Aarhus, Climate Adaption & Citizens Engagement Division
Dept. of the Environment, Climate and Communications
Newtown Road
Wexford
Y35 AP90

21st January 2021

Emailed to: environmentpolicy@decc.gov.ie

Re: Public Consultation on the Implementation of the UNECE Aarhus Convention & PRTR Protocol in Ireland

To whom it may concern,

IWEA welcomes the opportunity to engage with the Department of Environment, Climate & Communications on the Implementation of the UNECE Aarhus Convention and PRTR Protocol in Ireland.

The Irish Wind Energy Association (IWEA) is the representative body for the Irish wind industry, working to promote wind energy as an essential, economical, and environmentally friendly part of the country's low-carbon energy future. We are Ireland's largest renewable energy organisation with more than 170 members who have come together to plan, build, operate and support the development of the country's chief renewable energy resource.

Ireland has just over 300 operational wind farms[1], which represents an investment of over €7 billion, regularly powering 65% of Ireland's electricity needs. The wind energy industry also supports 4,400 jobs and annually pays more than €30 million in commercial rates to local authorities. We are a country with enormous renewable energy resources and are world leaders at incorporating onshore wind into the national grid.

Part XXVIII of the Aarhus Convention

This submission specifically relates to Part XXVIII 'Legislative, regulatory and other measures implementing the provision on access to justice in Article 9' of the Aarhus Convention which relates to Judicial Review.

As the Department is aware, the judicial review process is a two-stage process where an application for leave to take judicial review proceedings must first be made. If leave is granted, the applicant can proceed to bring judicial review proceedings. The purpose of this first stage leave process is to act as

[1] t shou d be noted that WEA ke the transm ss on system operator E rGr d bases these f gures on the number of nd v dua w nd farm connect ons Some arger w nd farms may have mu t p e connect ons

a filtering process to identify at an early stage if there are substantial grounds for which the challenge is being taken, determine if the leave applicant has sufficient interest in the matter and avoid the advancement of frivolous and vexatious cases.

Section 50A(3)(a) and 50A(3)(b)(i) of the Planning & Development Act 2000 (as amended) currently provides that the Court shall not grant leave to apply for judicial review unless it is satisfied that:

a) there are substantial grounds for challenging the decision or act concerned and contending that it is invalid or ought to be quashed; and
b) the leave applicant has sufficient interest in the matter which is the subject of the application.

It is our practical experience that neither substantial grounds or sufficient interest are being demonstrated in the majority of judicial review challenges being taken, which is having a significant impact on the development industry in general and specifically in relation to renewables, has delayed Irelands ability to achieve 2020 renewable energy targets and if left to continue will also delay our ability to achieve Ireland's 2030 renewable energy targets.

Based on searches of the Courts Service website (www.courts.ie), the number of applications for leave against An Bord Pleanála since the format of leave application was made ex parte (on 28 September 2010) is almost 500. The number has been increasing during each of the last four years with at least 91 leave applications during last year alone, which is the highest number in a year to date. It is our understanding that leave has not been refused in any of these cases.

We have only identified one reported judgment in a planning case where leave was refused at the ex parte stage: O'Neill v. Kerry County Council [2015] IEHC 827 which did not involve An Bord Pleanála. Of course, it is possible that leave has been refused in cases without the need for a written judgment, but we have not been able to identify any such cases. It seems the practice, in cases where there is some doubt, is for leave to be granted or for a direction to be made that the application for leave should be on notice.

Once a judicial review challenge is taken on a project, a Developer will typically delay a development until such time as a judgement is received. Our knowledge and experience in the development of onshore wind energy is that delays of up to 20 months are being encountered from leave application stage to the issuing of High Court judgements. Where cases are taken to the Court of Appeal or the Supreme Court further years of delays are experienced. This is evident though many high-profile infrastructure projects in Ireland including the Apple Data Centre case which was appealed to the Supreme Court. The appeal was dismissed however the development ultimately never progressed due to the protracted nature of the consenting and legal system in Ireland (2.5 years of court proceedings). Projects and development activities are effectively on hold during this time period which is having a real knock on effect including for projects of national, regional and strategic importance which can contribute to Irelands climate action targets.

We believe the '*sufficient interest*' and '*substantial grounds*' tests must be strengthened. Applicants who have a personal interest in a project, who are affected or likely to be affected by a development must be able to avail of the judicial review process. We consider this merit's a 'substantial interest' in the matter and it is the required threshold that needs to be met. In relation to the substantial grounds test we believe this needs to demonstrate substance and that the application must have a reasonable prospect of success in order to avoid and minimise situations where an individual or a group not directly associated with a project can take a judicial review challenge. We do not believe it is the intended purpose of the Aarhus Convention to allow unnecessary judicial review challenges to be taken.

Ireland has transposed the Aarhus Convention requirement that legal challenges of relevant acts, decisions or omissions shall be '*not prohibitively expensive'* through Section 50B(2) of the Planning and Development Act 2000 by adopting the approach that '*each party shall bear their own costs*'. This effectively means that where an applicant wins a judicial review challenge they are entitled to their legal costs from the losing party (the defendant). However, where the applicant loses the challenge, they are not subject to the costs of the defendant, just their own costs. These arrangements can in practice result in applicants not being exposed to any risks or costs arising from the initiation of planning related judicial reviews challenges thereby facilitating the taking of greater numbers of judicial reviews in the planning area in Ireland. We do not believe it is the intended purpose of the Aarhus Convention to allow unnecessary and frivolous judicial review challenges to be taken by applicants with very questionable standing and whose sole ambition is to delay a project by any means possible.

There have been many cases where judicial review challenges have been made before a decision on an application has been made by An Bord Pleanala or a Local Authority i.e. prior to a project receiving planning permission. There are many leave applications being made by '*motion ex parte'* which means a defendant does not receive notice of the motion and generally is not involved in the leave process, allowing granted leave to proceed to a full hearing in the absence of any involvement of concerned parties. These approaches are all contributing to delays and unnecessary judicial review challenges being taken.

Each year An Bord Pleanála (ABP) is required to publish its Annual Report and Accounts[2]. Most recently in its 2019 report, ABP identified 55 cases where judicial review proceedings in relation to ABP decisions and procedures were instituted. There were 17 substantive court judgements in 2019 with > 50% of these judgements upholding the ABP decision and legal proceedings costing the Board €1.6M in 2019 and €2M in 2018. Government Departments, Local Authorities and Developers regularly form respondents or notice parties to proceedings so similar legal expenses are also being incurred to these parties. It is our experience that judicial review cases are costing Developers between €500,000-€1M in legal expenses. This is on a per case basis so where numerous cases are taken on an individual project this amounts to multiples of this number and further time delays.

[2] http://www.pleanala.ie/publications/2020/AR2019_EN.pdf

Conclusion

We believe in the three fundamental rights to sound environmental governance of access to information, access to public participation and access to justice, however this must not be at unnecessary delay and expense to involved parties and at the expense of Ireland meeting its climate action targets. We need to refine judicial review applications to projects which have key substantive issues that need to be addressed and concern parties who have a personal interest in a project and who are affected or likely to be affected by a development.

IWEA welcomes the opportunity to comment on the Implementation of the UNECE Aarhus Convention and PRTR Protocol in Ireland. We respectfully request that the Department considers our comments and observations in relation to this consultation process and the items raised in relation to judicial review above.

Yours sincerely,

Irish Wind Energy Association