

## **Findings and recommendations with regard to communication ACCC/C/2014/112 concerning compliance by Ireland**

**Adopted by the Compliance Committee on 25 July 2021<sup>1</sup>**

### **I. Introduction**

1. On 29 May 2014, seven Irish non-governmental organizations (NGOs), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Ireland to comply with articles 3(1), 4, 5, 6, 7, 8 and 9 of the Convention in connection with renewable energy.
2. More specifically, the communicants allege systemic breaches of the above provisions by the Party concerned in its implementation of the European Union's renewable energy programme in the Party concerned through the Irish National Renewable Energy Action Plan.
3. On 22 August 2014, the Committee sent questions to the communicants seeking clarifications. The communicants provided answers thereto on 3 September 2014.
4. On 19 September and 12 November 2014, the communicants provided additional information.
5. On 21 November 2014, the Committee sent questions to the communicants seeking further clarifications.
6. On 1 December 2014, the communicants provided answers to the Committee's questions.
7. At its forty-seventh meeting (Geneva, 16-19 December 2014), the Committee determined on a preliminary basis that the communication was admissible.
8. On 28 June 2015, the communicants provided additional information.
9. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 29 June 2015.
10. On 3 and 13 October 2015, the communicants provided updates.
11. On 30 November 2015, the Party concerned provided its response to the communication.
12. On 2 January and 6 March 2016, the communicants provided additional information and on 3 February and 2 June 2016, respectively, two observer members of the public provided statements.
13. On 10 June 2016, the Party concerned provided additional information.
14. The Committee held a hearing to discuss the substance of the communication at its fifty-third meeting (Geneva, 21-24 June 2016), with the participation of representatives of the communicants and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.

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<sup>1</sup> This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

15. On 12 August 2016, the communicants provided further information.
16. On 13 July 2016, observer Environmental Pillar, a network of Irish non-governmental organizations, provided a statement.
17. On 18 August 2016, 27 February 2017, 3 September 2017, and 15 January 2018, the communicants provided additional information.
18. On 22 October 2019, the Party concerned provided an update, and on 23 October 2019, the communicants submitted comments thereon.
19. The Committee completed its draft findings through its electronic decision-making procedure on 14 June 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded on that date to the Party concerned and the communicants for comments. Both were invited to provide comments by 23 July 2021.
20. On 23 July 2021, the Party concerned, the communicants, and the observer Irish Environmental Network each provided comments on the draft findings.
21. The Committee proceeded to finalize its findings in closed session, taking account of the comments received, and adopted its findings through its electronic decision-making procedure on 25 July 2021. It agreed that the findings should be published as a formal pre-session document to its seventy-second meeting.

## II. Summary of facts, evidence and issues<sup>2</sup>

### A. Legal framework

#### Access to information

22. At the time of the information requests at issue in the present case, members of the public could make requests to public authorities for the release of environmental information under the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007), as amended by the European Communities (Access to Information on the Environment) (Amendment) Regulations 2011 (S.I. No. 662 of 2011) (the 2011 AIE Regulations).<sup>3</sup> Articles 8 and 9 of the 2011 AIE Regulations established the reasons that may be invoked to refuse a request for information.<sup>4</sup>

#### Decision-making on specific activities

23. Planning decisions are taken by planning authorities or the planning appeals board, An Bord Pleanála. Section 34(3) of the Planning and Development Act 2000 (the PDA) places an express obligation on a planning authority to consider “any written submissions or observations concerning the proposed development made to it in accordance with the permission regulations by persons or bodies other than the applicant”. A similar obligation is placed on An Bord Pleanála by section 37 of the PDA. Where a planning authority or An Bord Pleanála is required to carry out an environmental impact assessment (EIA), section 172(1G) of the PDA requires the authority or the Board to consider submissions or observations made in relation to environmental effects.<sup>5</sup>

24. Section 172(1J) of the PDA provides as follows:

“When the planning authority or the Board, as the case may be, has decided whether to grant or to refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following information available to the applicant for consent and the public:

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<sup>2</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>3</sup> Party’s response to communication, para. 6.1 and annexes 6-7.

<sup>4</sup> Party’s response to communication, para. 6.2 and annex 8, pp. 9-11

<sup>5</sup> Party’s response to communication, para. 8.14.

- (a) the content of the decision and any conditions attached thereto;
- (b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;
- (c) having examined any submission or observation validly made,
  - (i) the main reasons and considerations on which the decision is based, and
  - (ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by a member of the public;
- (d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;
- (e) any report referred to in subsection (1H);
- (f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and
- (g) the views, if any, furnished by other Member States of the European Union pursuant to section 174.”<sup>6</sup>

### **Plans, programmes and policies**

25. The PDA also provides a framework for the preparation and adoption of development plans by planning authorities.<sup>7</sup> Sections 9(6) and 27(1) of the PDA require a planning authority to demonstrate that a development plan and its policies and objectives are consistent with national and regional development objectives set out in the national spatial strategy, regional planning guidelines and regional spatial and economic strategies.<sup>8</sup>

26. The Minister for the Environment and Local Government may, pursuant to section 28 of the PDA, issue guidelines to planning authorities regarding any of their functions under the PDA and planning authorities shall have regard to those guidelines when preparing and making the draft development plan. The 2006 Wind Energy Guidelines for Planning Authorities (2006 Guidelines) were issued under section 28 of the PDA.<sup>9</sup>

27. The Minister has powers under section 31 of the PDA to direct a planning authority to take such specified measures as he/she may require in relation to a plan, where the Minister is of the opinion that, inter alia, a planning authority has ignored or has not taken sufficient account of submissions or observations made by the Minister or if the plan is not in compliance with the requirements of the PDA.<sup>10</sup>

### **Access to justice**

28. Where an applicant of an environmental information request was dissatisfied with the response of the public authority, he/she could request an internal review under article 11 of the 2011 AIE Regulations and thereafter could appeal to the Office of the Commissioner for Environmental Information (OCEI) in accordance with article 12 of those Regulations.<sup>11</sup>

29. Under article 15(3) of the 2011 AIE Regulations, the cost to appeal to the OCEI was €150. For individuals meeting certain criteria, the fee was €50. The rules were amended in 2014 to lower the standard cost to €50 and the reduced rate to €15.<sup>12</sup>

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<sup>6</sup> Party's response to communication, annex 34, p. 291.

<sup>7</sup> Party's response to communication, para. 9.6.

<sup>8</sup> Party's response to communication, para. 9.7.

<sup>9</sup> Party's response to communication, para. 9.8.

<sup>10</sup> Party's response to communication, para. 9.9.

<sup>11</sup> Party's response to communication, para. 6.2.

<sup>12</sup> Party's response to communication, annex 8, p. 16.

30. In accordance with article 13 of the 2011 AIE Regulations, any party who is affected by a decision of the OCEI may appeal to the High Court on a point of law.<sup>13</sup>

31. Section 3 of the Environment (Miscellaneous Provisions) Act 2011 (EMPA) provides that for certain environmental proceedings, each party shall bear its own costs and costs may be awarded in favour of an applicant to the extent to which the applicant is successful in obtaining relief against a respondent.<sup>14</sup> Section 6 EMPA applies this costs regime to enforcement proceedings to address damage to the environment and to requests for access to environmental information.<sup>15</sup>

## **B. Facts**

### **National Renewable Energy Action Plan (NREAP)**

32. On 30 June 2010, the Party concerned adopted a National Renewable Energy Action Plan (NREAP) as required by the Renewable Energy Directive.<sup>16,17</sup>

33. On 29 June 2012, the Committee adopted its findings and recommendations on communication ACCC/C/2010/54 (European Union).<sup>18</sup> The Committee found the European Union in non-compliance with articles 3(1) and 7 of the Convention in connection with the adoption of NREAPs by member States, and Ireland's NREAP in particular. At that date, Ireland was not yet a Party to the Convention.

34. On 12 November 2012, Mr. Swords initiated judicial review proceedings seeking inter alia an order quashing Ireland's NREAP for not complying with the Convention, a declaratory order that the Party concerned had breached the Convention and a protective cost order.<sup>19</sup>

35. On 12 August 2016, the High Court dismissed the case for not having been brought within the three-month time limit required.<sup>20</sup> It rejected Mr. Sword's application for a protective cost order as the State had agreed to carry its own costs.<sup>21</sup>

### **Access to information requests**

#### *Mr. Jackson's request*

36. On 13 January 2012, Mr. Jackson made a request for information regarding bogs owned by Bord na Mona, a semi-state company developing peatlands. Bord na Mona refused the request on the basis that it did not consider itself a public authority.<sup>22</sup>

37. On 23 September 2013, the OCEI found that Bord na Mona was a public authority and ordered Bord na Mona to deal with the request accordingly.<sup>23</sup>

#### *Mr. Dooley's request*

38. On 24 October 2013, Mr. Dooley made a request to Bord na Mona for information in relation to its new Clean Energy Hub. Bord na Mona rejected this request on the basis that it was appealing the OCEI's decision on Mr. Jackson's request to the High Court.<sup>24</sup>

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<sup>13</sup> Party's response to communication, para. 6.2.

<sup>14</sup> Party's response to communication para. 6.2.

<sup>15</sup> Party's response to communication, annex 9, pp. 7-9.

<sup>16</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, 2009 O.J. L140/16.

<sup>17</sup> Communication, p. 21.

<sup>18</sup> ECE/MP.PP/C.1/2012/12.

<sup>19</sup> Communicants' email, annex, 12 August 2016, paras. 21-22.

<sup>20</sup> Communicants' email, annex, 12 August 2016, paras. 32 and 73

<sup>21</sup> Communicants' email, annex, 12 August 2016, paras. 92-93.

<sup>22</sup> Communication, p. 16.

<sup>23</sup> Communication, p. 16.

<sup>24</sup> Communication, p. 17.

39. Mr. Dooley requested an internal review and was informed on 7 February 2014 that Bord na Mona had dropped its appeal but was in the process of revising its procedures on access to information requests and would revert by early March.<sup>25</sup>

40. Unsatisfied with this reply, on 10 February 2014 Mr. Dooley contacted the OCEI and was informed that he had the right to appeal but was advised to give Bord na Mona the possibility to deal with the matter internally because of the backlog of cases before the OCEI.<sup>26</sup>

41. By the end of April 2014, Bord na Mona had not yet reverted to Mr. Dooley.<sup>27</sup>

*Mr. Swords' request*

42. On 7 March 2012, Mr. Swords requested information regarding a public consultation on climate policy and legislation.<sup>28</sup>

43. After an initial response of 3 April 2012 and some correspondence with Mr. Swords, who requested an internal review, the Department of Environment, Community and Local Government refused Mr. Swords' request on 9 May 2013 on the basis that it did not include any clear and identifiable request for specific environmental information and had not been refined or clarified in the correspondence with the applicant.<sup>29</sup>

44. Mr. Swords appealed the decision to the OCEI on 10 May 2013, which refused his appeal on 20 September 2013 on the basis that it was manifestly unreasonable.<sup>30</sup>

*Mr. Duncan's request*

45. On 24 January 2013, the Party concerned signed a Memorandum of Understanding with the United Kingdom signalling their joint interest in trading in renewable energy.<sup>31</sup>

46. On 21 March 2013, Mr. Duncan requested from the Sustainable Energy Authority of Ireland a cost-benefit study prepared for the renewable export programme of Ireland. On 21 May 2013, the request was refused on a number of grounds.<sup>32</sup>

47. Mr. Duncan requested an internal review and access to the information was again refused on 24 June 2013.<sup>33</sup>

48. On appeal, the OCEI on 11 December 2015 upheld the refusal on the basis that the study did not contain environmental information because it had not yet been used in environmental decision-making.<sup>34</sup>

*Mr. Cassidy's request*

49. On 26 April 2013, Mr. Cassidy made an information request concerning the location of land held by Coillte (a state-owned commercial forestry business) that had been identified and agreed for use by Element Power (a developer) in relation to wind energy export projects.<sup>35</sup>

50. On 28 June 2013, Coillte refused the request on the basis that disclosure of information would be premature. Coillte explained that it had entered into preliminary optional agreements on certain sites that were subject to certain criteria being met, so may not ultimately be included in the project.<sup>36</sup>

51. On 15 July 2013, Mr. Cassidy requested an internal review, which was refused by Coillte on 9 August 2013 on the basis that the request affected commercial or industrial activities,

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<sup>25</sup> Communication, p. 17.

<sup>26</sup> Communication, p. 17.

<sup>27</sup> Communication, p. 18.

<sup>28</sup> Communicants' reply to Committee's questions, 1 December 2014, p. 14. Indicated link has by now been replaced with: [http://www.ocei.ie/decisions/dCEI\\_12\\_0005-Mr-Pat-Swords-and-the-index.xml](http://www.ocei.ie/decisions/dCEI_12_0005-Mr-Pat-Swords-and-the-index.xml) (last accessed 7 June 2021).

<sup>29</sup> Communicants' reply to Committee's questions, 1 December 2014, pp. 14-15.

<sup>30</sup> Communicants' reply to questions, 1 December 2014, pp. 14 and 17-18.

<sup>31</sup> Communication, p. 11.

<sup>32</sup> Communication, pp. 12-13.

<sup>33</sup> Communication, p. 14.

<sup>34</sup> Communicants' update, 2 January 2016, pp. 1-2 and annex, pp. 8-10.

<sup>35</sup> Communication, p. 15.

<sup>36</sup> Communication, p. 15.

related to material in the course of completion and concerned internal communications of public authorities.<sup>37</sup>

52. On appeal, the OCEI decided on 1 October 2015 that access had wrongly been refused and directed Coillte to provide the documentation.<sup>38</sup>

### **County Westmeath Development Plan**

53. On 22 February 2012, County Westmeath initiated pre-plan consultations for a new County Development Plan. Eighty-nine written comments were received and the Council then agreed a draft Plan.<sup>39</sup>

54. On 1 February 2013, the public was notified of the publication of the draft Westmeath County Development Plan 2014-2020 and the Plan was made available for inspection from 1 February to 12 April 2013. A total of 895 submissions were received during this period.<sup>40</sup>

55. The Council voted to adopt some alterations to the draft Plan.<sup>41</sup> As these proposed alterations were material, further public participation on them was required, which took place from 18 October 2013 to 15 November 2013. In this time 3,500 submissions were received.<sup>42</sup>

56. The County Manager (a senior official) submitted a report to the Council on 14 December 2013, summarizing the issues raised in the submissions and making recommendations. The Manager's report noted the submission from the Minister for the Environment, Heritage and Local Government, advised that the alterations contravened national policy and recommended that they not be adopted. Notwithstanding the report, on 21 January 2014 the Council adopted the Plan, including the amendments.<sup>43</sup>

57. On 15 February 2014, the Department of Environment, Community and Local Government issued notification of the Minister's intention to issue a Material Direction under section 31 of the PDA instructing the Council to take measures to amend the plan. Notice of the draft Direction was published and submissions were invited from 27 February to 12 March 2014. 5,624 submissions were received during this period. An independent inspector was appointed by the Minister to review the issue including submissions received from the public.<sup>44</sup> This inspector's report was made available on 20 May 2014. Two weeks were provided by the Department of the Environment for the relevant groups to make submissions.<sup>45</sup>

58. The Ministerial Direction issued on 10 July 2014 directed the Council to remove certain policies from the Plan which, if implemented, would have had the effect of precluding virtually any wind farm development in the county.<sup>46</sup>

### **Revision of the 2006 Guidelines**

59. In January 2013, the Party concerned initiated a review of certain aspects of the 2006 Guidelines.<sup>47</sup>

60. A pre-draft consultation process ran from 30 January 2013 to 15 February 2013. A total of 550 submissions from individuals and organizations were received.<sup>48</sup>

61. A key input to the review was a report on international best practice in relation to onshore wind farm noise produced by Marshall Day Acoustics, who had been commissioned by the Sustainable Energy Authority of Ireland, on behalf of the Department on Communications, Energy and Natural Resources. Marshall Day Acoustics produced a report entitled "Examination of the Significance of Noise in Relation to Onshore Wind Farms" in November 2013. The report also

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<sup>37</sup> Communication, p. 15 and annex to communicants' update, 3 October 2015, p. 2.

<sup>38</sup> Annex to communicants' update, 3 October 2015, p. 12.

<sup>39</sup> Party's response to communication, para. 9.10.

<sup>40</sup> Communication, p. 31

<sup>41</sup> Party's response to communication, para. 9.10.

<sup>42</sup> Communication p. 32, and Party's response to communication, para. 9.10.

<sup>43</sup> Communication, pp. 32-33, and Party's response to communication, para 9.10.

<sup>44</sup> Party's response to communication, para. 9.10.

<sup>45</sup> Communication, p. 33.

<sup>46</sup> Party's response to communication, para. 9.10.

<sup>47</sup> Party's response to communication, paras. 10.1-10.3.

<sup>48</sup> Party's response to communication, para. 10.3.

reviewed the submissions received in the pre-draft public consultation and noted the key noise-related topics that had arisen in the submissions received.<sup>49</sup>

62. The draft revised guidelines proposed setting a more stringent day and night noise limit of 40 decibels (dB) in certain circumstances, a mandatory minimum distance of 500 metres between a wind turbine and the nearest dwelling, and the complete elimination of shadow flicker between wind turbines and neighbouring dwellings.<sup>50</sup>

63. The draft revised guidelines were subject to public consultation from 11 December 2013 to 21 February 2014. Submissions from 7,500 organizations and members of the public were received.<sup>51</sup>

64. In December 2017, a strategic environmental assessment (SEA) for the draft revised guidelines commenced and a public consultation was due to take place in 2019.<sup>52</sup> The Committee does not have any further information about the status or adoption of the revised guidelines.

### **Specific windfarm projects**

65. Between August 2012 and December 2013, members of the public submitted comments on and made access to information requests with respect to a number of windfarm projects including Corkermore Wind Farm, County Donegal; Foylatalure Wind Farm, County Kilkenny; GDNG Renewables, County Donegal; Cloghan Wind Farm, County Offaly; Straboy, County Donegal; Ballina, County Mayo; and Tinahely, County Wicklow.

66. The public's information requests included requests for information as to how the public's comments had been taken into account in the decision-making procedures on the windfarm projects.<sup>53</sup>

## **C. Domestic remedies**

67. The communicants state that domestic remedies, such as the OCEI, an Bord Pleanála, the Irish Ombudsman and the High Court, have been utilized by environmental groups and individuals.<sup>54</sup> The communicants further refer to unsuccessful references that have been made to the European Commission and the EU Ombudsman.<sup>55</sup>

68. The Party concerned submits that the communicants made this complaint whilst at the same time invoking a domestic remedy before the national courts. The Party concerned submits that the Committee ought not consider any issue that relates to the *Swords* proceedings (see paras. 34-35 above) as this would amount to an impermissible infringement on the jurisdiction of its High Court.<sup>56</sup>

69. The High Court delivered its judgment dismissing Mr. Sword's application on 12 August 2016 (see para. 35 above).<sup>57</sup>

## **D. Substantive issues**

### **Article 4**

70. The communicants submit that the Party concerned's administration, and EU institutions, refused to provide access to information concerning the environmental protection associated with the NREAP, such as actual savings of greenhouse gas emissions and associated environmental benefits. The communicants assert that the public has repeatedly been denied any

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<sup>49</sup> Party's response to communication, para. 10.4.

<sup>50</sup> Party's response to communication, para. 10.5.

<sup>51</sup> Party's response to communication, paras. 10.6-10.7.

<sup>52</sup> Party's update, 22 October 2019, p. 3.

<sup>53</sup> Communication, pp. 27-28, 54-60; communicants' reply to Committee's questions, 1 December 2014, pp. 22-30 and Party's response, annexes 16-30.

<sup>54</sup> Communication, p. 48.

<sup>55</sup> Communication, pp. 49-51.

<sup>56</sup> Party's response to communication, para. 3.7.

<sup>57</sup> Communicants' email, annex, 12 August 2016, paras. 32 and 73

information on cost assessments and environmental effectiveness relating to the Party concerned's renewable energy programme.<sup>58</sup>

71. The communicants further submit that the decision of the OCEI in Mr. Duncan's case (see paras. 45-48 above) means that environmental information only has to be disclosed once a specific decision has already been taken and the environmental effects have already occurred. They submit that this contradicts common sense, natural justice and the Committee's findings on communication ACCC/C/2004/1.<sup>59</sup> The communicants submit that this decision was not challenged at the High Court because of the costs of such a challenge.<sup>60</sup>

72. The communicants further contend that requests for information on renewable energy developments in which state or semi-state entities are involved are simply refused. The communicants refer in this regard to the requests of Mr. Cassidy (see paras. 49-52 above) and Mr. Dooley (see paras. 38-41 above).<sup>61</sup>

73. The Party concerned submits that the precise nature of the communicants' complaint is not clear. Regarding the specific requests for environmental information, it submits that the Committee ought not interfere with determinations made on the merits of requests by domestic authorities.<sup>62</sup> The Party concerned submits moreover that domestic remedies were not exhausted with respect to Mr. Duncan's request.<sup>63</sup> Finally, it submits that reports have been published that quantify fuel and CO<sub>2</sub> emission savings.<sup>64</sup>

74. Observer Irish Environmental Pillar submits that the OCEI has adopted a narrow interpretation of environmental information that has a chilling effect on access to justice as only cases concerning environmental information benefit from cost protection under Part 2 of EMPA (see para. 31 above).<sup>65</sup>

#### **Article 5**

75. The communicants allege that the Party concerned has failed to comply with article 5(2) of the Convention by not publishing environmental information, including on fuel and emissions savings, in a transparent manner.<sup>66</sup>

76. The communicants further submit that the Party concerned failed to comply with article 5(7)(a) by not disclosing the cost-benefit study requested by Mr. Duncan (see paras. 45-48 and 71 above).<sup>67</sup>

77. The Party concerned submits that it has published information relating to emissions and fuel savings and that the communicants have failed to identify the information that they take issue with.<sup>68</sup> With regard to the cost-benefit study, it reiterates that domestic remedies have not been exhausted and submits that the study is confidential in light of possible future negotiations with the United Kingdom.<sup>69</sup>

#### **Article 6(4)**

78. The communicants submit that the Party concerned failed to comply with article 6(4) because the development of its renewable energy programme has been decided in advance of any public participation process.<sup>70</sup> The communicants refer as an example to the two-week public

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<sup>58</sup> Communication, p. 10.

<sup>59</sup> Communicants' update, 2 January 2016, p. 2.

<sup>60</sup> Communicants' update, 2 January 2016, p. 3.

<sup>61</sup> Communication, pp. 14-18.

<sup>62</sup> Party's response to communication, para. 6.3.

<sup>63</sup> Additional information from the Party concerned, 10 June 2016, para. 1.3.

<sup>64</sup> Party's response to communication, paras. 6.5-6.6.

<sup>65</sup> Observer statement from Irish Environmental Pillar, 13 July 2016, pp. 3-4.

<sup>66</sup> Communication, p. 18.

<sup>67</sup> Communication, pp. 18-19.

<sup>68</sup> Party's response to communication, para. 7.1.

<sup>69</sup> Party's response to communication, para. 7.4.

<sup>70</sup> Communication, p. 21.



consultation on the NREAP, already criticized by the Committee in its findings on ACCC/C/2010/54 (European Union).<sup>71</sup>

79. The communicants further submit that the following were all decided without public participation as required by the Convention:

- (a) The All-Island Grid Study;
- (b) The Gate 3 process;
- (c) The adoption of a 40% renewable electricity target;<sup>72</sup>

80. In addition, the communicants claim that the 15% target for electricity production from renewable sources by 2010 and the 33% target for electricity production from renewable sources by 2020 did not undergo proper public participation. While they were both preceded by public participation at the policy level, the communicants claim the 2010 target should have been preceded by a strategic environmental assessment and that there was no information on financial and environmental impacts provided for participation on the 2020 target.<sup>73</sup>

81. The communicants submit that, despite the lack of public participation on these decisions, decision-makers refuse to address their concerns in relation to them in the public participation on individual projects. They allege that the “zero option” has never been considered.<sup>74</sup>

82. The Party concerned submits that the All-Island Grid Study, published in 2008, was a research study, and not a strategy, plan or programme and that therefore no public participation was required under the Convention.<sup>75</sup> It states that the Study was used to inform the development of later plans and strategies, such as Eirgrid’s Grid 25 Strategy and that Eirgrid carried out a SEA for the development of an implementation plan for that strategy for the period from 2011 to 2016.<sup>76</sup>

83. The Party concerned submits that the Gate process also does not require public participation as it is not a plan or programme.<sup>77</sup> It submits that, notwithstanding the fact that public consultation was not required under the Convention, the Direction on Gate 3 issued was subject to public consultation.<sup>78</sup>

#### **Article 6(8)**

##### *Legal framework*

84. The communicants submit that under section 172(1J) of the PDA (see paras. 23-24 above), only reasons and considerations that are “valid” are treated as relevant to both the decision-making and its subsequent documentation.<sup>79</sup>

85. The Party concerned submits that its legal framework is clear and complies with the Convention. In particular, it states that there are express obligations in sections 34(3) and 37 of the PDA for decision-makers to consider written submissions and a similar obligation in section 172(1G) that requires decision-makers to consider submissions relating to environmental effect for projects subject to EIA.<sup>80</sup>

86. The Party concerned further submits that both the EIA and the Inspector’s report must be made publicly available under section 172(1J)(b), section 172(1H) and (1J)(e) of the PDA. It submits that the main reasons and considerations ultimately relied on to justify a grant or refusal of a planning permission will necessarily be more succinct than the full evaluation of the proposal but

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<sup>71</sup> Communication, p. 21.

<sup>72</sup> Communication, p. 22.

<sup>73</sup> Communicants’ email update, 2 January 2016, p. 8.

<sup>74</sup> Communication, pp. 22-23.

<sup>75</sup> Party’s response to communication, para. 8.7.

<sup>76</sup> Party’s response to communication, para. 8.8.

<sup>77</sup> Party’s response to communication, para. 8.10.

<sup>78</sup> Party’s response to communication, para. 8.11.

<sup>79</sup> Communication, pp. 24-25.

<sup>80</sup> Party’s response to communication, paras. 8.14-8.16.

that it does not follow that other matters considered during the evaluation process were regarded as irrelevant.<sup>81</sup>

*Practice*

87. The communicants allege that in a number of planning decisions taken by local authorities, there was no written analysis or consideration of how the public's input was addressed in the decision-making process.<sup>82</sup>

88. The communicants claim that on a number of occasions decision makers did not adequately respond to or take into account comments received (see para. 65 above).<sup>83</sup> They submit that in decisions taken by An Bord Pleanála, the Inspector's reports recorded a summary of the public input but the input was frequently documented as being of no relevance as the decision criterion was solely the national policy/plan.<sup>84</sup>

89. The Party concerned submits that the communicants' allegation is not supported by evidence. It claims moreover that if the communicants were concerned that the public's submissions had not been considered by the decision-maker, they could have appealed the decision to An Bord Pleanála or challenged the decisions of both the planning authority and An Bord Pleanála before the Court through judicial review. The Party concerned states that the communicants' real concern appears to be that the decision-makers should invalidate or disapply national policy.<sup>85</sup>

**Article 6(9)**

90. The communicants allege that the public is not provided with reasons and considerations which address environmental considerations and demonstrate transparency and proportionality.<sup>86</sup>

91. The communicants further claim that reasons and considerations in the approval of wind farm developments is non-transparent, irrational and contradictory, referring to reports in which the communicants' comments about wind farms were said to relate to policy rather than individual projects.<sup>87</sup>

92. The Party concerned submits that the communicants' complaint lacks coherence or any clarity. It states that the decisions of An Bord Pleanála quoted set out the reasons and considerations on which each decision is based and that there is therefore no basis for alleging that these decisions breach article 6(9).<sup>88</sup>

93. The Party concerned submits that, in so far as the communicants challenge the reasons and considerations provided by An Bord Pleanála, this is not an appropriate issue for the Committee. The Party concerned claims that there is a statutory obligation on planning authorities and An Bord Pleanála to state the main reasons and considerations upon which their decisions are based; this obligation is invariably complied with and thereby the Convention is complied with. It further submits that the failure to state reasons for an administrative decision is a ground upon which a decision may be declared invalid. It states that the fact that the communicants disagree that wind energy will have a positive impact on climate considerations does not substantiate that no reasons have been provided for the permissions granted.<sup>89</sup>

94. The Party concerned further submits that for individual wind farm developments, any environmental information relevant to the planning permission application will be included in the environmental impact statement, which is a publicly available document. At the conclusion of the process, the evaluation that comprises the EIA must also be made publicly available. It states that in practice these documents are not only made publicly available for physical inspection, but An Bord

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<sup>81</sup> Party's response to communication, para. 8.17.

<sup>82</sup> Communication, p. 24.

<sup>83</sup> Communicants' reply to questions, 1 December 2014, pp. 22-30

<sup>84</sup> Communication, p. 24.

<sup>85</sup> Party's response to communication, para. 8.16.

<sup>86</sup> Communication, pp. 25-29 and communicants' reply to questions, 1 December 2014, pp. 22-30.

<sup>87</sup> Communication, p. 28-30.

<sup>88</sup> Party's response to communication, para. 8.18.

<sup>89</sup> Party's response to communication, para. 8.19.

Pleanála and most planning authorities routinely make their decisions and inspectors' reports available electronically immediately after the decision has been taken.<sup>90</sup>

#### Article 7

95. The communicants submit that in the public participation process on the draft Westmeath County Development Plan the overarching national policy predetermined the outcome.<sup>91</sup> They submit that, in reply to the public's submissions on noise and visual impact, official reports consistently stated:

“The Council is bound by National Energy Policy, which in the context of wind turbines is the Wind Energy Development Guidelines 2006. These guidelines set out standards in relation to the size, appearance and physical properties of any proposed structures

Noise limits from wind turbines are prescribed by the Wind Energy Development Guidelines 2006”.<sup>92</sup>

96. The communicants note that the decision by the County Councillors to make amendments to the plan, inter alia, introducing greater separation distances between windfarms and housing, was overruled by the Minister for Housing and Planning on the basis of section 31 of the PDA. They claim that the two-week participation period on the section 31 Notice of Intent was insufficient under the Convention and that the subsequent inspector's report did not consider that there had been a failure of public participation on the overarching Guidelines.<sup>93</sup>

97. The communicants submit that the foregoing was not an isolated occurrence but that amendments concerning the distance of wind turbines to housing introduced by County Councillors into the draft Offaly County Development Plan 2014-2020 were expected to be overruled on the same basis.<sup>94</sup>

98. The Party concerned submits that the communicants do not dispute that the Westmeath County Development Plan would have virtually precluded wind farm development in County Westmeath and so needed to be amended in order to make it consistent with national policy. The Party concerned submits that the communicants' allegation appears to be that the public participation process on the Plan was “pro forma” because the Plan was legally required to be consistent with national policy. The Party concerned states that this would only hold if the only issue determined by the Plan was whether wind farm development should be permitted as a matter of principle. It submits that this is clearly incorrect and that there are a range of other issues that form part of the Plan on which the public can and do make submissions.<sup>95</sup>

99. The Party concerned states that extensive public consultation took place over a two-year period, at different stages of the preparation of Westmeath County Development Plan. It submits that the matters raised by members of the public were considered by the County Manager and by the Council. The Party concerned submits that while the communicants may be disappointed that their views were not accepted, this does not mean that article 7 was breached.<sup>96</sup>

#### Article 8

100. The communicants claim that the 2006 Guidelines constitute generally applicable legally binding rules that may have a significant effect on the environment. To support this claim, they cite a planning inspector's report in which the inspector stated that distance of 516 metres between houses and a wind turbine is adequate based on the 2006 Guidelines.<sup>97</sup>

101. The communicants allege that the technical update of the guidance on noise and shadow flicker in the 2006 Guidelines (see para. 59 above) was carried out in breach of article 8 of the Convention. They submit firstly that two weeks was an insufficient time-frame for public

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<sup>90</sup> Party's response to communication, para 8.21.

<sup>91</sup> Communication, pp. 31-33.

<sup>92</sup> Communication, p. 31.

<sup>93</sup> Communication, pp. 33-34.

<sup>94</sup> Communication, pp. 34-35.

<sup>95</sup> Party's response to communication, para. 9.10.

<sup>96</sup> Party's response to communication, para. 9.12.

<sup>97</sup> Communication, p. 37.

participation. Secondly, they allege that the scope of the public participation was limited to the noise and shadow flicker aspects, and thereby did not address the issues raised in the public participation phase on the Westmeath County Development Guidelines.<sup>98</sup> Thirdly, they allege that the effects on “residential amenity” were not adequately considered.<sup>99</sup>

102. The communicants also refer to an access to information request seeking proof of how public participation was taken into account. The communicants and observer Coulson allege that the reply was unsatisfactory as it referred to a report prepared by Marshall Day Acoustics which was prepared by a private entity without sufficient expertise on health impacts and included insufficient information on noise and its impacts.<sup>100</sup> The communicants and observer Coulson further allege that the Department of Environment did not adequately consider concerns raised by the Department of Health and generally failed to adequately consider health impacts of wind farms.<sup>101</sup> They submit that this demonstrates that matters had already been decided prior to the public participation.<sup>102</sup>

103. The Party concerned submits that the public participation procedure on the draft revised Guidelines complied with the requirements of article 8 of the Convention because the time frame, two months, was sufficient. The guidelines were issued in draft form for the consultation and the public was given an opportunity to comment as submissions were sought and considered prior to the finalisation of the Guidelines.<sup>103</sup>

104. The Party concerned submits that the effect that wind turbines could have on public health is not a matter that would fall within the remit of the Guidelines but that nonetheless the Department of Health was consulted and stated that there was no reliable or consistent evidence that wind farms directly cause adverse health effects in humans.<sup>104</sup>

105. The Party concerned contends that it is inaccurate to state that the planning process and associated public participation was pro forma.<sup>105</sup> The Party concerned contends that the planning authority reports of the individual wind farm planning applications and appeals demonstrate this. It submits that the communicants may disagree with individual decisions taken in respect of wind farm developments but that this cannot form the basis for an allegation that there has been a systemic or individual failure to comply with article 8 of the Convention.<sup>106</sup>

106. Finally, the Party concerned claims that in December 2017, a strategic environmental assessment (SEA) for the draft revised guidelines commenced and a public consultation would commence as part of this process in the course of 2019 and submits that the guidelines are expected to be issued after the conclusion of the SEA process.<sup>107</sup>

#### **Article 9(1) – inexpensive and expeditious review procedure**

107. With respect to the requirement to provide an expeditious review procedure, the communicants submit that the OCEI has in effect stopped processing appeals.<sup>108</sup> The communicants claim that there is a seven week period to determine admissibility, at least six months until an investigator will start working on the case and at least a year to then process the request.<sup>109</sup> The communicants cite statements of the OCEI, which attribute the delays to practical difficulties, including a lack of resources.<sup>110</sup> Finally, the communicants claim that by the time a decision concerning access to environmental information is obtained, the public participation period will already be closed and the time limit for judicial review of a decision will have expired.<sup>111</sup>

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<sup>98</sup> Communication, pp. 35-36.

<sup>99</sup> Communication, pp. 36 and 40.

<sup>100</sup> Communication, pp. 38-39 and Coulson’s observer statement, 3 February 2016, pp. 4 and 9.

<sup>101</sup> Communication, pp. 40-41 and Coulson’s observer statement, 3 February 2016, pp. 4 and 6-8.

<sup>102</sup> Communication, p. 41.

<sup>103</sup> Party’s response to communication, para. 10.6.

<sup>104</sup> Party’s response to communication, para. 10.8.

<sup>105</sup> Party’s response to communication, para. 10.13-10.14.

<sup>106</sup> Party’s response to communication, paras. 10.14-10.16.

<sup>107</sup> Party’s update, 22 October 2019, p. 3.

<sup>108</sup> Communication, p. 42.

<sup>109</sup> Communicants’ email, 2 January 2016, p. 4.

<sup>110</sup> Communication, p. 42 and communicants’ email, 2 January 2016, pp. 3-4.

<sup>111</sup> Communicants’ email, 2 January 2016, p. 3.

108. As regards an inexpensive review procedure, the communicants point out that the appeal fee to the OCEI (see para. 29 above) has been identified in a National Implementation Report as an obstacle in relation to article 4.<sup>112</sup>

109. The Party concerned submits that further dedicated resources were allocated to the OCEI to enable processing appeals in a timely manner. It claims that additional staff were appointed in June 2015 to deal with appeals brought under the AIE Regulations.<sup>113</sup> It submits that the OCEI's 2015 Annual Report supports its submission that significant progress in investigating and issuing determinations on appeals has been made.<sup>114</sup>

110. Observer Irish Environmental Pillar submits that the median time for the OCEI to make a decision was almost two years in 2015 and almost one and a half years in 2016.<sup>115</sup> It further submits that there is no requirement for the OCEI to take a timely decision, in contrast to the general law on access to information which states that decisions by the Information Commissioner should be taken within four months.<sup>116</sup> It states that there has been an 80% increase in the case load of the OCEI from 2015 to 2016 and that the OCEI at times issues interim decisions which lead to further delays.<sup>117</sup>

#### **Article 9(3) and 9(4)**

111. The communicants complain about the duration and costs of Mr. Swords' judicial review proceedings. They claim that motions brought during the proceedings by the Party concerned unnecessarily prolonged the proceedings and thereby increased the costs for the plaintiff.<sup>118</sup>

112. The communicants contend that it is generally recognized that the preparatory work for taking a case to the "leave" stage in the Party concerned costs about €20,000, even though this cost was avoided in this case as the plaintiff had some legal knowledge. They state that this would not be an option available to the typical Irish citizen.<sup>119</sup>

113. As regards review of environmental information requests, the communicants refer to a case by the National Asset Management Authority, which appealed an OCEI decision and incurred legal fees of €71,350 while the OCEI incurred €50,000.<sup>120</sup>

114. The Party concerned submits that the communicants' allegations relating to the level of costs are speculative and not supported by evidence.<sup>121</sup> It submits that under the EMPA and the PDA, a member of the public seeking to challenge a planning permission can do so without the risk that if the legal proceedings are unsuccessful costs will be awarded against him or her except in exceptional cases where proceedings are an abuse of process, frivolous or vexatious.<sup>122</sup>

115. The Party concerned further submits that the communicants ignore the fact that litigants can and frequently do represent themselves or receive *pro bono* legal representation or arrange a conditional fee agreement. It submits that article 9 of the Convention does not require that proceedings are free but only that the costs are not prohibitively expensive.<sup>123</sup>

#### **Article 9(5)**

116. The communicants submit that, in the *Swords* proceedings, the State Solicitor obstructed the communicants' efforts to raise substantive issues regarding the Committee's findings on communication ACCC/C/2010/54 and the NREAP and has repeatedly sought costs and expenses.

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<sup>112</sup> Communication, p. 41.

<sup>113</sup> Party's response to communication, para. 6.4.

<sup>114</sup> Additional information from the Party concerned, 10 June 2016, para. 1.4 and annex 2.

<sup>115</sup> Observer statement from Irish Environmental Pillar, 13 July 2016, p. 2.

<sup>116</sup> Observer statement from Irish Environmental Pillar, 13 July 2016, p. 2.

<sup>117</sup> Observer statement from Irish Environmental Pillar, 13 July 2016, pp. 2-3.

<sup>118</sup> Communication, p. 47.

<sup>119</sup> Communication, p. 45.

<sup>120</sup> Communicants' opening statement at the hearing, 23 June 2016, p. 5.

<sup>121</sup> Party's response to communication, para. 11.4.

<sup>122</sup> Party's response to communication, para. 11.2.

<sup>123</sup> Party's response to communication, para. 11.4.

The communicants contend that this is indicative of a vindictive approach being taken to those seeking access to justice.<sup>124</sup>

117. The Party concerned considers that it is inappropriate for the Committee to consider the *Swords* proceedings while these are pending before domestic courts.<sup>125</sup> In any case, it considers the communicants' allegations to be "wild and unsubstantiated".<sup>126</sup>

#### **Article 3(1)**

118. The communicants claim that failures of the Party concerned's NREAP to comply with article 7 of the Convention have been repeatedly highlighted to public authorities and that this has been either ignored or the complainant has instead been directed to the courts. The communicants submit that public authorities have abdicated their responsibilities to ensure that the framework they are using complies with the Convention.<sup>127</sup>

119. The communicants further submit that the only means of enforcing the Convention is for a member of the public to initiate judicial proceedings at enormous personal expense. They claim that public authorities take no enforcement measures and are obstructive of enforcement measures brought by members of the public.<sup>128</sup> They further state that the Party concerned will "drag out" judicial proceedings causing further cost to claimants.<sup>129</sup> The communicants refer to statements of the State Solicitor made during the *Swords* proceedings which allegedly disputed the applicability of the Convention and contradicted the findings of the Committee on communication ACCC/C/2010/54.<sup>130</sup>

120. The Party concerned submits that the communicants have failed to either particularize or substantiate any alleged breach of article 3(1) of the Convention and that there exists a robust legal framework through which the rights guaranteed by the Convention can be realized.<sup>131</sup> Concerning any alleged failure to comply with the Committee's findings in ACCC/C/2010/54, it submits that these findings were not directed at the Party concerned but at the European Union.<sup>132</sup> The Party concerned also asserts that there is no basis for the communicants' allegation that the State Solicitor is "actively trying to re-write the international jurisprudence of the Convention in the High Court".<sup>133</sup>

### **III. Consideration and evaluation by the Committee**

121. Ireland deposited its instrument of ratification of the Convention on 20 June 2012, meaning that the Convention entered into force for Ireland on 18 September 2012 i.e. ninety days after the date of deposit of the instrument of ratification.

#### **Admissibility**

##### *Article 4*

122. Regarding Mr. Dooley's request for information (see paragraphs 38-41 above), the Committee has no information before it as to what happened after April 2014. There is no evidence that Mr. Dooley returned to the OCEI following the lack of a response by Bord na Mona or took any further action. The Committee thus considers this allegation to be inadmissible under paragraphs 19 and 20(d) of the annex to decision I/7 for lack of corroborating information.

123. With respect to Mr. Swords' information request (see paras. 42-44 above), the OCEI took four months to find his request to be manifestly unreasonable, and Mr. Swords did not seek appeal to the court thereafter. Had he brought his case to court, any further costs would have been

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<sup>124</sup> Communication, p. 47.

<sup>125</sup> Party's response to communication, paras. 3.2-3.7, 11.6.

<sup>126</sup> Party's response to communication, para. 3.4.

<sup>127</sup> Communication, p. 23.

<sup>128</sup> Communication, p. 9.

<sup>129</sup> Communication, p. 9.

<sup>130</sup> Communication, pp. 7-8.

<sup>131</sup> Party's response to communication, paras. 5.1 and 5.4.

<sup>132</sup> Party's response to communication, para. 5.3.

<sup>133</sup> Party's response to communication, para. 3.6.

limited to his own costs. For the reasons elaborated in paragraph 161 below, the Committee does not consider that own costs mean that further domestic remedies could not have been pursued. Accordingly, the Committee find the allegations concerning Mr. Swords' information request inadmissible under paragraphs 20(d) and 21 of the annex to decision I/7 for a failure to exhaust available domestic remedies.

124. By contrast, the OCEI took two years and five months to issue its decision upholding the refusal of Mr. Duncan's information request (see paras. 45-48 above). In its findings on communication ACCC/C/2013/93 (Norway), the Committee held that, while it could not rule out that there may have been other domestic remedies available, given the Ombudsman's almost two and a half year delay in the handling of the communicants' complaint, the communication was admissible.<sup>134</sup> By the same logic, it would be unreasonable to expect Mr. Duncan to pursue further domestic remedies given the delay at the OCEI stage. Thus, the Committee finds this claim to be admissible.

#### *Article 8*

125. The draft revised 2006 Guidelines had not yet been finalized at the time the communication was submitted. Based on the information before the Committee, they have in fact to date not yet been finalized. The Committee thus finds the allegations concerning article 8 to have been made prematurely and thus to be inadmissible under paragraph 20(d) of the annex to decision I/7 for being incompatible with the provisions of that decision.

### **Scope of consideration**

#### *Compliance by the European Union*

126. The Committee will not examine allegations regarding the compliance with the Convention by the European Union in the present case, since the communication identified only Ireland as the Party concerned.

#### *Acts prior to the Convention's entry into force*

127. The Committee will not examine any acts or events from before 18 September 2012 since this is before the Convention came into force for the Party concerned.

#### *Article 4*

128. The Committee notes that the access to information requests by Mr. Jackson and Mr. Cassidy (see paras. 36-37 and 49-51 above) were resolved favourably by the OCEI, a domestic remedy. Accordingly, the Committee will also not examine these aspects.

#### *Article 6*

129. The planning permissions for the GDNG Renewables and Cloghan Wind Farm projects were overturned on appeal (see para. 65 above). Accordingly, domestic remedies addressed any potential breach and the Committee will not examine them in this case.

#### *Article 6(4)*

130. The only decision alleged in the communication to violate article 6(4) is the GDNG Renewables project. Since that decision was overturned, the Committee will not consider the communicants' allegations concerning article 6(4) of the Convention.

131. With respect to the communicants' submissions concerning the North South Interconnector Project and associated High Court proceedings in *Val Martin*,<sup>135</sup> since these matters postdate the communication, the Committee will not examine these in the context of the present case.

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<sup>134</sup> ECE/MP/PP./C.1/2017/16, para. 65.

<sup>135</sup> Communicants' update, 15 January 2018.

*Article 7*

132. With respect to the communicants' allegation that the two-week consultation period which took place following the Ministerial Direction regarding the Westmeath County Plan was too short a timeframe, the Committee notes that this allegation was not included in the original communication and moreover, not substantiated to any depth. Accordingly, the Committee will not examine this allegation.

**Article 4**

133. Given its above findings on admissibility and scope of consideration, the Committee considers in detail the refusal of Mr. Duncan's request for the cost-benefit study prepared for the renewable export programme of the Party concerned. This refusal was upheld by the OCEI on the ground that the study did not contain environmental information. In particular, the OCEI considered that the study "does not appear to have yet been used within the framework of a measure or activity affecting or likely to affect relevant elements or factors. If it were to be used within such a framework in the future, the information it contains could potentially constitute environmental information of this type."<sup>136</sup>

134. The Committee considers that the term "used in environmental decision-making" in the last clause of article 2(3)(b) should not be read as requiring that such analyses and assumptions have already been used in environmental decision-making. Such a reading is inconsistent with the Convention. Rather it should be understood to include information that may potentially be used in environmental decision-making. Moreover, "environmental decision-making" is to be understood in its broadest sense and so is not limited to decision-making under article 6, 7 or 8 of the Convention.

135. Accordingly, cost-benefit or economic analyses or assumptions that may potentially be used in environmental decision-making constitute "environmental information" under article 2(3)(b).

136. As can be seen from the OCEI's decision, the cost-benefit study at issue was commissioned by the Sustainable Energy Authority of Ireland, in cooperation with other public authorities. The study is described as a "preliminary strategic scoping and exploratory examination" of the overall viability of Ireland exporting renewable energy to the United Kingdom.<sup>137</sup> In broad terms the study concluded that there is an opportunity for Ireland which is "worth exploring further."<sup>138</sup> The study was completed in July 2012, by which time the governments of Ireland and United Kingdom had begun negotiating a framework agreement for the export of renewable energy from Ireland to the United Kingdom.

137. It is clear to the Committee that this study was commissioned for the purpose of establishing the viability and cost-benefits of exporting renewable energy to the United Kingdom and was prepared for use to assist decision-making relating to the renewable energy export programme. It thus amounts to environmental information under the Convention.

138. Based on the foregoing, the Committee finds that, by refusing the disclosure of the cost-benefit study prepared for the renewable energy export programme on the basis that the study was not "environmental information", the Party concerned failed to comply with article 4(1) in conjunction with article 2(3) of the Convention.

**Article 5(2) and (7)**

*Information on fuel and emission savings*

139. The communicants' claim that information on fuel and emission savings is inaccurate and not calculated in a transparent manner is not supported by any specific examples. Accordingly, the Committee finds the communicants' allegations under article 5(2) and (7) to be unsubstantiated.

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<sup>136</sup> Communicants' update, 2 January 2016, annex, p. 9.

<sup>137</sup> Communicants' update, 2 January 2016, annex, p. 2.

<sup>138</sup> Communicants' update, 2 January 2016, annex, p. 2.



*Cost-benefit study on renewable energy export programme*

140. Having found in paragraph 138 above that the cost-benefit study on the renewable energy export programme is environmental information, the Committee examines whether the Party concerned was required by article 5(7)(a) to proactively publish the study for being an “[analysis] of facts which it considers relevant and important in framing major environmental policy proposals”.

141. The Committee considers that whether particular information “frames” a policy proposal depends on the stage of the decision-making and on the relevance of that information to the decision-making. Such “framing” information is usually mentioned in the explanatory memorandum or other official justification for the proposal, even if not in the text of the proposal itself.

142. The Committee understands that the study had concluded that exporting renewable energy was “worth exploring further.”<sup>139</sup> Given that the related negotiations then stalled in April 2014, it appears to the Committee that the formation of the renewable energy export programme was at a rather early stage. Given the early stage of the decision-making, the Committee considers that the communicants have not substantiated that the cost-benefit study was indeed important in framing a major environmental policy proposal and that the Party concerned was not yet under an obligation to proactively publish the cost-benefit study.

143. Based on the foregoing, the Committee does not find the Party concerned to have failed to comply with article 5(7)(a) of the Convention.

**Article 6(8)**

*Legislation*

144. Sections 172(1G) and 172(1J)(c) of the PDA require a decisionmaker to consider “validly made” submissions and observations in relation to the environmental impacts of a proposed development. This could potentially engage not only article 6(8), but article 6(7) as well. However, the communicants have not substantiated their allegation that these provisions have the effect that only certain submissions and observations are considered. As such, the communicants have not demonstrated that the outcome of public participation is not duly considered, and the Committee finds that the Party concerned is not in noncompliance with article 6(8) by virtue of section 172(1G) and 172(1J)(c) of the PDA.

*Practice*

145. The communicants claim that the input from the public in a number of cases was only summarized and that there was no analysis or consideration as to how it was addressed in the decision-making process. They allege the public’s input was frequently determined as being of no relevance because it related to upstream national policy decision-making.

146. The Committee is not in a position, to determine whether or not the decisionmaker indeed failed to take due account of the public’s comments on the basis of the brief excerpts of reports and documents put before it by the communicants in this case.<sup>140</sup> The Committee thus considers this allegation to be unsubstantiated.

147. Moreover, there is nothing in the Convention that requires public participation on options that were rejected at an earlier stage of tiered decision-making, provided that public participation took place at that earlier stage. The communicants submit that no such public participation indeed took place previously, and this and the related article 6(4) allegations seem to be the core of the communication.

148. The Committee does not rule out that if these allegations, that the earlier decision-making occurred without proper public participation, were substantiated and had taken place when the Convention was in force for the Party concerned, a failure to “cure” such defects in the downstream decision-making would have amounted to noncompliance with article 6(8).

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<sup>139</sup> Communicants’ update, 2 January 2016, annex, p. 2.

<sup>140</sup> See, e.g. communication, annex A, and communicants’ reply of December 2014, pp. 22-30.

149. However, the Party concerned had at the time of those events assumed no obligations under the Convention, and thus there can be no underlying breach which needed to be cured in the downstream decision-making process. Accordingly, the Committee does not find the Party concerned to be in noncompliance with article 6(8) of the Convention in the present case.

#### **Article 6(9)**

150. The communicants' article 6(9) allegations have two aspects. Firstly, the communicants criticize the information contained in the reports and decisions as being too positive and lacking information concerning the negative environmental impacts. Secondly, the communicants point out that certain issues were not analysed in the decision-making at issue as a result of upstream policy decisions.

151. With respect to the first issue, the Committee finds no evidence that the decisions failed to contain sufficient reasons and considerations in a manner that would be contrary to article 6(9). Rather, the statement of reasons cited by the communicants appear to set out the decision-makers' reasoning very clearly.

152. In any event, it seems that the communicants' real complaint relates to its second alleged failure. The Committee considers that this complaint relates to upstream processes which took place at a time in which the Party concerned was not subject to any obligations under the Convention, and thus the Party concerned cannot be in noncompliance for any failure to cure alleged deficient public participation that occurred upstream. Accordingly, the Committee does not find the Party concerned to be in noncompliance with article 6(9) of the Convention in the present case.

#### **Article 7**

153. With respect to the communicants' allegations that the public participation was essentially meaningless regarding both the draft Westmeath County Development Plan and the draft Offaly Development Plan, the Committee again states that it cannot find non-compliance where the alleged failure to provide for public participation occurred before the Party concerned assumed any obligations under the Convention. Accordingly, the Committee does not find the Party concerned to be in noncompliance with article 7 of the Convention in the present case.

#### **Article 9(1)**

154. With respect to the communicants' allegation that the fee to appeal to the OCEI is neither free nor inexpensive and that the OCEI's procedure suffers from significant delays and is thus not expeditious, the Committee notes that in its findings on communication ACCC/C/2016/141 (Ireland), the Committee held that "a Party is not required to ensure access to more than one expeditious review procedure fulfilling the requirements of article 9(1), second subparagraph".<sup>141</sup> By the same logic, a Party is not required to ensure access to more than one review procedure that is "free or inexpensive" within the meaning of article 9(1), second subparagraph, although of course, the requirement in article 9(4) that the procedure not be prohibitively expensive will still apply.

155. With respect to ensuring access to a review procedure that is "free or inexpensive" and "expeditious" within the meaning of article 9(1), second subparagraph, in its findings on communication ACCC/C/2016/141 (Ireland), the Committee held that:

For the Party concerned, that procedure is the internal review carried out by the public authority concerned pursuant to article 11 (1) of the AIE Regulations, the initial procedure that must be requested by an applicant seeking review of an unsuccessful information request. A request for internal review under article 11 (1) is free of charge and, being laid down in article 11 of the AIE Regulations, is "established by law". ....Consequently, the Committee finds that the legal framework of the Party concerned does not fail to comply with the requirement in article 9(1), second

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<sup>141</sup> ECE/MP.PP/C.1/2021/5, paras. 90-92.

subparagraph, to provide access to an expeditious procedure established by law that is free of charge for reconsideration by a public authority.

156. Accordingly, since under the legal framework of the Party concerned, internal review is an “expeditious” and “free of charge” review procedure, the Committee finds that the Party concerned does not fail to comply with the requirement in article 9(1), second paragraph, of the Convention to provide access to a free or inexpensive review procedure for the reconsideration of requests for environmental information.

### **Article 9(3)**

157. The communicants allege noncompliance with article 9(3) of the Convention, yet have not provided any evidence that they were denied access to review procedures to challenge an act or omission that contravened national law relating to the environment. Rather, their claim is that judicial procedures in the Party concerned are prohibitively expensive, which engages not article 9(3), but 9(4). Thus, the Committee finds the communicants’ claim concerning article 9(3) of the Convention to be unsubstantiated.

### **Article 9(4)**

#### *Timely*

158. Where review procedures are to be used sequentially, and not as alternatives,<sup>142</sup> the Committee makes clear that the requirements of article 9(4) apply to each such review procedure.<sup>143</sup> Accordingly, if one of those review procedures is not timely, then the Party concerned will fail to meet the requirement in article 9(4) that review procedures under article 9(1) are timely.

159. In its findings on communication ACCC/C/2016/141 (Ireland), the Committee held that:

by failing to ensure that decisions by the OCEI on appeals under the AIE Regulations are timely, the Party concerned fails to comply with article 9(4) of the Convention.<sup>144</sup>

160. That finding applies equally to the communicants’ allegations in the present case. Accordingly, by not putting in place measures to ensure that the OCEI decide appeals regarding environmental information requests in a timely manner, the Party concerned fails to comply with the requirement of article 9(4) of the Convention to ensure timely procedures for the review of environmental information requests.

#### *Prohibitively expensive*

161. With respect to Mr. Swords’ litigation, the Committee notes that in that case each side bore their own costs, and Mr. Swords has not substantiated how his own costs, in which he represented himself, were prohibitively expensive. The Committee accordingly finds that the communicants have not demonstrated that, with respect to Mr. Swords’ proceeding, the Party concerned failed to comply with the requirement in article 9(4) that review procedures under article 9(1) not be prohibitively expensive.

### **Article 9(5)**

162. To support their allegation of noncompliance with article 9(5), the communicants refer to the conduct of the State Solicitor in Mr. Swords’ court proceeding. They claim that in that case the State Solicitor was obstructive and repeatedly sought costs and expenses and that this is indicative of a vindictive approach being taken to those seeking access to justice.

163. Article 9(5) requires each Party to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers and other barriers to access to justice in environmental matters. The communicants have not provided evidence to show how the alleged

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<sup>142</sup> ECE/MP.PP/C.1/2016/10, paras. 74 and 75.

<sup>143</sup> ECE/MP.PP/C.1/2021/8, para. 99.

<sup>144</sup> ECE/MP.PP/C.1/2021/5, para. 110.

conduct of a body or institution of the Party concerned in a particular court proceeding amounted to a failure to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

164. Based on the information put before it in this case, the Committee finds that, in the circumstances of this case, the allegation that the Party concerned failed to comply with article 9(5) is unsubstantiated.

## **IV. Conclusions and recommendations**

165. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

### **A. Main findings with regard to non-compliance**

166. The Committee finds that:

(a) By refusing the disclosure of the cost-benefit study prepared for the renewable energy export programme on the basis that the study was not “environmental information”, the Party concerned failed to comply with article 4(1) in conjunction with article 2(3)(b) of the Convention;

(b) By not putting in place measures to ensure that the OCEI decide appeals regarding environmental information requests in a timely manner, the Party concerned fails to comply with the requirement of article 9(4) of the Convention to ensure timely procedures for the review of environmental information requests.

### **B. Recommendations**

167. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 36 (b) and (c) of the annex to decision I/7, recommends that the Party concerned take the necessary legislative, regulatory, administrative and practical measures to ensure that:

(a) Access to cost-benefit studies used in environmental decision-making is not refused on the basis that it is not environmental information within the meaning of article 2(3)(b) of the Convention,

(b) Appeals under the AIE Regulations to the OCEI are required to be decided in a timely manner, for instance by setting a specified deadline.

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