

THE HIGH COURT

2017 No. 104 JR

Between

VAL MARTIN

Applicant

– and –

AN BORD PLEANÁLA

Respondent

– and –

EIRGRID PLC

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 11th January, 2018.

TABLE OF CONTENTS

(Numbers in square brackets are paragraph numbers)

A. INTRODUCTION [1]

I. Background. [1]

II. Some General Points Arising [2]

(i) Pleadings. [2]

(ii) Government Policy and An Bord Pleanála. [7]

(iii) Strategic Environmental Assessment and An Bord Pleanála. [8]

(iv) PCIs and An Bord Pleanála. [9]

(v) Delay. [11]

(vi) Collateral Attack. [15]

III. Five Themes. [16]

B. THE EVIDENCE BEFORE THE COURT [23]

IV. Implementation Programme [23]

V. Strategic Environmental Assessment [31]

VI. Planning Report [51]

VII. Public and Landowner Consultation Report [54]

VIII. Environmental Impact Statement [62]

(i) Introduction. [62]

(ii) NREAP. [63]

(iii) Alternatives. [68]

IX. Response to Issues Raised in Submissions/Observations [71]

C. APPLICABLE LEGAL PRINCIPLE [76]

X. Burden of Proof [76]

XI. Standard of Proof [77]

XII. Rectification of Perceived Shortcomings in SEA [78]

(i) Introduction. [78]

(ii) Križan v. Slovakia (Case C-416/10). [79]

(iii) Kavanagh v. Ireland [2007] IEHC 296. [80]

(iv) Ratheniska v. An Bord Pleanála [2015] IEHC 18. [82]

(v) Genovaitė Valčiukienė v. Pakruojis rajono savivaldybė (Case C-295/10). [84]

D. THE UNECE COMPLIANCE COMMITTEE, ETC. [87]

XIII. The UNECE Compliance Committee. [87]

XIV. Project-Splitting [88]

E. CONCLUSION [89]

A. INTRODUCTION

I. Background

1. Mr Martin is a farmer and environmental campaigner who has, since 2008, been involved in a campaign of opposition against Ireland's National Renewable Energy Action Plan. The within proceedings comprise a so-called 'telescoped' application by Mr Martin for leave to bring, and for substantive relief by way of, judicial review of a decision of An Bord Pleanála made on 19th December, 2016, to grant planning approval to EirGrid plc under s.182B of the Planning and Development Act 2000, as amended (the 'Act of 2000'), for the proposed North-South 400kV Interconnector Development, a development which has previously been the subject of comprehensive consideration by the court in its decision in *North East Pylon Pressure Campaign Ltd & anor v. An Bord Pleanála and ors* [2017] IEHC 338 (the '*North East Pylon case*').

II. Some General Points Arising

(i) Pleadings.

2. Although Mr Martin is a lay-litigant and thus deserving of some indulgence when it comes to the formalities of pleading his case, the court cannot but note that there are some very significant deficiencies in his pleadings.

3. First, the statement of grounds and his written submissions (which are not easy to follow) largely comprise generic statements of law without any particular connection to any legal point. Regrettably, the court must find that his pleadings fall well short of that particularity required under O.84, r.20(3) of the Rules of the Superior Courts 1986, as amended. The court recalls in this regard the following observations of Murray C.J. in *A.P. v Director of Public Prosecutions* [2011] 2 ILRM 100,112:

"In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review set out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought."

"It is not uncommon in many such applications that some grounds, and in particular the ultimate ground, upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted particularly when such a ground is invariably accompanied by a list of more specific grounds."

4. *A.P.* was among the decisions recently considered by Cregan J. in *Malone v Mayo County Council* [2017] IEHC 300, under the heading "*Requirement to plead a judicial review with precision*", in deciding to set aside leave to apply for judicial review, after (it is clear from paras.2-4 of his judgment) Cregan J. had tried repeatedly to facilitate the applicant in properly pleading his case.

5. Second, many of the provisions of European Union law to which reference is made by Mr Martin are not applicable in the context of a challenge of a decision to An Bord Pleanála.

6. Third, Mr Martin's complaints go well beyond his pleadings, even extending to decisions of bodies not before the court, e.g., the adoption of the National Renewable Energy Action Plan (NREAP) submitted by Ireland to the European Commission in July 2010 and the adoption of the list of projects of common interest (PCIs) by the European Commission pursuant to the PCI Regulation, i.e. Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17th April, 2013 on guidelines for trans-European energy infrastructure (O.J. L115, 25.4.2013, 39).

(ii) Government Policy and An Bord Pleanála.

7. It is not the function of An Bord Pleanála to review government policy or to consider public submissions in relation to government policy. Indeed the court cannot but recall, in this regard, s.143 of the Act of 2000, and the provision at sub-section (1) of same that "*The Board shall, in performing its functions, have regard to*", *inter alia*, "*(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural*". The court references the role of An Bord Pleanála, not because of some transgression that it perceives to arise in this regard on the part of An Bord Pleanála, but because, with respect, Mr Martin's application appeared to the court to be informed by a want of understanding of the foregoing.

(iii) Strategic Environmental Assessment and An Bord Pleanála.

8. None of the Strategic Environmental Assessment ('SEA')-related points made by Mr Martin concerning the role of An Bord Pleanála have any legal validity. An Bord Pleanála has no role in SEA and matters relating to SEA have no relevance to an individual planning application. It is not the function of An Bord Pleanála to determine whether a proper SEA has been carried out for the purposes of the SEA Directive, i.e. Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (O.J. L197, 21.07.2001, 30). As is clear from the SEA Directive, and the related national regulations (the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004), SEA does not take place in the context of a specific development. Much of Mr Martin's application appeared to the court, with respect, to be informed by a want of understanding of the foregoing.

(iv) PCIs and An Bord Pleanála.

9. It is not the function of An Bord Pleanála, whether as a national competent authority or otherwise, to review the decision of the European Council and Parliament to adopt the PCI Regulation or to review (let alone accept public submission concerning) whether a

particular project has correctly been adopted for the purposes of the Regulation. As to what is the role of An Bord Pleanála in this regard, the following text from the written submissions of counsel for An Bord Pleanála provides a succinct yet informative explanation, and is respectfully adopted by the court:

[T]he [PCI] Regulation establishes a methodology whereby 'Projects of Common Interest' are identified. There is no dispute but that the North South Interconnector has been adopted at the European level as such a PCI....Article 8 [of the PCI Regulation] provides that 'By 16 November 2013, each Member State shall designate one national competent authority which shall be responsible for facilitating and coordinating the permit granting process for projects of common interest.' [In Ireland, An Bord Pleanála has properly been so designated.] The function of the competent authority is...to act as a clearing-house or framework coordinator for the development consent process. It is not a role that requires any substantive decisions to be taken regarding the acceptability of a proposed development. The role of the competent authority is totally different from the 'project promoter' which is defined in Article 2(6) [of the PCI Regulation] and which, in this case, is EirGrid....[T]he adoption of [a]...PCI [as a PCI] is a matter that follows very clear procedures under the PCI regulation and, crucially, has nothing to do with the Board. Indeed, Article 7 mandates the Board (when considering the planning application) to accept that the PCI is necessary from an energy policy perspective."

10. It follows from the foregoing, and more particularly from the PCI Regulation, that any notion that An Bord Pleanála can re-visit the decision to list a project as a PCI is wrong.

(v) Delay.

11. The NREAP was submitted to the European Commission in June 2010. The Grid25 Strategy for the Development of Ireland's Electricity Grid was published in October 2008. The Grid25 Implementation Programme 2011-2016 went on public display in March 2011, with public submissions being invited at that time. So, insofar as Mr Martin has a concern about the adequacy of SEA or a concern about the absence of SEA, he is (hopelessly) out of time under any of the varying versions of Order 84 of the Rules of the Superior Courts 1986 (as amended) that applied over 2008-2011. (Order 84 appears to the court to set the relevant timeframe as, for the reasons stated above, it is not possible to assail the role of An Bord Pleanála in the SEA process because An Bord Pleanála has no role in SEA, and matters relating to SEA have no relevance to an individual planning application).

12. Though it scarcely seems necessary to engage in an extensive consideration of applicable case-law, given the length of the delay presenting, one relatively recent case of particular relevance to which the court has been referred in the context of delay is that of *Swords v. Minister for Communications, Energy and Natural Resources and ors* [2016] IEHC 503. In his judgment in *Swords*, Keane J. described the substance of the proceedings before him in the following terms, at paras.4-9:

"4.... [T]he plaintiff claims a number of declarations...against the State comprising: various declarations that the State has acted in contravention of the Aarhus Convention... various declarations that the State has acted in breach of EU law; a declaration that the national renewable energy action plan ('NREAP') submitted by the State to the Commission of the European Union...was adopted by the State in contravention of the Aarhus Convention and in breach of both EU law and the law of the State; an injunction restraining the State from relying upon the present NREAP for any practical purpose; and a mandatory injunction directing the State to comply with the requirements of the Aarhus Convention in the adoption or implementation of any future plan or programme equivalent to the present NREAP.

5. In seeking those reliefs, the plaintiff relies on two principal contentions. The first is that the State, in its development of the NREAP, has failed to properly comply with the provisions of the Aarhus Convention and, in particular, Articles 6 and 7 of that Convention, requiring signatory states to make provision for members of the public to participate in the development of their environmental policies.

6. The plaintiff's second principal contention is that the State failed to carry out a strategic environmental assessment or an environmental impact assessment in respect of the NREAP, as required by the...[SEA] Directive...as amended....

7. The State raises three significant preliminary pleas in response to the plaintiff's claims. Those pleas are: first, that the plaintiff's claims are out of time (hence, the present motion to dismiss the proceedings on grounds of delay); second, that, insofar as they relate to the Aarhus Convention, those claims are non-justiciable before the Courts of Ireland because, although Ireland has ratified the Convention, the particular provisions of the Convention at issue in these proceedings do not form part of the domestic law of the State; and third, that, insofar as they relate to State policy in the field of renewable energy, the plaintiff's claims are not amenable to review by the Courts under the principle of the separation of powers.

8. On the merits of the plaintiff's case and in response to the first of the two principal arguments advanced by him, the State pleads that the adoption of the State's NREAP is not covered by Articles 6 or 7 of the Aarhus Convention or that, if it is, the public participation requirements of the Convention were met in the course of the adoption process.

9. In reply to the plaintiff's second principal argument, the State acknowledges that it did not carry out a strategic environmental assessment or an environmental impact assessment in adopting the NREAP but contends, in essence, that the SEA Directive did not apply to the NREAP because the NREAP is a statement (or restatement) of existing State policy and, thus, was unlikely to have any new significant environmental effects, and that the EIA Directive did not apply to the NREAP because the NREAP does not set the framework for future development consents bringing it within the relevant annexes to that Directive; does not have likely effects on sites that would require it to be assessed under Directive 92/43/EEC; and is not in a category that would require an environmental impact assessment to be carried out under the EIA Directive."

13. When it came to the issue of delay, Keane J. observed, *inter alia*, as follows, at paras.27-28, 31, 71 and 73:

"27. The first of those applications in time is the State's motion to have the present proceedings dismissed by reason of delay. That motion issued on the 21st of March 2014. While the relief it seeks is couched as an order dismissing the proceedings on grounds of laches or, in the alternative, the plaintiff's inordinate and inexcusable delay in bringing both his application for judicial review and the present plenary proceedings, the real issue it raises is whether the plaintiff's challenge to the lawfulness of the State's NREAP is prohibited by operation of the time limits applicable to applications for judicial review.

28. The relevant facts, which I do not understand to be in dispute, are the following. Article 4(2) of Directive 2009/28/EC of 23 April 2009 required each Member State, including Ireland, to notify its NREAP to the Commission by the 30th June

2010. The State notified its NREAP to the Commission in July 2010. A slightly amended or modified version of that NREAP was notified to the Commission in October 2010. The plaintiff was certainly aware, no later than the 15th of October 2010, that the State had adopted the NREAP at issue, since that was the date upon which he made the relevant complaint to the Committee concerning the circumstances of its adoption. The plaintiff did not initiate judicial review proceedings until the 12th of November 2012. [In the within proceedings, the equivalent date is 6th February, 2017]. In those proceedings, the plaintiff sought, amongst other reliefs, an order quashing the State's NREAP. Accordingly, depending on the view one takes of the significance of the State's notification to the Commission of a slightly amended NREAP in October 2010, the plaintiff did not commence his challenge to the lawfulness of the State's NREAP for a period of somewhere between 25 months and 28 months after its adoption was notified to the Commission. [The equivalent periods here are periods of either six years and seven months or six years and four months.]

...

31. That being so, it is appropriate to identify the relevant period for the purposes of the present motion as that between the notification of the State's NREAP to the Commission in July or October 2010 and the initiation of judicial review proceedings by the plaintiff on the 12th of November 2012, rather than that between the former event and the issue of the plenary summons in these proceedings on the 24th April 2013.

...

71. No application for an extension of time under O. 84, r. 21(3) has been made in this case. It follows that no attempt has been made to persuade the Court that there is good and sufficient reason for doing so or that the circumstances that resulted in the plaintiff's failure to bring his challenge to the State's NREAP within the three month period prescribed were outside his control or could not reasonably have been anticipated by him. Thus, it seems to me that no requirement arises under Order 84, r. 21(4) for the Court to have regard to the effect that an extension of time might have on the State or a third party.

...

73. For the reasons I have set out in the preceding portion of this judgment, I have come to the conclusion that the State is entitled to succeed in its application for an order striking out these proceedings on grounds of delay."

14. The court would but note in passing that the delay arising in the within proceedings is considerably more significant than that which arose in *Swords*, without there being any explanation or excuse for that delay.

(vi) Collateral Attack.

15. A further pervasive difficulty with the within proceedings, it seems to the court, is that while they involve, ostensibly, a challenge to a decision of An Bord Pleanála, they in fact comprise a collateral attack on the NREAP, the Grid25 Strategy and the Grid 25 Implementation Programme. (That the court can have regard to the true target of an application ostensibly directed at another end is clear from decisions such as *Goonery v. Meath County Council* (Unreported, High Court, Kelly J., 15th July 1999 and *Kinsella v. Dundalk Town Council* (Unreported, High Court, Kelly J., 3rd December, 2004)). A collateral attack is an attack made on a decision, order or judgment in proceedings other than those whose specific object is the reversal, variation or nullification of the said decision, order or judgment. A claim of collateral attack may be raised to prevent a party from attacking the validity of an order other than by the designated appeal route or judicial review. The 'rule' against collateral attack is informed by, *inter alia*, the need to maintain (a) the integrity of the system of administration of justice and (b) the rule of law more generally. Though a collateral attack may constitute an abuse of process, the latter concept is typically applied to proceedings lacking in *bona fides* and which are frivolous, vexatious or oppressive. The rule against collateral attack, it seems to the court, can also apply in instances such as that now presenting where challenge is made, it seems in good faith, but where the form of attack (on prior plans and policies via an ostensible attack on a later planning decision) cannot be allowed to proceed when one has regard to the policy considerations that inform the so-called 'rule' against collateral attack. In the within proceedings, the form of collateral attack on the prior plans and policies aforesaid is not permissible under s.50(2) of the Act of 2000 (to the extent that that provision is relevant (and it is not relevant in the An Bord Pleanála-SEA context)) or under the general law relating to judicial review.

III. Five Themes

16. There are five themes which emerge from the statement of grounds and the written and oral submissions before the court.

17. The first theme concerns the procedural issues that the court has addressed above.

18. The second theme relates to perceived breaches of the EIA Directive, as amended, i.e. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (O.J. L26, 28.01.2012, 1), as amended. Those breaches can be broken down into three subheadings: (i) issues around public participation; (ii) issues around the alternatives considered by the developer and ultimately by An Bord Pleanála in granting development consent; and (iii) issues around the need being established by the development. Much of the judgment that follows is concerned with this second theme.

19. The third theme concerns the NREAP, in respect of which Mr Martin complains that it was not the subject of a SEA. This presents the procedural issue touched upon above, viz. that the said plan was adopted by Ireland (which is not a party to these proceedings) and was submitted to the European Commission as long ago as July 2010, with the result that any challenge to same is hopelessly out of time, even leaving aside for a moment that it would involve an impermissible collateral attack.

20. The fourth theme concerns the adoption by the European Parliament and the Council of the PCI Regulation. That is a complaint that does not lie against either the respondent or the notice party.

21. The fifth theme that emerges concerns the application of the SEA to the North East Pylon project. Again, as mentioned above, An Bord Pleanála has no role in SEA. Moreover, matters relating to SEA have no relevance to an individual planning application.

22. In passing (and not so much a theme as a line of criticism that went un-pursued at hearing), there was suggestion in Mr Martin's pleadings that the proceedings before An Bord Pleanála were a *pro forma* exercise. It is not entirely clear what Mr Martin means or meant to contend in this regard. The detail provided in this judgment (and in the *North East Pylon* case) as to what An Bord Pleanála did, and the volume and quality of the information which it considered, all points to anything other than a *pro forma* exercise. Moreover, An Bord Pleanála acted independently in the exercise of its functions and was free to reject the proposal before it as

incompatible with proper planning or otherwise unlawful. Any notion that An Bord Pleanála engaged in anything less than a proper exercise of its functions is as unfounded as it is rejected.

B. THE EVIDENCE BEFORE THE COURT.

IV. Implementation Programme

23. Exhibited among the evidence before the court is EirGrid's *Grid25 Implementation Programme 2011-2016*, which describes Grid25, at 2, as "a high-level strategy outlining how EirGrid intends to undertake the development of the electricity transmission grid in the short-, medium- and longer terms, to support a long-term sustainable and reliable electricity supply". The vision of Grid25 is stated as follows, at p.5 of the *Implementation Programme*:

"Given that the demands for transmission infrastructure are likely to be far different in 2025, and beyond, than currently [the Implementation Programme was prepared in 2011], EirGrid must plan for the longer-term future strategic transmission development and reinforcement needs of the electricity transmission network.

The Vision of Grid25 'is of a grid developed to match future needs, so it can safely and reliably carry power all over the country to the major towns and cities, and onwards to every home, farm and business...'

...

The Strategy to achieve this vision states, inter alia:

'Grid25 will deliver an efficient transmission network for Ireland's social and economic development. It will have the necessary capacity to reliably transport the future anticipated power levels from renewable and conventional generators and interconnectors to the cities and towns and the villages where the power is required.

We will follow international best practice and innovative methods to provide the necessary transmission capacity. The technology options available to implement Grid25 will increase as research and development is carried out. We will be proactive in investigating and adopting new technologies taking due consideration of the cost and effectiveness of the technology.'

Grid25 notes EirGrid's Statutory obligation to balance the provision of reliable transmission infrastructure with the costs to the final customer and with the impact of that infrastructure on the environment".

24. That is the vision. The strategic objectives are set out in section 1.3, the principal objective being that:

"In developing the Grid, the Grid25 strategy envisages the deployment of strategic alternatives designed for the long-term development of a safe, secure, reliable, economic and efficient grid. In this context, the Grid Development Strategy of Grid25...notes that, in consideration of the capacity of new transmission lines, there will be a positive presumption towards building new lines at 400 kV and at 110 kV where appropriate. [The North East Pylon interconnector is rated at 400 kV]. Building at 400 kV rather than 220 kV is more efficient and provides greater power carrying capability. Building one 400 kV circuit avoids the need for building a multiplicity of 220 kV and 110 kV lines and so has less long-term impact on the environment and on local communities. In the longer term, it may be appropriate to upgrade the 220 kV network to 400 kV, for similar reasons of efficiency and capacity. EirGrid will examine each case as the need to upgrade arises."

25. The *Implementation Programme* later moves on to a consideration of the "Strategic Policy Context for Grid25", observing, *inter alia*, as follows, in Section 1.4:

"Irish energy policy is set firmly in a global and EU context which has put energy security and climate change among the most urgent international challenges. In pursuit of this, the EU has set a legally binding obligation for Member States that greenhouse gases across the EU must be reduced by at least 20% by 2020, compared with 1990 levels.

The strategic context for energy infrastructure is set out in a number of policy documents covering National, Regional and Local levels, and comprising both spatial and non-spatial planning policy.

These include

- Irish Government's Energy White Paper Delivering a Sustainable Energy Future for Ireland (March, 2007)*
- National Development Plan 2007-2013, National Spatial Strategy 2002-2020,*
- Regional Planning Guidelines 2010-2022,*
- County Development Plans and relevant Local Area Plans."*

26. Moving forward, Section 2 of the *Implementation Programme*, under the overall heading "The Grid Development Strategy" states, *inter alia*, as follows, at Sections 2.1-2:

"2.1 Introduction

The high voltage (HV) electricity transmission network...forms the backbone of the electricity supply system in Ireland. High-quality and reliable electricity transmission infrastructure, providing quality performance, is vital for Ireland's ongoing socio-economic development, and thus is of national strategic importance.

2.2 The Grid

The national electricity transmission grid plays a vital role in the supply of electricity, providing the means to transport power across a meshed network, linking generator locations with often significantly spatially distant demand centres. The 400kV network provides a high capacity link between Moneypoint generation station on the west coast and the Greater Dublin area on the east. The 220kV network forms a number of single circuit loops around the country. The 110kV network, which is the most extensive element of the overall transmission system, extends across the country....

The Irish network is currently connected to the transmission system of Northern Ireland primarily by means of a single 275kV double circuit interconnection between Louth and Tandragee substations. There are also two lower-capacity 110kV connections with the Northern Ireland network at Letterkenny in Co Donegal and Corraclassy in Co Cavan.

The transmission system on the island of Ireland is almost entirely constructed as overhead line (OHL), except in very limited circumstances, such as congested or built-up areas, where underground cable (UGC) [is] used."

27. The issue of interconnection is addressed at para. 2.3.4 which states, *inter alia*, as follows:

"The primary benefits of interconnection are:

☐ Improving competition – by linking to other European markets

☐ Supporting development of renewable power generation...

☐ Improving security of supply....

...

EirGrid is currently developing the 500MW East West Interconnector between Ireland and Wales. This has a scheduled completion date of 2012. [This has since been built and is operational].

EirGrid and Northern Ireland Electricity are currently progressing the planning of a second major interconnector between the Republic of Ireland and Northern Ireland. These, and other potential longer-term future interconnectors, could play a significant role in internationalising the Irish energy market, and in facilitating the anticipated high levels of renewable generation on the island, by providing a means to export excess generation when output from renewable generation is high, and to import power when it is low."

28. Much later in the *Implementation Programme*, in Section 4.2, under the heading "Network Reinforcement Developments", EirGrid "identifies development projects that are driven by generic demand growth and reinforcements resulting from generator demand and interconnector connections". Table 4.2 then lists the network reinforcement projects relevant to the *Implementation Programme*. Then the text observes that "Of note, in the TDP [Transmission Development Plan] 2010, the North-South 400 kV Interconnector development was identified as in the public planning process. The application was subsequently withdrawn from that planning process....However, for consistency, the status has not been altered in this IP [Implementation Programme], which reflects the content of the TDP 2010. The project is listed in Table A1 of Appendix A."

29. If one then turns to Appendix A, headed "Network Enforcement Projects...", an introductory paragraph states that "These comprise development projects that are driven by generic demand growth and the deep reinforcements resulting from generator demand and interconnector connections" and, at p.63 (under headings identified at p.58 and replicated below) there is specific reference to the North South Interconnector, in the following terms:

“

CP No.	Project Title and Description	Major New Equipment	Project Justification	ECD	Phase
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...

CP0466a & CP0469	North-south 400 kV Interconnection Development A new 400kV line constructed between the existing Woodland 400 kV station, in south-east Co Meath and Turleenan in Co Tyrone	Woodland 400kV Bay:1 400kV line: 140km	To increase transfer capacity between the two systems in both directions and avoid situations where a single event could lead to system separation. Also to provide network reinforcement in the north east.	Drc-14	Public Planning Process
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”

30. There can be no doubt, even from the brief survey undertaken in the preceding pages of the within judgment, that specific information was provided in the *Implementation Programme* in relation to the North South Interconnector project, though it is important to note that the North South Interconnector project is but one project among many considered in the *Implementation Programme*, a factor which naturally has implications for the amount of text that can specifically be devoted to each such project.

V. Strategic Environmental Assessment

31. Also before the court is the "Environmental Report for the Grid25 Implementation Programme 2011-2016" which comprised the Strategic Environmental Assessment undertaken by EirGrid. The introductory text to the Report states, *inter alia*, as follows in Section 1.1:

"The SEA has been undertaken in order to anticipate and avoid adverse impacts arising from the IP. This will facilitate the development of the strategy outlined in Grid25 in a sustainable way that will ensure that such development will be conceived and delivered, having regard to the carrying capacity of the receiving environment.

The purpose of this SEA Environmental Report – which should be read in conjunction with the IP – is to provide a clear understanding of the likely environmental consequences of decisions arising from the Grid25 IP."

32. There follows, *inter alia*, a reference to the SEA Directive and its implementation, a consideration of the legal framework for the Grid 25 Implementation Programme SEA, including, at p.2, reference to the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004, as amended, and reference to the requirement therein to carrying out an environmental assessment "for all plans and programmes: (a) which are prepared for sectors including energy and which set the framework for future development consent of projects listed in Annexes I and II to the Environmental Impact Assessment Directive, or (b) which are not directly connected with or necessary to the management of a European site but, either individually or in combination with other plans, are likely to have a significant effect on any such site." The Report continues, at pp.2-3:

"The environmental assessment [i.e. the SEA] must be carried out by the competent authority of the plan or programme; in addition an Environmental Report (ER) must be prepared during the preparation of the plan or programme. EirGrid is the competent authority with respect to the IP for Grid25.

Prior to making a decision on the scope and level of detail of the information to be included in the ER, EirGrid – as required – gave notice to the relevant environmental authorities indicating that a submission may be made.

...

On completion of the draft IP and an earlier version of this ER, EirGrid gave the environmental authorities consulted at scoping stage, as well as the public, at least 4 weeks to make submissions on the IP and ER; the environmental authorities were sent a copy of the draft IP and ER and a newspaper notice was published. Submissions made were taken into consideration before adoption of the IP.

...

During the preparation of the draft IP and before its adoption, EirGrid took into account both the ER and submissions made on the draft IP and ER by environmental authorities, other bodies and the public."

33. So clearly such submissions as were made by the public were considered.

34. The Report continues, *inter alia*, as follows, at p.5, under the section heading "Context for the Implementation Programme":

"The IP identifies the best current understanding of those parts of the transmission system that are envisaged as likely to be developed over the next five years..."

The IP incorporates advice and comments received from both the Environmental Protection Agency (EPA) and the National Parks and Wildlife Service section (NPWS) of the Department of the Arts, Heritage and the Gaeltacht (DAHG), as well as from other parties during the period of public consultation in respect of the draft IP...This SEA ER has been revised in response to submissions made during the period of public consultation."

35. Thus, as can be seen, the environmental assessment process was an iterative one. Earlier drafts of the Report were put out for public consultation with the environmental and other authorities. When responses (submissions) were received, those were considered and formulated to form the eventual Report which has been placed before the court.

36. Moving on, the Report notes, at p.6, under the heading "The Grid25 Strategy", *inter alia*, as follows:

"The strategy is a response to government policy set out in the government's Energy White Paper Delivering a Sustainable Energy Future for Ireland – the Energy Policy Framework 2007-2020..."

The White Paper includes the meeting of 33% of electricity consumption from renewable energy (this target was subsequently increased to 40%) – and a number of Actions which are set to achieve the Strategic Goal of Ensuring that Electricity Supply Consistently Meets Demand. These actions include:

□ the delivery of a second North-South electricity interconnector..."

37. Moving on, at p.9, there is reference to the "National Renewable Energy Action Plan" which, it is stated, "sets out Ireland's national trajectories for the share of energy from renewable sources consumed in transport, electricity and heating and cooling between now and 2020", observing also that "This Plan does not provide a spatial component for renewable energy generation", with the necessary consequence that it was not, therefore, a strategic policy document that needed to be considered in the context of the plan in issue.

38. The methodology for the SEA is identified in Section 3 of the Report. "The SEA process", it is stated, at p.14, "started in August 2009." The main stages of that process are then identified. At p.17, under the heading "The SEA Environmental Report", the following appears:

"In this Environmental Report, which was placed on public display alongside the draft IP and subsequently updated, the likely environmental effects of the IP and the alternatives are predicted and their significance evaluated..."

The Environmental Report provides EirGrid as well as the public with a clear understanding of the likely environmental

consequences of decisions regarding how subsidiary regional developments will be conceived and delivered....

The Environmental Report was required to be altered in order to take account of recommendations contained in submissions and in order to take account of changes which were made to the draft IP on foot of submissions."

39. So what was at play, as can be seen, was not just an information-gathering process, but an effective consultation process, with EirGrid considering the submissions made to it and, where appropriate, making changes to the draft plan. As the Report notes, at 17, *"The Environmental Report is required to contain the information specified in Annex U to the SEA Directive and Schedule 2 of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004"*. Overleaf, under the heading *"The SEA Statement"*, the following text appears concerning methodology:

"On adoption of the IP the SEA statement was made public and includes information on how environmental considerations have been integrated into the IP...summarising the key issues raised in consultations and in the Environmental Report indicating what action was taken in response and the reasons for choosing the IP in the light of the other alternatives, identifying the other alternatives considered, commenting on their potential effects and explaining why the IP was selected."

40. Much later in the Report, in Section 8, under the heading *"Evaluation of Implementation Programme Provisions"*, and the sub-heading *"Potential Cumulative effects that could generally occur"*, *inter alia*, the following is stated, across from the heading *"Landscape"*: *"Interconnectors including the East-West Interconnector between Ireland and Wales and interconnectors between the Republic and Northern Ireland would have unavoidable effects on the landscape. The development of a marine interconnector could conflict with visual sensitivities, especially in more vulnerable areas."* What all this shows is an evaluation of the potential effects that could arise from projects which are considered together within this tier one strategic document.

41. At p.97 the whole issue of interconnection is specifically addressed at some length, it being stated, *inter alia*, that *"EirGrid and Northern Ireland Electricity (NIE) are currently progressing the planning of a second major other interconnector between the Republic of Ireland and Northern Ireland"*, with *"Unavoidable effects on the landscape"* again being mentioned as an issue presenting, followed by, *inter alia*, the following observation:

"In carrying out the assessment, EirGrid has examined a broad range of scenarios, such as the likely required number of interconnectors, different fuel prices and different generation portfolios. The report concludes that enhanced interconnection between the all-island grid and other grids has the potential to deliver numerous benefits to the island of Ireland."

42. Overleaf, the Report continues as follows, under the heading *"Likely Significant Effects"*, the following text appearing at p.98:

"As referenced in the IP and provided for by Eirgrid's Grid25 strategy/Eirgrid's transmission Development Plan would:

- ☐ *Improve competition...*
- ☐ *Support the development of renewable power generation...*
- ☐ *Improve security of supply...*

By doing this, interconnection would help to facilitate the achievement of higher level government targets contained in higher level national and international energy and greenhouse gas emission policies, including decreasing Ireland's dependence on fossil fuels, improving energy and security and reducing greenhouse gas emissions.

...

The development of interconnectors potentially conflicts with the protection of various environmental components (ecology...cultural heritage...human health...water resources...and land resources) however such conflicts would be mitigated by measures which have been integrated into the IP through the SEA...e.g. the ongoing co-operation in preparation of Renewable Energy Generation Guidelines and Strategies...and the preparation of a high level plan for high level transmission requirements taking into account likely offshore and onshore constraints and respond corresponding opportunity areas.

...

Indirectly, the development of interconnectors would be likely to potentially conflict with the various environmental components...as it would facilitate the development of renewable energy generation infrastructure, which are provided for by land use planning policies, including those from the NSS (National Spatial Strategy), NDP (National Development Plan) and lower tier Regional and County Plans. There would be unavoidable impacts upon the landscape...some of which would be mitigated.

Also, the interconnectors identified under 1 and 2 above could play a significant role in internationalising the Irish energy market."

43. So potential direct effects, potential indirect effects, and potential cumulative effects are all considered in the context of the SEA.

44. Continuing, at p.103, the Report features the headings *"Reinforcement of the Transmission System in the Regions"* and, as a subset of that, *"Border Region"*, following which there is a footnoted reference to the fact that *"Border Region 2' is being jointly developed by EirGrid and Northern Ireland Electricity"*, this being a reference to what has become the North South Interconnector.

45. Among the criticisms made by Mr Martin in his submissions were that there was no assessment of, or information provided in relation to, the Renewables Integration Development Plan but in fact, at p.105 of the Report, one finds the following stated:

"[L]ong term developments referred to in 'Border Region 4' are part of the Renewables Integration Development Plan (RIDP) which is a joint exercise between EirGrid, Northern Ireland Electricity and System Operator for Northern Ireland (SONI) Ltd. The RIDP currently comprises a series of ongoing studies of potential options - there is no project as such,

hence its designation in Border Region 4 as a long term development. As details of the RIDP as a project emerge at some future point in time the project will be included within a future Transmission Development Plan, which will be screened for need to undertake SEA, within an environmental appraisal report. Although 'Border Region 4' does not refer to specific works that will occur south of Strabane it is noted that any future works in that area are likely to cross ecologically and scenically sensitive areas."

46. What the foregoing offers is a clear expression of the potential to bring forward RIDP in the future; it is not being proposed as part of this implementation plan but, quite clearly, information is nonetheless provided within the SEA report concerning the RIDP.

47. Issue was also taken by Mr Martin with the quantum of responses that issued following the invitation for submissions. The submissions that presented are summarised after p.258 of the Report. So, for example, there is a synopsis of Submission No 4, from a Mr Swords (as referenced by Mr Martin in his own submissions) who submitted as follows:

"There has been no environmental assessment complete[d] for the Government's renewable energy programme. Secondly public participation procedures which are legally binding have been bypassed. Thirdly the SEA Environmental Report does not quantify the environmental objectives of the programme, in particular the proposed greenhouse gas savings of the wind energy it is designed to facilitate and the alternatives considered to reach those greenhouse gas savings. Finally further details about the illegalities of the Renewable Energy Action Programme can be found at the N Aarhus Convention Compliance Committee website..."

which draws the following response:

"Comments on the undertaking of environment assessment or otherwise of other policies, plans, programmes or projects is not within the scope of this report.

The purpose of the ER for the Grid25 draft IP – is to provide a clear understanding of the likely environmental consequences of decisions arising from the draft IP. The preparation of the draft IP and accompanying SEA have complied with all legislative provisions. The information contained in the ER complies with the requirements as detailed under Annex I...of the SEA Directive.

The type and extent of future renewable energy projects is unknown therefore it is not realistic to quantify impacts upon greenhouse gas emissions; however, reference can be made to target emissions in the 2007 White Paper on Energy; qualitative consideration relating to such is given through the application of Strategic Environmental Objective C1[1] throughout the assessment

[1] SEO C1: To help facilitate the achievement of higher level targets contained in the Government's Energy White Paper Delivering a Sustainable Energy Future for Ireland – the Energy Policy Framework 2007-2020 and targets relating to the Kyoto Protocol".

48. Then, over the page, under the heading "Proposed Amendments Arising", there is reference to the European Union having "set a legally binding target that greenhouse gases across the European Union must be reduced by at least 20% by 2020", and reference to the fact that "Any generation plants greater than 50MW fall under the EU Large Combustion Plant Directive (2001/80/EC) [as transposed]...[which] limits the emissions of certain pollutants into the air from large combustion plants" and also to the fact that "The EPA is charged with ensuring that generation plants meet their requirements under these directives. There are a number of other EU Directives and national policy initiatives that apply restrictions to emissions from generation units."

49. What is clear, even from this consideration of Mr Swords' submissions (one of 22 referenced in the Report), is that the submission was made, the submission was considered, and then the effects of that submission are set out.

50. All in all, what is clear from the Report (and the Implementation Plan) is that there is no basis (none) for Mr. Martin's contention in the within proceedings that there was a lack of information presented/considered in the SEA process. It quite clearly was taken into consideration and there was an effective exercise in consultation.

VI. Planning Report

51. Moving on next to the Planning Report, if only to show that there is no disjoin between the Implementation Plan and its strategic environmental assessment and the lower-tier project which emanates from it:

– Section 2 ("Description of Proposed Development"), *inter alia*, outlines the project history and development; refers to the re-evaluation process that transpired over 2010-2013, following the withdrawal of the previous application for planning approval in 2010; and mentions the consideration of documents issued since the publication of the preliminary evaluation report.

– Section 4.3.3 (under the heading "The Government Green Paper on Energy Policy in Ireland") references, *inter alia*, the National Energy Efficiency Action Plan (NEEAP) and the NREAP, observing, *inter alia*, as follows:

"Of particular relevance to the North-South 400kV Interconnection Development the following is set out in the Green Paper:

'As part of the Grid25 strategy, EirGrid and ESB Networks continue to work in partnership with Northern Ireland Electricity (NIE) and the System Operator Northern Ireland (SONI) to strengthen cross-border transmission capability by way of the planned second North-South Interconnector, a high capacity transmission capability by way of the planned second North-South Interconnector, a high capacity transmission line that will run between Counties Meath and Tyrone.'

– Section 4.3.6 is concerned with the "Government Policy Statement on the Strategic Importance of Transmission and Other Energy Infrastructure 2012" and Section 4.3.7 is again concerned with the "National Renewable Energy Action Plan".

52. So while, for example, the NREAP is not relevant to An Bord Pleanála's consideration of the application for development consent, made in the context of the North South Interconnector development, there was no paucity of information concerning same among the information accumulated and considered in the course of the consent process.

53. Moving on, there is reference to the strategic plans of EirGrid, including Grid25 (Section 4.3.10); reference to the Regional Planning Guidelines for the Greater Dublin Area 2010-2022 (which at that time included County Meath, where the Woodland substation is located) (Section 4.4.2), including mention that "[T]he North-South Interconnector and the Woodland (Meath)-Kingscourt (Cavan) 400kV line are expected to provide long term capacity between the Republic of Ireland and Northern Ireland (NI) systems"; – so again no paucity of information concerning Grid25 and the implementation programme – recitation of "The Grid25 Initiatives" (i.e. those initiatives being put in place to address various themes emerging from the feedback received by EirGrid in respect of its major projects (Section 5.5.3)); and then in the "Conclusions" (Section 6) one finds mention that among the material considerations to which there has been regard are "the provisions of Grid25, EirGrid's transmission network development policy, as well as the Grid 25 Implementation Programme and accompanying SEA".

VII. Public and Landowner Consultation Report

54. As touched upon previously above, the (surprising) point has been made by Mr Martin in his written and oral submissions that there was an inadequacy of consultation in relation to the project. Among the documents exhibited before the court are the "Public and Landowner Consultation Report". In Section 2 of same (headed "Context of Public and Stakeholder Engagement"), EirGrid observes, *inter alia*, as follows:

"1 In making an application for planning approval for the North-South 400kV Interconnection Development, EirGrid is obliged to consult and has consulted with members of the public and the public concerned in accordance with the following legislative best practice and planning practice requirements:

- ☐ Aarhus Convention requirements;
- ☐ Consolidated EIA Directive requirements;
- ☐ Irish legislation requirements; and
- ☐ Project of Common Interest (PCI) requirements.

2 EirGrid is also committed to providing accessible, meaningful and accountable consultation as part of its project development process."

55. There follows reference to the Aarhus Convention, the related *Implementation Guide*, and Ireland's *Draft National Implementation Report* (prepared by the Department of the Environment, Community and Local Government to outline the implementation in Ireland, to that time, of the Aarhus Convention), and the later submission of the *National Implementation Report*, following input during the consultation exercise by, *inter alia*, EirGrid. Moving on, there is mention of the EIA Directive and the requirements of national law. Then, in Section 2.2, Eirgrid identifies "Eirgrid's Approach to the Public Consultation Process", stating, *inter alia*, that "All of the consultation activities to date...aimed to ensure that the public participation activities devised for the project were...accessible...meaningful...and...accessible". These terms are amplified upon in some detail. Thus at Section 2.2.1.1 it is stated that "[A]ccessible consultation aims to provide and make project information and key project messages available to the public, public concerned, landowners and other stakeholders", at section 2.2.1.2 it is stated that "Meaningful consultation means providing clarity to members of the public on what aspects of the project are open for consultation", and Section 2.2.1.3 states, *inter alia*, that "Accountable project decision making ensures that the project has taken on board issues, as appropriate, and the project only moves forward once each phase has been appropriately dealt with." At Section 2.2.2, under the heading "EirGrid's approach to Consultation in Project Development", mention is made that "In the rollout of projects under the Grid25 strategy, EirGrid has consistently used graphical roadmaps to present the timeline of the project to the public and other stakeholders in a simplified and accessible manner."

56. In Section 3 of the *Public and Landowner Consultation Report*, an overview of the public consultation undertaken by EirGrid transpires under the heading "Overview of Public Consultation and Stakeholder Engagement Undertaken". This consultation process comprised two strands. Strand 1 focused "on the public and public concerned and all interested stakeholders, including prescribed authorities". Strand 2 "focused on potentially affected landowners". The overview is reduced to tabular form, at Table 3.1 with the period 2011-14 summarised as follows:

	2011-2014
Strand 1: Structured Phases of Public Consideration and/or Engagement	<p><i>Re-evaluation Process Phase (2011-2013)</i></p> <p><i>This two phase process corresponded with the publication of the Preliminary Re-evaluation Report and Final Re-evaluation Report and the wider public consultation activities undertaken at this time.</i></p> <p><i>The preliminary re-evaluation phase – the formal consultation period was from 9th May 2011 to 1st July 2011.</i></p> <p><i>The final re-evaluation phase – the formal engagement period was from 16th April 2013 to 27th May 2013</i></p> <p><i>The Preferred Project Solution Phase – this phase focused on consultation on the preferred project solution and the Preferred Project Solution Report. This consultation period was from 16th July 2013 to 9th September 2013.</i></p>

Strand 2: Focused Landowner Engagement	<p><i>Phase 1 – Focused landowner engagement took place following the publication of the Indicative Route (this corresponded with the publication of the Preliminary Re-evaluation Report).</i></p> <p><i>Phase 2 – Focused landowner engagement took place following the publication of the Preferred Project Solution Report in July 2013.</i></p> <p><i>Phase [3]... - Following assessment of all the modification requests received, landowners were informed (in writing) of the Final Line Design and tower location that EirGrid was intending to submit to An Bord Pleanála (the Board) for approval (December 2013).</i></p>
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”

57. A footnote to this table observes that “[T]hroughout all stages of the project, EirGrid reviewed, and continued to review, all stakeholder submissions and feedback up until the submission of the application for planning approval.” So the consultation process was clearly highly iterative.

58. Later, at Section 5.2.3, there is consideration of “*The Grid25 Implementation Programme 2011-2016 and Strategic Environmental Assessment*” (both of which have been touched upon previously above in some detail).

59. At Section 8.2 one finds a description of the “*Project Proposal Phase (December 2013-Submission)*”, which includes, at Sub-Section 8.2.1.2, mention of “*EirGrid’s Grid25 Initiatives*” in the following terms:

“5 In January 2014, EirGrid set out a number of initiatives, in response to public concerns expressed about some of its major projects proposed as part of the Grid 25 strategy (which includes the North-South 400kV Interconnection Development) to develop and upgrade Ireland’s electricity transmission network.

6. The initiatives, published on EirGrid’s website...include a proposal for community gain funds for localities located close to new pylons and substations....

8 EirGrid published a Community Update Brochure in July 2014...to ensure continued awareness of the project prior to the submission of the application. It advised that EirGrid was preparing an Environmental Impact Statement...in accordance with the scoping opinion that was provided by the Board and which was informed by the feedback received during public consultation and participation. It also provided an update on the opinion of the IEP [Independent Expert Panel] that the work completed to date on the North-South 400kV Interconnection Development is compatible with the methodologies now being employed on the Grid West and Grid Link projects. The brochure set out EirGrid’s update Project Development and Consultation Roadmap and identified the stage which had been reached in terms of the roadmap. It also advised on the timelines associated with the PCI notification procedures being undertaken at that time by EirGrid and the lead up to an application submission. The brochure also contained an overview of the project and the national grid development strategy (Grid25)...”.

60. At the end of Section 8 (which is concerned generally with the “*Period Post-Closure of Consultation on the Preferred Project Solution and Prior to the Submittal of the Planning Application*”), p.160, mention is made of EirGrid’s publication on 27th March, 2015, of its discussion paper “*Your Grid, Your Views, Your Tomorrow*”, coupled with the observation therein that:

“Our review of Grid25 found there remained a compelling and clear need for the project. We expect to submit a planning application for the North South 400kV Interconnection Development in the coming weeks.

We remain committed to our new standards of consultation to ensure that all interested parties have an opportunity to voice their views...”.

61. What rings through the *Public and Landowner Consultation Report* with striking clarity, as with all the planning application documentation that the court has seen, is that there was no dearth of information: information was provided in accessible manner; consultation was invited; that consultation was meaningful, and it was effective.

VIII. Environmental Impact Statement

(i) Introduction.

62. Chapter 2 of Volume 3B of the EIS, *inter alia*, identifies the strategic need of the proposed North-South Interconnector, which, the introductory text states, “*arises from the required development of the existing high voltage transmission network infrastructure on the island of Ireland*”. Section 2.2.3 identifies the “*Transmission System Needs*” presenting, including the limitations on the existing interconnection between Ireland and Northern Ireland. The “*Benefits of the Proposed Interconnector*” are articulated in Section 2.3, being (in summary) (i) the improvement of competition by reducing the constraints restricting the efficient performance of the all-island single electricity market, (ii) the improvement of security of supply by providing a reliable high-capacity link between the two parts of the all-island transmission system, and (iii) the development of renewable power generation by enhancing the flexible exchange of power-flows over a large area of the island of Ireland.

(ii) NREAP.

63. In the course of his submissions, Mr Martin contended that information needed to be provided on the NREAP as part of the application for development consent. So it is notable that in the EIS, the following observations appear, at pp.2-16 to 2-17, viz:

“In response to Article 4 of...the Renewable Energy Directive...the Government of Ireland has submitted a National Renewable Energy Action Plan (NREAP) to the EU Commission.

...

A key constraint to the practical development of wind power generation is the ability of the existing transmission systems to absorb and manage this form of power generation.

The second north-south interconnector contributes to this objective by resolving the power transfer limitations that currently exist between the power systems.

...

The addition of the second interconnector therefore significantly contributes to power system stability on the island as the level of RES-E installed increases to meet the future renewable targets."

64. So the information which Mr Martin contends ought to be provided, is provided, and is provided in the correct context.

65. Overleaf, in Section 2.4, under the heading "Conclusion Regarding the Strategic Need for the Project", there is reference (again) to Grid 25 (which seems to the court to de-bunk (again) the criticism made by Mr Martin that there was some paucity of information in the consent process in relation to Grid25. The benefits of the proposed development are re-stated and observation is also made, at p.2-19, that "The need case for the project was also confirmed by external reviewers (i.e. London Power Associates (LPA)). This LPA report entitled External Peer Review of Grid25 Review (2015) for EirGrid, is included as Appendix 2 to the discussion paper."

66. As to consultation, and the supposed lack of same, the issue of "Consultation and the EIA" is addressed at Section 1.3.3 of Volume 3B of the EIS, in the following terms:

"Consultation is an essential part of the EIA process. It provides prescribed bodies, interest groups (with specific environmental responsibility) and the public (in particular those that may be directly affected by the proposed development e.g. landowners) with an opportunity to:

☐ *Comment on the information supplied by the developer;*

☐ *To participate in the relevant environmental decision-making procedure; and*

☐ *Express comments and opinions when all options are open to the competent authority before the decision on the application for planning approval is made."*

67. In Section 1.5, headed "Difficulties Arising During Preparation of the EIS", *inter alia*, the following conclusion is reached:

"[D]espite the difficulties encountered in compiling this EIS (including the inability to access the entire extent of the alignment of the proposed development), EirGrid and its project team are satisfied that a comprehensive and objective EIS has been prepared in respect of the proposed development, which is more than adequate to meet the requirement that it alerts the competent authority, the public and public concerned and prescribed authorities to the potential effects of the proposed development on the environment."

(iii) *Alternatives.*

68. A further aspect of the complaint made by Mr Martin in relation to the environmental impact statement and environmental information concerns alternatives. That is addressed, *inter alia*, in Section 4 of Volume 3B of the *Environmental Impact Statement* under the heading "Transmission and Technology Alternatives". The legislative context is considered and it is noted that "In relation to the strategic matter of determined policy, reference is made to EirGrid plans and strategies including Grid25 – A Strategy for the Development of Ireland's Electricity Grid for a Sustainable and Competitive Future (2008)". So there is no disjoin; matters are fully articulated in the EIS to the extent that they should be.

69. Mr Martin submitted that one alternative which was not considered was the 'do nothing' alternative. But An Bord Pleanála expressly stated in its decision that it considered the EIS which was put before it, which statement does consider the following alternative, stating as follows in Section 4.1.2 (under the heading, in enlarged Bold font, "DO NOTHING ALTERNATIVE"):

"17. It is best practice in Environmental Impact Assessments (EIA) to consider the 'Do Nothing' alternative, i.e. where no development occurs. Under a 'Do Nothing' alternative, the strategic transmission infrastructure and its associated development would not be constructed. The land upon which such development is proposed to occur – primarily comprising agricultural land – would remain unchanged. As a consequence, the environmental impacts, identified in this EIS, positive and negative, would not occur.

18. Furthermore, under a 'Do Nothing' scenario there would remain a single interconnector between the transmission systems of Ireland and Northern Ireland, with consequent limitations as set out at Chapter 2 of this volume [of] the EIS. Of particular note, there would remain an inherent risk of system separation, requiring a constraint on the total transfer capacity available on the existing interconnector. This would serve to frustrate the operation of the SEM, as per the Single Electricity Market Directive...[I]t would also significantly frustrate current Government targets for 40% of National electricity consumption from renewable sources by 2020. The 'Do Nothing' scenario would also fail to offset the likely environmental impact of any alternative options to secure the future reinforcement of the transmission infrastructure in the north-east area of Ireland.

19. Having regard to all of the above, the 'Do Nothing' alternative is not considered to be appropriate."

70. Perhaps worth noting in passing, if only because it follows immediately on the above-quoted text, is the consideration of the "Alternatives to Transmission Network Solutions" that appears at p.4-7 onwards, which includes reference, at 4-11, to the Government Policy Statement of July 2012 on the Strategic Importance of Transmission and Other Energy Infrastructure, including the references therein to the fact that "The major investment underway in the high voltage electricity transmission system under EirGrid's Grid25 Programme is the most important such investment in Ireland's transmission system for several generations" and also to the fact that "While the Government does not seek to direct infrastructure developers to particular sites or routes or technologies, the Government endorses, supports and promotes the strategic programmes of the energy infrastructure providers, particularly EirGrid's Grid25 investment programme".

IX. Response to Issues Raised in Submissions/Observations

71. The issue of participation has already been touched upon by the court. Among the documents exhibited before the court is the response document prepared by EirGrid to address the written submissions or observations made by members of the public and prescribed bodies to An Bord Pleanála upon the application for development consent being made, including, as it happens, a submission by Mr Martin. (The approach adopted by EirGrid was to group the issues together and provide composite responses, but, by way of acknowledgement of those who made submissions, each such person was named as having made a submission/observation).

72. At p.824, under the heading "*Strategic Environmental Assessment*", it is observed, *inter alia*, that:

"A number of submissions claim that the statutory process for the proposed development is flawed owing to deficiencies at Strategic Environmental Assessment (SEA) level. In particular a number of submissions questioned the validity of the planning application based on the following reasons:

☐ *The planning application was not subject to SEA;*

☐ *Grid 25 was not subject to SEA;*

☐ *A project which is funded under and part of the National Renewables Energy Plan (NREAP) requires a valid SEA to make a valid planning application; and*

☐ *A SEA should have been carried out on the NREAP."*

73. So the above issues were articulated in submissions made by parties, including Mr. Martin, and then EirGrid responded to them, *inter alia*, in the following terms:

"39 An SEA is not required in respect of the North-South 400kV Interconnection Project, the subject matter of the application for approval. In particular an SEA is not required in respect of a project but in respect of plans or programmes. Article 2 of the...[Strategic Environmental Assessment] Directive defines 'plans and programmes' as:

'plans and programmes...which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions.'

40. Article 3(2)(a) requires that an environmental assessment shall be carried out for all plans and programmes:

which are prepared for [a number of sectors, including]...energy...and which set the framework for future development consent of projects...'

...

41. The proposed development [the North South Interconnector] is a 'project' for the purposes of the EIA Directive, for which an EIS is required to be carried out. In this respect, Article 1(2) of the EIA Directive states:

'For the purposes of this Directive 'project' means:

- the execution of construction works or of other installations or schemes,

- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

42. In any event insofar as the proposed development forms part of Eirgrid's Grid25 development strategy, an SEA of the Grid25 Implementation Programme was conducted which involved public participation including the opportunity for the public to make submissions. Both the Grid25 Implementation Programme and the related SEA expressly refers to the North-South 400kV Interconnection Development...Thus an SEA of the plan or programme which incorporates the project has been carried out and any objection to the proposed development on the basis of purported non-compliance with the SEA Directive is without merit."

74. And that, of course, is the position that EirGrid maintains before the court.

75. At p.58, under the heading "*Other General Issues Arising*" there is consideration of alleged differences in approach to consultation compared with other Grid25 projects (which alleged differences are rejected by EirGrid). Then a number of specific issues raised by the North East Pylon Pressure Campaign in respect of public participation are raised and addressed in terms.

C. APPLICABLE LEGAL PRINCIPLE

X. Burden of Proof

76. In *Harrington v. An Bord Pleanála* [2014] IEHC 232, the submission was made that the applicant had sought to invert well-established legal principles in relation to the burden of proof in judicial review. In the course of his judgment, O'Neill J. observed, at para.45, that "Although the procedure in the appeal before the respondent was not an adversarial one, there is no doubt that the procedure in this judicial review is undoubtedly adversarial, and the onus of proof resting upon the applicant in these proceedings is well-settled", reliance being placed on the decisions in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39, *Weston v. An Bord Pleanála* [2010] IEHC 255 and *Lancefort Ltd v. An Bord Pleanála* (Unreported, High Court, McGuinness J., 12th March, 1998), as supporting the proposition that "[T]he applicant carries the burden of proof of establishing the grounds in respect of which leave for judicial review was granted." In *Weston*, Charleton J. observed, at para.11, that "The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on... the applicant." Any fair-minded analysis of the evidence considered in the preceding pages by

reference to the critical themes identified at the outset of the within judgment would have to yield the conclusion reached by the court, viz. that the burden aforesaid has not been discharged in the within application: there was clearly material before An Bord Pleanála to support the conclusions it reached.

XI. Standard of Proof

77. As this is a telescoped hearing, Mr. Martin has to advance grounds of challenge which are “substantial grounds” within the meaning of s.50A of the Act of 2000, [Under s.50A(3) of the Act of 2000, “The Court shall not grant section 50 leave unless it is satisfied that [inter alia] – (a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed”.] i.e. grounds that are “reasonable”, “arguable” and “weighty”, to borrow from the judgment of Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 ILRM 125, 130, echoing (at least with regard to the requirement of reasonableness) the judgment of Egan J. in *Scott v. An Bord Pleanála* [1995] 1 ILRM 424, 428-9. *McNamara and Scott* have been cited and applied in many decisions of the Superior Courts, including, *inter alia*, *KA v Refugee Appeals Tribunal* [2014] IEHC 223. As will be seen hereafter, the court concludes in the within judgment that none of the grounds upon which leave is sought in Mr Martin’s statement of grounds constitute substantial grounds for contending that the decision of An Bord Pleanála is “invalid or ought to be quashed”, to borrow from s.50A(3) of the Act of 2000, or offers a basis on which substantive relief by way of judicial review falls properly to be granted. Any fair-minded analysis of the evidence considered in the preceding pages by reference to the critical themes identified at the outset of the within judgment would have to yield the conclusion reached by the court, viz. that the burden of proof which Mr. Martin bears, firstly, to obtain leave from the court and, secondly, in the event that leave were granted (it will not be) to obtain substantive relief, has not been discharged.

XII. Rectification of Perceived Shortcomings in SEA

(i) Introduction.

78. Mr Martin has contended that when An Bord Pleanála was making its decision concerning the application for development consent it should have rectified any (perceived) shortcomings in the strategic assessment previously carried out. In advancing that proposition, Mr. Martin relied on a couple of decisions of the Court of Justice, viz. *Križan v. Slovakia* (Case C-416/10) and *Genovaitė Valėiukienė v. Pakruojo rajono savivaldybė* (Case C-295/10) (though it is useful also to refer in this regard to a couple of cases decided by the Irish courts).

(ii) Križan v. Slovakia

(Case C-416/10).

79. This was a Slovakian case concerning a landfill where there was a significant gap of several years between the environmental impact assessment and the impugned development. Though it has been proffered by Mr Martin as being a case about development consent, the court does not see it to be so. It is, in truth, a case concerned with the existence of a time-gap between a pre-existing environmental impact assessment and a subsequent development consent. Notably, what happened in *Križan* cannot happen under Irish law. This is because under our legal system the relevant planning authority’s decision falls to be made only after an environmental impact assessment has been completed, and thus there will not be a significant gap between the carrying out of that environmental impact assessment by the relevant planning authority and the issue of the planning permission (development consent).

(iii) Kavanagh v. Ireland

[2007] IEHC 296.

80. This was a case in which Mr Kavanagh sought to impugn certain decisions to develop a prison across the road from Mr Kavanagh’s family residence, on the basis that the decisions to develop had been done without prior public consultation and/or without carrying out any proper environmental assessment in accordance with European Union law. In the course of his judgment, Smyth J. made the following observations concerning what might be styled ‘the SEA point’:

“Article 2 [of the SEA Directive] draws a distinction between ‘plans and programmes’ in the ordinary meaning of the words and ‘plans and programmes’ for the purpose of the Directive. In other words ‘plans and programme[s]’ (in the ordinary sense) must possess certain characteristics if they are to constitute ‘plans and programmes’ (in the Directive sense). The European Commission has provided guidelines (and they are no more) on the implementation of the Directive. Paragraph 3.3 of the Guidelines suggest[s] that ‘the name alone (‘plan’, ‘programme’, ‘strategy’, ‘guidelines’, etc.) will not be a sufficiently reliable guide: Documents having all of the characteristics of the plan or programme as defined may be found under a variety of names.

...

The original decision made by the Government...is not captured at all by the Directive. (Even if it were a plan or programme such as is contended for by the Plaintiff). In my judgment a plan is envisaged as a framework against which decisions are made concerning development consents: e.g. a development plan sets a framework against which individual planning permissions for specific projects are to be granted. There is no information before the Court which indicates that the proposed project for the development of a prison site at Thornton (or for that matter the proposed project for the Thornton Hall prison) when combined with the replacement of Mountjoy prison amount to a ‘plan’. Even if they can amount to a plan ‘they did not amount to a plan’ which constitutes a framework against which individual development consents for particular projects are to be granted.”

81. In the within case, Mr Martin appears to assert that the North-South Interconnector development and RIDP, i.e. the prospective further development in the Donegal-West/Northern Ireland area, amount to a plan, and that there was a failure to consider this so-called plan. But it is abundantly clear from the evidence before the court that the North-South Interconnector development is a stand-alone project. Yes, it was considered in the Grid25 implementation plan, and yes, that plan was the subject of a SEA; however, it is factually and legally incorrect for Mr Martin to assert, in effect – if the court might reduce matters to mathematical form – that ‘North-South Interconnector development + RIDP = a plan’. It follows from the foregoing that it was appropriate for An Bord Pleanála to conduct its assessment of the North-South Interconnector project as it did.

(iv) Ratheniska v. An Bord Pleanála

82. This appears to be the only previous consideration by the Superior Courts of the Grid25 implementation plan, which consideration in the course of a failed challenge to a decision of An Bord Pleanála granting approval for a development comprising certain electricity transmission infrastructure and associated works comprising what was known as the 'Laois-Kilkenny Reinforcement Project'. In the course of his judgment, Haughton J. observed, *inter alia*, as follows, at paras. 6-7 and 9:

"6...In October, 2008, EirGrid published 'A Strategy for the Development of Ireland's Electricity Grid for a Sustainable and Competitive Future', known as 'Grid 25'. This was a high level strategy outlining how EirGrid intended to undertake the electricity transmission grid in the short, medium and long term to support a long term sustainable and reliable electricity supply. The 'Grid 25 Implementation Programme 2011-2016' was a practical strategic overview of how the early stages of Grid 25 would be implemented. It was subjected to Strategic Environmental Assessment (SEA) under the SEA Directive 2001/42/EC. The SEA Directive was transposed into Irish law via EC (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (S.I. 435 of 2004) and the Planning and Development (Strategic Environmental Assessment) Regulations 2004 (S.I. 436 of 2004) both of which Regulations became operational on 21st July, 2004. These Regulations were amended by S.I. 200 and 201 of 2011. This involved a systematic process of identifying and evaluating the likely significant environmental effects of Grid 25 and avoidance of those adverse effects which could not be sustainably accommodated.

7. At p. 119 of the SEA there is specific reference to 'Laois/Kilkenny Reinforcement' with the following description:-

'New 400/110kV transmission station in Co. Laois. The station will be looped into the existing Dunstown-Moneypoint 400kV line and Carlow-Portlaoise 100kV line. A new 110 kV circuit from the new station to Kilkenny using the existing Ballyragget-Kilkenny 38kV line which is built to 110kV standards. A new 110/38kV station at Ballyragget to cater for loss of the Kilkenny-Ballyragget 38kV line.'

...

9. Upon completion, the SEA was circulated to various environmental authorities such as the EPA and certain government ministries and was published in a newspaper notice which indicated that a copy of the SEA Statement and Implementation Programme were available for inspection. Both the draft Implementation Programme and the SEA Environmental Report went on public display at the end of March, 2011 and the public was entitled to take part in the consultation process."

83. Notably, the SEA here was published – notice in fact appeared in three national newspapers (a copy of which notice was exhibited before the court in evidence), with public involvement invited: "Written submissions or observations may be made to EirGrid"; "Is féidir aighneachtaí nó breithiníthe a scríbhinn a chiur chuig Éirgrid".

(v) *Genovaitė Valėiukienė v. Pakruojis rajono savivaldybė*

(Case C-295/10).

84. This case was relied upon by Mr Martin to substantiate further his proposition that An Bord Pleanála, as competent authority, was entitled to rectify any (perceived) deficiency or shortcoming in an earlier strategic assessment. The case concerned a Lithuanian law that had the effect of exempting an entire class of plans or programmes from the requirement to conduct an SEA. The Court of Justice observes, *inter alia*, as follows, at paras.44 and 47:

"44 Pursuant to Article 3(5) of Directive 2001/42, the Member States are to determine, either through case-by-case examination or by specifying types of plans and programmes, whether plans, such as those at issue in the main proceedings, are likely to have significant environmental effects thereby requiring an assessment to be carried out in accordance with that directive. According to that provision, Member States may also decide to combine both approaches.

...

47 Consequently, a Member State which establishes a criterion which leads, in practice, to an entire class of plans being exempted in advance from the requirement of environmental assessment would exceed the limits of its discretion under Article 3(5) of Directive 2001/42, in conjunction with Article 3(2) and (3), unless all plans exempted could, on the basis of relevant criteria such as, *inter alia*, their objective, the extent of the territory covered or the sensitivity of the landscape concerned, be regarded as not being likely to have significant effects on the environment (see, to that effect, in respect of the margin of discretion accorded to Member States pursuant to Article 4(2) of Directive 85/337, Case C 427/07 *Commission v. Ireland* [2009] ECR I 6277, paragraph 42 and the case-law cited)."

85. It is clear from the just-quoted text that *Genovaitė* is not authority for the proposition that An Bord Pleanála could or should have rectified any perceived failures in relation to public consultation at a previous stage.

86. In passing, though not truly a point arising, given the conclusions reached by this Court as regards the decisions of the Court of Justice in *Križan* and *Genovaitė*, the court notes that even if there were the European obligations of the type contended for, a member state in any event remains free to establish procedural rules governing the litigation of such points (*Peterbroeck v. Belgium* (Case C-312/93, para.12)) and, as the court indicated in Section A above, there are procedural difficulties a-plenty arising from the manner of Mr Martin's application.

D. THE UNECE COMPLIANCE COMMITTEE, ETC.

XIII. The UNECE Compliance Committee.

87. Article 15 of the Aarhus Convention on review of compliance, requires the Meeting of the Parties to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this

Convention". Pursuant to this obligation, the Meeting of the Signatories set in place a scheme of actions that led to the establishment of a Compliance Committee. Reference was made by Mr Martin to Finding ACCC/C/2012/76 of that Committee. That is a finding concerned with systemic over-deference by the courts of Bulgaria and has nothing to do with the PCI Regulation. Counsel for EirGrid submitted at hearing that what Mr Martin has in mind is a complaint that the UNECE Compliance Committee presently has under consideration concerning an alleged failure by the European Union (which is a signatory to the UNECE Convention) to adopt a proper regulatory framework or clear instructions for implementing Article 7 of the Aarhus Convention in relation to National Renewable Energy Action Plans. None of the relevant detail is properly before the court; however, the court does not see how a complaint against the European Union has any connection to a challenge brought against a decision of An Bord Pleanála to grant development consent for the North-South Interconnector project (not least, though certainly not only, in circumstances where no deficiency presents in relation to public participation and consultation in the process which resulted in that consent).

XIV. Project-Splitting

88. The issue of project-splitting was touched upon by Mr Martin but does not arise on the facts of the case at hand. This is because everything to do with the North South Interconnector development has been assessed thoroughly by An Bord Pleanála, notwithstanding that certain aspects (notably the access routes) were not within the development consent application.

E. CONCLUSION

89. For all of the reasons aforesaid, leave to apply for judicial review is respectfully refused by the court. Though the point is, as a consequence of the court's refusal of leave, entirely academic, the court notes that had it granted leave to apply for judicial review it would, for all of the reasons aforesaid have refused all the reliefs sought.