provide to the Board sufficient information for the Board to assess the proposed development.

43. Section 182E(5) states that neither the consultations under subsection (1) nor the provision of an EIA scoping opinion under subsection (3) shall prejudice any other functions of the Board under the Planning and Development Act 2000 and Planning and Development Regulations 2001, or any other enactment and cannot be relied upon in the formal planning process or in legal proceedings.

44. Moreover, under Section 182B(1) of the Planning and Development Act 2000, before making a decision, the Board shall consider, inter alia, any submissions or observations made in accordance with section 182A(4) or (8).

45. The ability of the public to participate effectively in relation to the determination of whether a development was strategic infrastructure was considered by the Irish

[17] See paragraph 1, fifth item, of the Seventh Schedule of the 2000 Act.

[18] Which reflects a requirement of Article 5(2) of the EIA Directive.

Supreme Court in **Callaghan v. An Bord Pleanála**.[19] As noted above, that case concerned the procedure for applications for other (non-electricity transmission) strategic infrastructure projects pursuant to Section 37E Planning and Development Act 2000. Section 37B(1) requires persons proposing to make applications for permission for development specified in the Seventh Schedule of the 2000 Act to enter into consultations with An Bord Pleanála. Following the consultation, An Bord Pleanála is required under Section 37B(2) to express an opinion as to whether the threshold criteria concerning strategic importance under Section 37A(2)(a) to (c) have been met. This opinion will decide how the application is to be made (whether under Section 37E or otherwise) but, as confirmed by the Supreme Court, does not finally determine whether the development is strategic infrastructure.

46. In that case, it was argued that a member of the public should have an entitlement to participate at the pre-application consultation stage on the issue of whether the strategic infrastructure development procedure was appropriate. The matter was extensively argued at High Court level (before Costello J), in the Court of Appeal (Hogan J) and in the Supreme Court (Clarke CJ). Each Court found that there was no breach of the right to participate, as the opinion of An Bord Pleanála that the strategic infrastructure regime applied did not materially or practically affect the applicant's rights such as would engage the constitutional right to participate provided in Irish law.[20] In particular, it remained entirely open to An Bord Pleanála to revisit the issue of whether a development was one which constituted strategic development at the substantive stage of the application process.

47. Accordingly, the opinion given by An Bord Pleanála allowing access to the strategic infrastructure procedure did not definitively determine any issue, and there was no breach of the right of participation.

48. In so holding, the Supreme Court considered the requirements of the Aarhus Convention and of EU law. At §§6.4-6.5, for instance, Clarke CJ noted that,

> "6.4 There is no doubt that it is well established in European Union law in the environmental area that, in cases where Union law applies, a party must be entitled to be heard at a stage in the process where all relevant matters are still alive in the sense that the final decision on those matters can still be influenced. To put the same principle in the negative it is impermissible that a party be deprived of the opportunity to be heard at a stage where material final decisions are made on some aspect of the consent process, thus depriving the relevant party of the opportunity to seek to influence that aspect of the decision.
>
> 6.5. For example, this approach can be seen in the judgment of the Court of Justice of the European Union in Case C-416/10 *Križan* which concerned inter alia the requirement for early and effective public participation in the environmental sphere in the context of Directive 96/61 EC and the Aarhus Convention. The CJEU stated:-
>
> 'In that regard, it is important to note that Article 15 of Directive 96/61 requires the Member States to ensure that the public concerned are given early and effective opportunities to participate in the procedure for issuing a permit. That provision must be interpreted in the light of recital 23 in the preamble to

[19] [2018] IESC 39, (Unreported, Supreme Court, 31 July 2018).
[20] As recognised, for instance, in **Dellway Investments v NAMA** [2011] IESC 13.

that directive, according to which the public must have access, before any decision is taken, to information relating to applications for permits for new installations, and of Article 6 of the Aarhus Convention, which provides, first, for early public participation, that is to say, when all options are open and effective public participation can take place, and, second, for access to relevant information to be provided as soon as it becomes available. It follows that the public concerned must have all of the relevant information from the stage of the administrative procedure at first instance, before a first decision has been adopted, to the extent that that information is available on the date of that stage of the procedure.

...

However, it is for the referring court to determine whether, first, in the context of the administrative procedure at second instance, all options and solutions remain possible for the purposes of Article 15(1) of Directive 96/61, interpreted in the light of Article 6(4) of the Aarhus Convention, and, second, regularisation at that stage of the procedure by making available to the public concerned relevant documents still allows that public effectively to influence the outcome of the decision-making process.' (Emphasis added)."

49. However, the Supreme Court held that the opinion of An Bord Pleanála admitting the application to the strategic infrastructure procedure did not determine any issue: rather, all issues could be revisited at the substantive stage. Considering the argument of breach of the right to participate, Clarke CJ held that:-

"7.8 In this context it is appropriate to note the statement by Hogan J. in this case to the effect that this Court had made clear that an administrative decision maker hearing a matter between parties cannot be bound or constrained by any view formed by the same decision maker when making an earlier determination on an ex parte basis for an altogether different statutory purpose. In that regard Hogan J. cited Adam v. Minister for Justice (2001) 3 I.R. 53. That clearly represents a general principle. It has been clear, of course, since at least East Donegal Co-operative Livestock Mart Ltd. v. Attorney General [1970] I.R. 317 that legislation requires, if at all possible, to be construed in a manner which renders it consistent with the Constitution. Where legislation provides for some form of preliminary view being taken on an ex parte basis but gives the task of making a final decision after a full consideration involving the views of all interested parties, then a constitutional construction of that legislation would require that any party who had a right to be heard at the latter stage could not have that right impaired by the decision maker being in any way bound or influenced by the fact that an earlier decision may have involved a preliminary consideration of some of the issues which may fall for ultimate determination.

7.9 Indeed, such a process happens before the Courts. A judge may be persuaded on an ex parte application seeking an interim injunction that the plaintiff has established an arguable cause of action and that the other criteria necessary for the grant of an injunction are met. The same judge may be called on to consider whether to grant an interlocutory injunction having heard not only the plaintiff but the defendant. The judge hearing that interlocutory injunction should not pay any regard to the fact that, without having had the benefit of hearing the defendant, an earlier view had been taken that the criteria were met.

7.10 It seems to me to clearly follow that, unless the relevant legislation contains clear provision to the contrary, the proper interpretation of legislation involving a two stage process must be that any matters determined at an earlier or preliminary stage where an interested party is not entitled to be heard must remain open for full re-consideration at the stage when a final decision potentially affecting the rights or obligations of any individual is to be made. **It follows in turn that the default position in this case must be that the Board cannot be bound or influenced by its earlier decision to go down the SID route when considering the strategic importance of the proposed development in the context of making a final decision as to whether to grant permission.**

[…][21]

50. On this basis, Clarke CJ concluded that,

"7.13 For those reasons I am of the view that all relevant matters remain at large when the Board comes to consider whether to grant permission. The Constitution requires such a construction to be placed on the legislation if at all possible and there is nothing in the wording of the legislation which would prevent it being interpreted in that way. On that basis I agree with the judgment of the Court of Appeal on that issue."

51. It is clear, therefore, following the **Callaghan** judgment that the preliminary opinion of An Bord Pleanála in non-electricity transmission strategic infrastructure cases does not definitively determine any issue and, accordingly, the pre-application consultation procedure does not give rise to a breach of the right to participation. In the case of electricity transmission network strategic infrastructure applications pursuant to Section 182A, it is submitted that this position is even clearer, as no formal "Opinion" is issued by An Bord Pleanála similar to that issued under Section 37B PDA 2000.

52. The **Callaghan** principles were re-affirmed in **An Taisce v. An Bord Pleanála**,[22] in the context of the multi-stage substitute consent procedures as applied to unauthorised quarries[23] in Ireland. In **An Taisce,** the Supreme Court confirmed that, where the applicable statutory framework provides for a multi-stage process where a central substantive conclusion is reached at the first stage without any possibility of revisiting it thereafter, there is a requirement for public participation at the first stage. In that case, the legislative scheme did not allow for the key substantive question of exceptionality[24] as a pre-requisite to a grant of substitute consent to be reconsidered at the substantive stage, but public participation was provided for only at the second stage. The Supreme Court held that this did not comply with the requirements of the EIA Directive.[25] However, as with **Callaghan,** it was noted that "*…matters would be*

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[21] The Court at this stage considered and rejected an argument to the contrary based on another statutory provision.
[22] [2020] IESC 39, (Unreported, Supreme Court, 1 July 2020).
[23] An Taisce
[24] As the Committee will be aware, the CJEU has held that, while in principle environmental impact assessments must be carried out in advance of the grant of development consent, "*EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law*". However, it is a core substantive requirement of such reguarisation that "*it does not offer the persons concerned the opportunity to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception*": Joined Cases C-196/16 and C-197/16 **Comune di Corridonia**, §§37-38.
[25] §§127 to 128.

considerably different if there was a total overlap in the factors which may be considered at each stage, or if the decision firstly reached was subject to being revisited at the substantive stage".[26]

53. This is consistent with the requirements of Article 6(2)(a) of the Aarhus Convention which requires that the public be informed early in an "*environmental decision-making process*" of a "*proposed activity and the application on which a decision will be taken*". In the case of pre-application consultation, no application has yet been made, and no decision is taken at the end of that consultation.

54. In sum, Ireland submits that there was in this instance ample opportunity to participate in the process. The public participation provisions of the Convention and Directive were triggered at the time of the submission of the formal application for consent in October 2014. Subsequent to that, an oral hearing, in relation to the proposed development, was held over 6 days in November 2013. The Communicant was present and made both oral and written submissions, in particular to the Board's inspector. The Communicant was also permitted to conduct cross-examination of certain EirGrid witnesses.

Question 7

At what point does An Bord Pleanala's pre-application file for a strategic infrastructure development become available to the public on An Bord Pleanala'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?

55. Section 182E(6) of the Planning and Development Act 2000 (as amended) provides that An Bord Pleanála shall keep a record in writing of any consultations under Section 182E in relation to a proposed development, including the names of those who participated in the consultations, and a copy of such record shall be placed and kept with the documents to which any application in respect of the proposed development relates.

56. Thus, the physical pre-application file is made available at the offices of An Bord Pleanála for public inspection once an application for planning permission is lodged. The pre-application file is not made available on An Bord Pleanála's website at any time.

57. In respect of applications to which the Section 37B pre-application procedure applies, Section 37C(3) contains an identically worded provision to Section 182E(6).

Question 8

Both the communicant and the Party concerned refer to the €50 fee for a member of the public to making an observation or submission to An Bord Pleanala. 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.

58. Question 8 concerns the compatibility of €50 administrative fee to make an

[26] §§129.

observation or submission to An Bord Pleanála with two Articles of the Convention:

58.1. Article 3(2) which, under the heading "General Provisions, provides that "*[e]ach Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters*"; and

58.2. Article 6(7) which, under the heading "Public Participation in Decisions on Specific Activities", provides that "*[p]rocedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity*".

59. In posing this Question, the Committee has also referred to the twelfth preambular paragraph which states the Contracting Parties to the Convention recognised that "*… the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them*".

60. In terms of the reference to "free access" in the twelfth preambular paragraph, Ireland submits that this does not either by itself or read together with either Article 3(2) or 6(7) state that members of the public cannot be required to pay any fee in making a submission to environmental decision-maker.

61. In particular, it is submitted that the Convention does not preclude the charging of a reasonable fee justified by the administrative costs involved in processing the observations received from the persons concerned, as is the case for the €50 administrative fee.

62. Furthermore, Ireland observes that:

62.1. First, it is noteworthy that, in considering the meaning of the twelfth preambular paragraph, the Implementation Guide to the Convention states:[27]

> *"The twelfth preambular paragraph also mentions free access. Free access may be understood to mean free, open, unfettered and non-discriminatory access to procedures for public participation. It does **not** imply that the government should subsidize all the costs of any member of the public to participate in a given procedure. However, the **costs borne by the member of the public should be the normal costs associated with participation in any procedure**. The State should not impose financial constraints on members of the public that wish to participate. The issue of costs is further developed in the Convention". (emphases added)*

Thus, it is submitted that the reference to "free access" in the preamble is consistent with the €50 administrative fee.

62.2. Second, and in any event, Ireland notes that the preambular does not of itself

[27] The Aarhus Convention: An implementation guide (2nd ed., 2014), p. 32.

have legal effect[28] and that neither Article 3(2) nor 6(7) include any specific requirement stating that members of the public must be able to lodge written submission without contributing the administrative costs of the decision-maker.

63. For the assistance of the Committee, it is significant that this exact issue has also been considered by the Court of Justice in the context of the Directive 85/337. In Case C-216/05 **Commission v. Ireland**, the EU Commission argued that the requirement for a member of public to pay a fee to make a submission in relation to development consent procedures. The Court of Justice roundly rejected this argument for a number of reasons. The key portion of its reasoning was as follows:

> *"41 Article 5 of each of these directives provides that Member States may levy a charge for supplying information but that such charge is not to exceed a reasonable amount. Those rules show that, for the Community legislature, the charging of a fee of a reasonable amount is not incompatible with the guarantee of access to information.*
>
> *42 It follows from all the foregoing that the levying of an administrative fee is not in itself incompatible with the purpose of Directive 85/337.*
>
> *43 Although Directive 85/337 does not preclude fees such as those charged under the national legislation at issue in the present case,* ***they cannot, however, be fixed at a level which would be such as to prevent the directive from being fully effective****, in accordance with the objective pursued by it (see, to that effect, Case C-97/00 Commission v France [2001] ECR I-2053, paragraph 9).*
>
> *44 This would be the* ***case if, due to its amount, a fee were liable to constitute an obstacle to the exercise of the rights of participation conferred by Article 6 of Directive 85/337.***
>
> *45 The amount of the fees at issue here, namely EUR 20 in procedures before local authorities and EUR 45 at the Board level,* ***cannot be regarded as constituting such an obstacle****.* ***Nor has the Commission succeeded in refuting Ireland's argument that the level of the fees is justified in the light of the administrative costs involved in processing the observations received from persons concerned.***
>
> *46 In the light of those considerations, the Commission's arguments that the fees in question are contrary to the scheme and purpose of Directive 85/337 must be rejected". (emphasis added)*

64. In summary, the Court of Justice accepted that: (i) the charging of fees *per se* was not incompatible with the scheme and purpose of the public participation procedures under the EIA Directive; (ii) fees were permissible to the extent that they were not set at a level which was liable to constitute an obstacle to exercise participation rights; (iii) the specific fees in place in Ireland were not such an obstacle; and (iv) there was no evidence to refute the argument that the fees were justified in light of the administrative costs involved in processing the fees.

[28] For example, in its decision dated 25 February 2011 in ACCC/C/2009/38 concerning the United Kingdom, the Committee noted at para. 68: "*the preamble, while being an important aid to interpreting the Convention, does not in itself create binding legal obligations*".

65. Ireland submits that, for similar reasons, the €50 administrative fee raised in Question 8 is consistent with Article 3(2) and Article 6(7).

Question 9

With respect to a "normal" planning application under article 34 of the Planning and Development Act 2000:

(a) Is it necessary to seek leave to appeal the planning permission to An Bord Pleanala?
(b) Does An Bord Pleanala review the merits of the planning decision?
(c) What are the cost rules for an unsuccessful third party appeal to An Bord Pleanala? Do costs follow the event or does each party bear their own costs?

66. Question 9 concerns the rules for lodging, nature of, and costs rules for appeals to An Bord Pleanála against ordinary planning decisions under Section 34 of the Planning and Development Act 2000 (as amended).

67. In terms of Question 9(a):

67.1. Section 37(1)(a) of the 2000 Act provides that: "*[a]n applicant for permission and any person who made submissions or observations in writing in relation to the planning application to the planning authority in accordance with the permission regulations and on payment of the appropriate fee, **may**, at any time before the expiration of the appropriate period, appeal to the Board against a decision of a planning authority under section 34";*

67.2. In addition:

67.2.1. Section 37(4)(a) provides that, notwithstanding section (1), "*where in accordance with the permission regulations any prescribed body is entitled to be given notice of any planning application, that body shall be entitled to appeal to the Board before the expiration of the appropriate period within the meaning of that subsection where the body had not been sent notice in accordance with the regulations*";

67.2.2. Section 37(4)(c) provides that, notwithstanding section (1), "*a body or organisation referred to in paragraph (d)* [effectively environmental NGOs][29] *shall be entitled to appeal to the Board against a decision by a planning authority on an application for development (being development in respect of which an environmental impact assessment report was required to be submitted to the planning authority in accordance with section 172) before the expiration of the appropriate period within the meaning of that subsection*";

67.2.3. Section 37(6)(a) provides that "*[n]otwithstanding subsection (1)(a), a*

[29] Section 37(4)(d) refers to bodies or organisations "*(not being a State authority, a public authority or a governmental body or agency) —*
(i) the aims or objectives of which relate to the promotion of environmental protection,
(ii) which has, during the period of 12 months preceding the making of the appeal, pursued those aims or objectives, and
(iii) which satisfies such additional requirements (if any) as are prescribed under paragraph (e)"

person who has an interest in land adjoining land in respect of which a decision to grant permission has been made may, within the appropriate period and on payment of the appropriate fee, apply to the Board for leave to appeal against a decision of the planning authority under section 34";

67.3. Thus, there is no requirement to seek leave to lodge an appeal under Section 37 for persons falling within the terms of Section 37(1)(a). Nor is there a leave requirement where an appeal is brought under Section 37(4) by a prescribed body which was entitled to be given notice of the application but was not or by an environmental NGO;

67.4. However, persons not falling within the terms of Section 37(1)(a) but who can lodge an appeal under Section 37(6)(a) must seek leave to appeal.

68. In terms of Question 9(b):

68.1. Section 37(1)(b) of the 2000 Act provides that, subject to certain exceptions, "*where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application* ***as if it had been made to the Board in the first instance*** *and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given; and subsections (1), (2), (3) and (4) of section 34 shall apply, subject to any necessary modifications, in relation to the determination of an application by the Board on appeal under this subsection as they apply in relation to the determination under that section of an application by a planning authority*";

68.2. The exceptions to this provision are narrow and concern:

68.2.1. Where An Bord Pleanála is empowered to dismiss an appeal for failure to respond to a request for submission or documents (Section 133);

68.2.2. Where An Bord Pleanála enjoys a discretion to dismiss an appeal because, either:

68.2.2.1. It is of the opinion that:

(a) The appeal is vexatious, frivolous or without substance or foundation;

(b) The appeal is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducement by any person;

or

68.2.2.2. It is satisfied, in the particular circumstances, the appeal or referral should not be further considered by it having regard to:

(a) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or

(b) any previous permission which in its opinion is relevant.

(Section 138)

68.2.3. Cases where an appeal relates only to a condition or conditions attached to permission granted by the planning authority at first instance and An Bord Pleanála does not consider that a full de novo consideration would not be warranted (Section 139).

68.3. It follows that, in the vast majority of cases, the appeal to An Bord Pleanála is entirely *de novo* reconsideration of the planning application.

69. Finally, as regards Question 9(c):

69.1. In terms of the costs of an appeal under Section 37, the general position is that each party bears its own costs. However, Section 145(1) provides that:

"*(a) the Board, if it so thinks proper and irrespective of the result of the appeal or referral,* ***may direct the planning authority to pay—***

(i) to the appellant or person making the referral, such sum as the Board, in its absolute discretion, specifies as compensation for the expense occasioned to him or her in relation to the appeal or referral, and

(ii) to the Board, such sum as the Board, in its absolute discretion, specifies as compensation to the Board towards the expense incurred by the Board in relation to the appeal or referral,

and

(b) in case —

(i) the decision of the planning authority in relation to an appeal or referral is confirmed or varied and the Board, in determining the appeal or referral, does not accede in substance to the grounds of appeal or referral, or

(ii) the appeal or referral is decided, dismissed under section 138 or withdrawn under section 140 and the Board, in any of those cases, considers that the appeal or referral was made with the intention of delaying the development or securing a monetary gain by a party to the appeal or referral or any other person,

the Board may, if it so thinks proper, ***direct the appellant*** *or person making the referral to pay —*

(I) to the planning authority, such sum as the Board, in its absolute discretion, specifies as compensation to the planning authority for the expense occasioned to it in relation to the appeal or referral,

(II) to any of the other parties to the appeal or referral, such sum as the Board, in its absolute discretion, specifies as compensation to the party for the expense occasioned to him or her in relation to the appeal or referral, and

(III) to the Board, such sum as the Board, in its absolute discretion, specifies as compensation to the Board towards the expense incurred by the Board in relation to the appeal or referral."

69.2. It follows that, depending on the outcome of the appeal, the Board has a discretion to direct either the planning authority or the appellant to compensate named parties in relation to expenses incurred in relation to the appeal.

Question 10

On what date was the Grid 25 Implementation Programme 2011-2016 adopted?

70. The Grid25 Implementation Programme was drafted, subjected to a public consultation process and finalised in April 2012. No legal challenge was taken against the Grid 25 Implementation Programme and/or the Strategic Environmental Assessment conducted in relation to that programme.

Question 11

On what date was the SEA for the Grid Implementation Programme 2011-2016 finalized?

71. The Laois Kilkenny Reinforcement Project was specifically identified in the Implementation Programme (sections 2.5.2 & 4.2), attached and available online,[30] and thereby assessed – at an appropriate Plan-level – in the SEA. The Environmental Report for the SEA is attached and is available online.[31] Laois Kilkenny is specifically mentioned in sections 8.11.2 which is derived from 2.5.2 of the Implementation Programme, and in section 8.12.

72. The Project was then subsequently assessed at project level in the EIA process undertaken by An Bord Pleanála.

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30 http://www.eirgridgroup.com/site-files/library/EirGrid/Grid25-Implementation-Programme-2011-2016.pdf.

31 https://www.eirgridgroup.com/site-files/library/EirGrid/Environmental-Report-for-the-Grid25-Implementation-Programme-2011-2016-Strategic-Environmental-Assessment.pdf.

73. The Draft Implementation Programme and Draft SEA Report(s) were publicly advertised and subject to public consultation prior to their finalisation. The submissions of the public consultation process are contained within the final Environmental Report as per the link above.

Question 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.

74. The European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the "AIE Regulations") transpose the requirements of EU Directive 2003/4/EC into Irish law. The duties to provide environmental information provided for in the AIE Regulations apply to "public authorities" as defined thereunder.

75. EirGrid Plc is a public authority within the meaning of the AIE Regulations. This is clearly drawn to the attention of the public on EirGrid Plc's website which also sets out information on how to make requests under the AIE Regulations.[32]

Question 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. 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?

76. An Bord Pleanála has confirmed that the full EIS was made available.

77. Section 182A (4) of the 2000 Act requires an applicant for approval to enable all the application documentation be made available for public inspection at the offices of the local planning authority (or authorities) and An Bord Pleanála and this was done in this case.

78. In addition to these statutory requirements, An Bord Pleanála also required the applicant for approval to post the full application documentation to a dedicated website location and this was also done.[33] The details of the availability of the application documentation as set out was included in the statutorily required public newspaper notices of the application. Three such newspaper notices were published in the three newspapers circulating in the area of the proposed development.

79. These processes were repeated upon receipt by An Bord Pleanála of the Environmental Impact Statement it requested in relation to the proposed development.

Question 14

At paragraph 4.6 of his statement for the oral hearing, EirGrid's technology and

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[32] https://www.eirgridgroup.com/contact/aie/.
[33] See www.eirgridlaoiskilkenny.ie.

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.

80. As Ireland understands it, by "public consultation" in this question, the Committee is referring to the oral hearing held from 4th – 7th November and 14th – 15th November 2013, as referenced in the Inspector's Report. As the Inspector's Report notes, in addition to that oral hearing, the applicant, EirGrid, had also undertaken pre-application public consultations in 2009-2012. These public consultation events are listed at pp. 55 – 56 of the Inspector's Report and summarised in the preceding pages. They resulted in the publication of a "Stage 1" public consultation report,[34] published in May 2011, and a "Stage 2" public consultation report, published in February 2012.[35]

81. EirGrid has confirmed that the details of the proposed development were summarised in the **Planning Reports** submitted with the planning application, which I attach herewith and which are also available online[36]. Section 8 of that the First Stage Planning Report summarises the project elements, including: a description of the project; explanations of the project units; engineering design; context for angle masts; underground cable; and the construction methodology, using photomontage and diagrams as appropriate.

82. In terms of the suitability of the different alternatives available for the Laois Kilkenny reinforcement project, a report entitled **Laois-Kilkenny Reinforcement Project Technical Comparison of AIS v GIS Substation Options** which was submitted as part of the application documentation at the outset of the application, is also attached and is available online.[37] This provides a cost and technical comparison between Air Insulated Switchgear and Gas Insulated Switchgear substations for the purposes of building the 400kV substation for the project.

83. The documents submitted were in accordance with Irish planning requirements and they were made available to the public during the public consultation.

84. It is noted within the appendix of the Stage 1 report "Technical Comparison of AIS vs GIS Substation Options" that EirGrid intended to build 6 x 400 kV bays and 9 x 110 kV bays. This was in line with EirGrid policy at the time to cater for the current and future needs of the region if required. Subsequent to this, a decision was made at executive level in EirGrid that the minimum amount of bays would be constructed to meet the project requirements, and thus the number of bays has in fact been reduced to 4 x

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[34] http://www.eirgridlaoiskilkenny.ie/media/pdf/21%20The%20Final%20Planning%20Application%20(Jan%202013)/Vol%202%20Planning/1%20Appendix%201%20-%20Stage%201%20Report%20Placeholder.pdf .
[35] http://www.eirgridlaoiskilkenny.ie/media/pdf/21%20The%20Final%20Planning%20Application%20(Jan%202013)/Vol%202%20Planning/2%20Appendix%202%20-%20Stage%202%20Report%20Placeholder.pdf .
[36] Planning Report.pdf (eirgridlaoiskilkenny.ie)
[37] http://www.eirgridlaoiskilkenny.ie/media/pdf/21%20The%20Final%20Planning%20Application%20(Jan%202013)/Vol%202%20Planning/Stage%201%20Appendices/Appendix%20B%20Technical%20Comparison%20of%20AIS%20vs.GIS%20Substation%20Opt.pdf .

400 kV bays and 6 x 110 kV bays with wing couplers in each station. There was one spare bay in the 110 kV station and that has now been allocated to a solar farm that is located adjacent to the substation. If in the future there is a need to extend (of which there currently is not) this would require additional equipment to be installed. In summary, the scope of the project has been reduced since the original application to only cater for the direct needs of the Laois Kilkenny Reinforcement Project for quality and security of supply for the south eastern region.

85. A drawing of the final substation sizing was provided within the planning application statutory drawings and is attached and available online.[38]

Question 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.

86. Within the planning application submission there are details of alternative options that were considered by EirGrid to meet the need for the project as per the system requirements at that time. A report into the available options to meet the need of the project is available as an **Appendix to the Stage 1 Planning Report** and is attached and available online.[39] The body of the **Stage 1 Planning Report** submitted with the planning application is also attached. The **Environmental Impact Statement** (see in particular chapter 4 in the EIS on "Alternatives" which details the context and rationale for the proposed development including "capacity" issue) is available at EirGrid Project. Environmental Impact Statement (eirgridlaoiskilkenny.ie). Please also note the section of the Inspector's Report considering the issue of alternatives, at pp. 75 onwards.

87. As these documents indicate, the project includes all of the necessary infrastructure to meet the quality and security of supply needs for the region. The option which was brought forward requires the least amount of new infrastructure to be built and the project was designed to meet the need identified.

Question 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.

88. Oral Hearings before An Bord Pleanála are recorded but the recording is not subsequently transcribed. The recording is primarily used as a device that assists the inspector in compiling a summary report of the oral hearing. Summaries of the

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[38] http://www.eirgridlaoiskilkenny.ie/media/pdf/21%20The%20Final%20Planning%20Application%20(Jan%202013)/Vol%201a%20Statutory/4%20Station%20Drawings%20-%20Coolnabacky/6%20Site%20Layout%20Plan%20(Compound).pdf.

[39] http://www.eirgridlaoiskilkenny.ie/media/pdf/21%20The%20Final%20Planning%20Application%20(Jan%202013)/Vol%202%20Planning/Stage%201%20Appendices/Appendix%20F-2%20Assessment%20of%20Alternative%20400-110kV%20Substation%20.pdf

submissions made are therefore contained throughout the Inspector's Report dated 31st January 2014.

89. For instance, I draw the Committee's attention to:

89.1. The Inspector's summary of the submissions received, at pp. 19;

89.2. The Inspector's summary of the observers' questioning of the expert witnesses in relation to their complaints of alleged inadequate opportunity for the public to participate in the procedure up to that point in time (at pp. 71 onwards);

89.3. The Inspector's discussion concerning the applicant's reference to "future proofing" insofar as, in addition to the stated purpose of the proposed development as a Laois/Kilkenny electricity reinforcement project, spare bays within the substation would enable the connection of wind farms into the grid (at pp. 112-114);

89.4. The Inspector's consideration of the concerns voiced in this regard at the oral hearing, namely a "fear of what might be facilitated by the proposed Coolnabacky substation", but ultimate conclusion that "most of the objections raised against the proposed development, both in the written submissions and during the course of the oral hearing have been overstated" (at p. 112);

89.5. The Inspector's consideration of the state of the wind farm planning applications in the vicinity at the time and the extent to which, given the "very considerable uncertainty" relating to them, they could reasonably be factored into the considerations of the present project (at pp. 112-113);

89.6. The concern voiced at the oral hearing that the proposed development could facilitate an even larger wind farm designed to export electricity to the United Kingdom (at p. 113), and the clarification made at the hearing that this would not occur (ibid.)

90. Aside from the summaries contained in the Inspector's report, no separate verbatim transcript exists of the oral hearing.

91. As noted above in relation to Question 14, it is noted within the appendix of the Stage 1 report "Technical Comparison of AIS vs GIS Substation Options" that EirGrid intended to build 6 x 400 kV bays and 9 x 110 kV bays. This was in line with EirGrid policy at the time to cater for the current and future needs of the region if required. Subsequent to this, a decision was made at executive level in EirGrid that the minimum amount of bays would be constructed to meet the project requirements, and thus the number of bays has in fact been reduced to 4 x 400 kV bays and 6 x 110 kV bays with wing couplers in each station. There was one spare bay in the 110 kV station and that has now been allocated to a solar farm that is located adjacent to the substation. If in the future there is a need to extend (of which there currently is not) this would require additional equipment to be installed. In summary, the scope of the project has been reduced since the original application to only cater for the direct needs of the Laois Kilkenny Reinforcement Project for quality and security of supply for the south eastern region.

Question 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.

92. The High Court Judge in the Communicant's case confirmed there is no automatic entitlement to costs for persons appearing before an oral hearing in a planning matter.[40]

93. There was no explicit approved cost award guidance or policy in place at that time in respect of such cost claims. Accordingly, An Bord Pleanála's approach was based on the relevant statutory provision as set out in sub-sections 5(A) and 5(B) of section 182B of the Planning and Development Act 2000 (as inserted by section 64 of the Planning and Development Amendment Act 2010). These provisions enable the Board to exercise a power to direct payment of such costs or a contribution to costs as the Board, in its absolute discretion, considers to be reasonable costs.

94. For completeness, I note that, at the time, a policy existed in relation to the award of costs in the context of objections to Compulsory Purchase Orders. This Policy was to the effect that costs would be awarded to a person who successfully resisted a Compulsory Purchase Order. The 2004 Policy did not apply to the costs of general observers in the context of development consent applications and therefore did not apply in the Communicant's case. Further, in 2016, An Bord Pleanála adopted a costs policy which covers electricity approval applications. This Policy indicates that an observer may be awarded costs in limited circumstances. Copies of the 2004 and 2016 policies are attached.

95. As regards the costs outcome in the particular case of the Communicant, An Bord Pleanála has stated that, in exercising its statutory discretion to award or not award costs in this case, it had particular regard to the fact that:

95.1. Relevant local authorities have a particular role in the planning system as the author of the relevant Development Plan applicable in the area, and their input and views on proposed development in their area, while not determinative of An Bord Pleanála's decision, is therefore of particular relevance as an input into the decision-making process;

95.2. In certain categories of strategic infrastructure (section 37E applications) the local planning authority is statutorily required to itself compile and submit a detailed planning report on the application as an input to the Board's consideration of such an application. While such a report is not statutorily required under Sections 182A/B such a local planning authority analysis is typically also submitted in these cases as an input to Board consideration;

95.3. Accordingly, in recognition of the fact that it is the standard practice of local

[40] **Ratheniska Timahoe and Spink (RTS) Substation Action Group v. An Bord Pleanála** [2015] IEHC 18 at §136.

authorities, as authors of the applicable Development Plan, to provide a report to the Board, and given the relevance of these reports and the time entailed in preparing such reports in each case arising, the local authority is usually awarded modest costs.

Question 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**

96. In relation to the **Harrington** case the following are attached (the High Court record number of which is in fact 2013 No. 276 JR):

96.1. The substantive High Court judgment of O'Neill J ([2014] IEHC 232);

96.2. The High Court order awarding costs against the Applicant; and

96.3. The Supreme Court order on appeal against that costs order, which on consent vacated the costs award against the Applicant and provided that the Respondent was to pay the applicant's costs of the appeal against the costs ruling, as well as the costs of the substantive proceedings.

97. While Ireland was not involved in the **Harrington** proceedings, it will be seen that the substantive proceedings in that case concerned inter alia an alleged breach of the Habitats Directive (Directive 92/43/EC). At that time, the version of Section 50B did not expressly list the Habitats Directive within the Directives covered by Section 50(B)(1)(a). Subsequent to this, Section 50B(1)(a) was amended by the Planning and Development (Amendment) Act 2018 to also expressly list the Habitats Directive. As the Supreme Court order in the **Harrington** case indicates, the Supreme Court had in those proceedings certified for appeal pursuant to Section 50A(7) of the Planning and Development Act 2000 the following point of law that the Supreme Court had determined to constitute a point of exceptional public importance:

> "*Whether or not section 50B of the Planning and Development Act 2000 as amended properly construed applies to all proceedings that arise under the Planning and Development Act 2000 as amended or merely those proceedings that arise pursuant to a law of the State that gives effect to the European Directives listed at section 50B(1)(a)?*"

98. Ultimately however as the Order indicates, An Bord Pleanála consented to pay the applicant's costs in that matter and therefore no judgment was delivered by the Supreme Court on that appeal. Harrington is therefore an example of a successful appeal by an applicant against a costs order made against it, resulting in the costs of the appeal of that costs order and the costs of the substantive proceedings being awarded to the applicant.

99. In relation to the **McCallig v. An Bord Pleanála** judgment, a copy of this judgment is attached. The Committee is also referred to the more recent judgment of the High

Court in **Heather Hill Management Company CLG v. An Bord Pleanála**[41] (cited above and also enclosed) which effectively departed from the reasoning in **McCallig** and which represents the current state of the case-law on the scope of application of Section 50B.

Question 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"?

100. Article 3(2) provides that "*[e]ach Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters*".

101. However, Ireland notes that this is an obligation to endeavour to assist and not obligation to require statutory bodies to conduct litigation in any particular manner. Ireland respectfully submits that the measures it has put in place concerning environmental costs satisfy the requirements of Article 3(2) and Article 9(4) of the Convention. In particular, these measures create rules which provide protection for litigants without interfering with the functions of planning authorities, such as An Bord Pleanála, which are independent and entitled to conduct litigation and to exercise their rights of defence when proceedings are instituted against them.

102. While Ireland was not a party to the proceedings, it is noted that, in the letter of 3 November 2014 to which this Question refers, An Bord Pleanála gives its view that the special costs rules apply only to the extent that the matters raised in the application relate to "*EIA issues*".

103. There would have been no guarantee that the High Court would have agreed with

[41] [2019] IEHC 186, (Unreported, High Court, Simons J., 29 March 2019).

An Bord Pleanála's argument, had the matter gone to hearing. As set out above, for instance, in **Heather Hill** the High Court adopted a broader view of the scope of Section 50B. Indeed, the Court's jurisdiction to determine the correct interpretation of law, and its application to the facts, is, itself, important in this context.

104. In Ireland's respectful submission, the requirement under Article 3(2) of the Convention to "*endeavour to ensure that officials and authorities assist the public in seeking…access to justice*" should not prevent an authority from raising what they considered to be genuine questions of law which are the subject of litigation before the Courts (in this case, the scope of application of Section 50B). While the views of the applicant and An Bord Pleanála on the correct interpretation of the scope of Section 50B may have differed, it would appear inconsistent with the independence of, and rights of defence of, such planning authorities if they were obliged to concede such questions of law and/or ignore what they may consider to be the correct interpretation of a given statutory provision.

105. In these circumstances, it is respectfully submitted that the fact that An Bord Pleanála raised this substantive point on the facts of these proceedings should not of itself amount to a breach by Ireland of its obligations

Question 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 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"?

106. Ireland repeats its observations in connection with Question 19 concerning the legal framework in place which insulates applicants in environmental proceedings from costs orders where Section 50B applies. However, as noted above, An Bord Pleanála is an independent statutory agency which has the right to exercise its right of defence in proceedings brought against it.

107. While Ireland was not a party to the proceedings, Ireland observes that ultimately, as the judgment of Haughton J indicates, it would appear that a significant number of arguments were made at the hearing of the proceedings that the judge ruled fell outside the leave granted, and therefore were contrary to the requirements of Irish judicial review procedure. It should be noted that, under Section 50A(3)(a), the Court shall not grant leave to bring proceedings under Section 50 PDA 2000 unless the applicant succeeds in demonstrating that there are "*substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed*". Where a judge has refused leave to bring certain grounds, s/he has therefore determined that the applicant has failed to show such substantial grounds.

Proceeding to argue points upon which leave has been denied is not permitted as it would ignore the judge's decision on leave.

108. It would appear that the actions of An Bord Pleanála may be viewed in this context. This is consistent with the note of the applicant's barrister dated 29 January 2015, who seems to have been aware of this issue in stating that "*although section 50B of the Planning and Development Act ought to have protected us, <u>there was always a risk the judge could have awarded a portion of the costs for the argument we made outside the leave we were granted</u>*" (emphasis added).

109. As noted above, there would have been no guarantee that the High Court would have agreed with any argument that An Bord Pleanála may have sought to make that costs of the portions of the argument falling outside the leave granted should be awarded against the applicant, had the matter gone to hearing. This would be a matter for the Court to determine.

110. Nevertheless, in these circumstances, it is respectfully submitted that the fact that An Bord Pleanála raised this substantive point of law on the facts of these proceedings should not constitute a breach by Ireland of its obligations. It would appear inconsistent with the independence of, and rights of defence of, such planning authorities if they were obliged to concede what they considered to be genuine issues of legal principle, such as the preclusion under Irish judicial review procedure on raising issues in argument for which no leave had been granted. In Ireland's respectful submission, any such obligation would risk seriously compromising the effectiveness of such central procedural rules of Irish judicial review procedure.

111. From its perspective, An Bord Pleanála has indicated that, in this instance, it made a proposal that it would not seek costs, by arguing that the matter fell in part outside the scope of Section 50B, if the applicant in the High Court proceedings withdrew its application for leave to appeal. The applicant elected to accept this proposal. As noted above, this arose in circumstances where the applicant was found by Haughton J to have pursued a significant number of issues for which it had not been granted leave.

112. An Bord Pleanála wishes to emphasise to the Committee that, while it typically seeks to have litigation concluded as soon as possible in order to bring certainty to its planning decisions and also reduce expenditure on public funds, it cannot and does not in that context ever seek to deny public access to justice or threaten applicants in any way. Reasonable offers of compromise are made in a bona fide manner as was done in this case. Had the compromise been rejected by the applicant, the issue of costs would have been for the Court to determine in the context of the protective framework under Section 50B.