ARTHUR COX

Renewable Energy Update

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ARTHUR COX - EXPECT EXCELLENCE

In this March 2016 legal update we have summarised and commented on a number of recent legal developments and open issues that will be of interest to developers of renewable energy projects, their funders and generators and offtakers in the SEM. This legal update is neither a complete nor a definitive statement of law or of regulation. Specific legal advice should be obtained before taking any action.

WIND ENERGY SECTOR - PLANNING UPDATE

From a planning perspective, the landscape has continued to dramatically change and continuously evolve in the wind energy sector, and there is an unrelenting appetite to challenge wind farm projects.

There have been a number of key developments over the past 12 months that developers will need to factor into their approach in both applying for and implementing planning permissions. This note considers recent legislation and recent decisions of the Irish and European courts and identifies potential grounds of legal challenge to wind farm consents, and their implications. By having project applications technically and legally reviewed in advance of their submission, it is possible to minimise the risk of these grounds being successful in judicial review or planning injunction proceedings.

Grid Connection Update

Since the 2014 decision in *O'Grianna v An Bord Pleanala*[1], grid connection for wind energy projects has been and remains a hot topic. More recently, the Department of the Environment, Community and Local Government published legislation (the Planning and Development (Amendment) Regulations, 2016[2] (the "Proposed Regulations")) with the purpose of legislating for the *O'Grianna* case. The impact of the Proposed Regulations, as currently drafted, will, however, have far wider consequences than the *O'Grianna* decision.

The Proposed Regulations have the potential to affect any wind farm project for which Environmental Impact Assessment ("EIA") or Appropriate Assessment ("AA") is required. The Proposed Regulations de-exempt grid connection works that would have otherwise been exempt under Class 26 and Class 27 of Part 1, Schedule 2 to the Planning and Development Regulations 2000 – 2015[3] if the wind farm project itself, rather than the cabling works requires EIA and/or AA.

Since publication of the Proposed Regulations, the Department has been meeting with IWEA and other key stakeholders to explore the implications of the Proposed Regulations, and to seek to agree on 'transitional measures'. We understand that these transitional measures may allow any project developers who have begun construction of the grid connection works, and who are capable of completing construction within a specified number of months of the new law coming into force, to continue to rely on the current exemptions. However, the scope of the transitional measures, if any, has yet to be agreed.

In order for the Proposed Regulations to be passed into law, Minister for State,

1 [2015] IEHC 248

2 Published on 28 January 2016.

3 Allowing any undertaker authorised to provide an electricity service to lay underground cables, or construct over-head lines of a voltage of 20kV or less.

Paudie Coffey (or his successor) must sign the Proposed Regulations. As the Proposed Regulations do not have any commencement provisions, they will have immediate effect from the date of signing. It remains to be seen whether or when the Proposed Regulations, or any revised Regulations, will be signed into law.

While we await certainty regarding the proposed change in law, a number of applications[4] for so-called Section 5 Declarations before An Bord Pleanála have been delayed. We do not anticipate that An Bord Pleanála will adjudicate on these in advance of the Draft Regulations coming into force (either in their current or a revised form).

At the moment, regrettably there is significant uncertainty for all projects that require a grid connection. We will continue to monitor the progression of this legislation, and provide key updates when they arise.

Who can look for a judicial review of a wind farm consent?

In order to challenge a grant of planning permission, an objector must demonstrate to the Court that he or she has what is known as "sufficient interest". The interpretation of "sufficient interest" has recently been considered by the High Court in the case of *Grace and Sweetman v An Bord Pleanála*[5], where a judicial review challenge was brought by two individuals who had not participated at any stage in the planning process. The applicants argued that participation in the planning process was not necessary in order to establish standing required to bring judicial review proceedings.

The High Court held that a failure to participate in the decision making process should not be the sole consideration in determining whether someone has "sufficient interest". However, it went on to find that, "'*wide access to justice' does not mean 'open house*'" and that "*a person who seeks to raise an issue at review stage which he could have raised during the decision making process must provide a cogent explanation for his non-participation*"[6]. As neither applicant had, in the Court's view, provided such a cogent reason, the Court found that they did not have standing to bring the challenge.

This decision is now under appeal to the Supreme Court on a number of grounds. The Court will consider whether the question of standing in environmental matters must to be revised in the light of recent judgments of the Court of Justice of the European Union ("**CJEU**"), including *Commission v Germany*[7]. More specifically, it will consider whether a person should be entitled to bring proceedings even if he / she has not made any submissions to the relevant planning authority in respect of a planning application or appealed a notification of intention to grant to An Bord Pleanála.

Commission v Germany concerned German legislation which only allowed applicants to legally review decisions on grounds they had already raised before the consenting authority. The CJEU held that such a limitation was inconsistent with European law. At best, this means that developers may have to face new grounds of challenge at judicial review stage, without having had the opportunity to address them during the planning process. At worst, it may mean that a planning permission can be challenged by a 'new' objector who did not participate in the planning process. For that reason, the decision of the Supreme Court is eagerly awaited, and it is hoped that it will be delivered within the next 12 – 18 months.

Other Potential Areas of Challenge

Immaterial Deviations

An appeal relating to the legality of wind turbines which deviated from the applicable planning permission on foot of "letter of comfort" assurances given by the relevant planning authority was recently decided by the Court of Appeal ("CoA")[8].

The appeal was of a refusal of a Section 160 planning injunction by the High Court. The CoA reversed the High Court's decision on 16 March, granting an injunction requiring the 3 constructed turbines to be removed.

Background

The wind farm was given planning permission, in July 2002, for 4 turbines with a hub height of 65 metres and rotor diameter of 57 metres. Only 3 turbines were installed in 2005 / 2006 (T1, T3 and T4). Due to the availability of models on the market and ground conditions, the dimensions and location of the turbines installed deviated from those specified in the planning permission.

The deviation in location was approximately 20 metres (T1 20m east, T3 20m south west, T4 is 19m north). There were also deviations in hub height and rotor diameter. The hub heights of the 3 turbines were reduced (T1 by 10m and T3/T4 by 5m) whereas the rotor diameters were increased (T1 by 1m and T3/T4 by 23m).

The turbine heights and rotor lengths were changed only after the developer had engaged with the planning authority and had received written confirmation from the planning authority that the deviations were acceptable.

An application for a section 160 planning injunction was brought in 2012. The High Court refused the injunction. It did not decide whether or not the deviations were material (such that they would render the development unauthorised) but, instead, refused the injunction based on various discretionary factors (prejudice; delay; bona fides; hardship; public interest; attitude of the planning authority).

4 There are approximately 7 relating to wind farm developments

5 [2015] IEHC 593

6 Paragraph 59 of the judgment

7 C-137/14, Judgment of the Court (Second Chamber), 15 October 2015

8 *William Henry Bailey v Kilvinane Wind Farm Limited* Appeal No. 2014 / 1037, 16 March 2016

The CoA reversed this decision. It considered the following factors:

» ***Is the development unauthorised?***

CoA concluded that the extent of the deviations was significant and not trifling or de minimus (except for the small increase in rotor diameter of T1).

» ***Should the Court refuse an injunction on discretionary grounds?***

CoA decided it ought not to exercise its discretion to refuse the injunction.

» Prejudice to Applicant:

CoA decided that there was clear demonstrable evidence of interference (in the form of shadow flicker, noise and visual impact) with the enjoyment by the applicant and other local residents of their property and other local amenities.

» Bona Fides of the Respondent:

The importance of engagement with a planning authority (per *Altara Developments Ltd v Ventola Ltd* [2005] IEHC 312) was acknowledged. However, CoA concluded that it was not reasonable for the developer in this case to "*suppose that a planning authority could informally sanction such deviations from location and rotor diameter without* ***a formal assessment of the potential planning and environmental impact*** *of these changes and especially their* ***potential effects on third parties***". (emphasis added).

» Hardship:

CoA acknowledged that an order restraining the use of the turbines would have serious economic consequences for the developer but concluded this could not cut across the right to ensure that planning laws are upheld.

» Public Interest:

CoA acknowledged the public interest in ensuring that alternative, non-carbon based renewable energy sources are brought to market but that there was a corresponding public interest in ensuring that planning laws are enforced.

What does the decision mean?

It is well understood that letters of comfort issued by a planning authority do not provide a complete response to planning enforcement.

CoA's decision confirms that such letters (and related engagement with a planning authority) may not even satisfy the question of whether a developer has acted reasonably and in good faith such that the Court is entitled to exercise its discretion to refuse enforcement. Every case will turn on its own facts. However, it appears from this appeal that where there is clear evidence that deviations are material and not *de minimus* and no formal impact assessment has been carried out, engagement with and approval by a planning authority does not entitle a developer to the Court's discretion on the ground that he / she acted reasonably and in good faith (albeit that they may be so entitled based on other factors).

Developers should exercise extreme caution in seeking and moreover relying upon letters of comfort from a local authority for changes to permitted development. Depending on the significance of the changes proposed, the better strategy might be to apply for planning permission for the changes. Any developer proposing to seek and rely upon a letter of comfort from a planning authority for changes considered to be immaterial should seek to mitigate the risk involved by:

» submitting an impact assessment report of the potential planning and environmental impact of the changes;

» submitting a technical advisor's view on the non-materiality of the changes; and

» demonstrating that third parties or the environment will not be affected by the changes, or that the impact will be negligible.

In addition, for future development planning applications, developers should consider if and how flexibility can be built in to allow for the implementation of various options, so the need for fresh permission as the project evolves is reduced.

Habitats: Compensatory v Mitigatory Habitat

The Habitats Directive and AA continue to be live issues in legal challenges to wind farm planning permissions.

In our March 2015 note[9], we considered the decision in *Briels v Minister van Infrastructuur en Milieu*[10]. In that case, the Court of Justice held that it is not enough for a developer to compensate "after the fact" for the permanent loss of a protected European habitat caused by a proposed project, by providing replacement habitat elsewhere. This issue of compensatory v. mitigatory habitat has now been considered by the Irish Courts in the *Grace and Sweetman* proceedings. In its decision, the High Court distinguished between Special Protection Areas (designated for the species that are homed within it) and Special Areas of Conservation (which are intrinsically valuable sites, as in *Briels*). In *Grace and Sweetman*, the developer, as part of its mitigation measures, undertook to provide an appropriate level of optimum foraging habitat for the hen harrier over the lifetime of the wind farm, to mitigate against the potential loss of habitat within the identified turbine avoidance zone. Grace and Sweetman argued that this was contrary to the Habitats Directive, and constituted compensatory habitat as in *Briels*.

However, the Court found that the development site itself had no intrinsic value, unlike the priority habitats in the cases of *Briels* and *Sweetman & Ors. v An Bord Pleanála*[11]. Both of those cases concerned the loss of part of the habitat, limestone pavement in *Sweetman* and molinia meadows in *Briels*.

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10 C-521/12, Judgment of the Court (Second Chamber) of 15 May 2014

11 C-258/11, Judgment of the Court (Third Chamber) of 11 April 2013

Developers should keep this distinction in mind when identifying sites for potential development, as any loss of intrinsically valuable habitat cannot be replaced by alternative habitat. If your proposed development would bring about a permanent and irreparable loss of a European site / protected habitat, then it will be necessary to prepare an 'IROPI' planning application, as opposed to a 'standard' application. An 'IROPI' planning application will only be granted where a project must be carried out for imperative reasons of overriding public interest, despite any inevitable adverse effects on a protected habitat, and where there is no alternative solution. This is provided for in Article 6(4) of the Habitats Directive and it is a very high threshold for a developer to meet.

Habitats: Best Scientific Knowledge

The CoA has also had cause to consider what best scientific knowledge is when carrying out an appropriate assessment or preparing an NIS, in the case of *People Over Wind v An Bord Pleanála*[12].

A consenting authority is only entitled to grant planning permission for a wind farm development that is located on, or near to, a protected European site if it is satisfied that on the basis of the best scientific knowledge, the development will not have an adverse impact on the relevant European site.

What level of scientific knowledge is needed?

This question has been recently answered by the Court of Appeal in *People Over Wind*. The Courts have held that it must be "*the best scientific knowledge which is reasonably available*" and the developer must use "*the best scientific methods and understanding*". The information must not be "*premised on a scientific analysis which is out-dated, flawed or which does not measure up to state of the art scientific understanding*" and must "*consider the best available scientific knowledge at the date of the decision*".

What level of scientific certainty is legally required?

A decision-maker may only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made it decides that no reasonable scientific doubt remains as to the absence of the identified potential effects[13].

Habitats: New Designations

The CJEU has recently ruled that post-consent AA may be required if a site has been designated after a consent has granted[14]. The CJEU held that, where a site was designated after consent for the project was granted, then it must be subject to a subsequent review by a consenting authority of its implications for the European site, if that review constitutes the only appropriate step for ensuring that the project does not result in potentially significant deterioration of or disturbance to the European site. It is not yet clear how this decision will be interpreted by the Irish courts, particularly in light of *Sandymount and Merrion Residents Association v An Bord Pleanála.*[15] That case involved similar facts, where planning permission was granted for the expansion of a sewage treatment plant within an area that was designated as a candidate European site 17 days after the grant. In its decision, the Irish High Court took account of the fact that the project would undergo assessment by other consenting authorities under the Habitats Directive".

We will continue to monitor the application and interpretation of this very recent decision in the Irish courts. From the perspective of a project developer, the decision is particularly relevant as European sites are designated on an ongoing basis, and therefore developers may not be wholly absolved of their obligations under the Habitats Directive to prepare a NIS or an AA Screening Statement simply because the site was not designated at the time planning permission was granted.

Implications of legal challenges: potential new developments

Costs

Judicial review challenges to wind farm projects almost always focus on EIA and AA. Where EIA arguments are raised by an applicant (either alone or together with AA arguments), the special costs rule is that, in general, an applicant cannot have costs awarded against him / her, even if a challenge fails. The position is less clear when only AA arguments are made. The standard costs rule that 'costs follow the event' (i.e. that an unsuccessful applicant pays all costs) has to date applied to cases including only AA arguments. However, the decision of the High Court in *Harrington v An Bord Pleanála*[16] has been appealed to the Supreme Court on this point. The Supreme Court will have to determine whether the special costs rules should extend beyond simply the EIA Directive[17]. We await the determination of this case for clarity on this issue. Due to the potential implications of this determination, we are aware of at least one High Court case where a hearing on costs has been adjourned[18] pending its delivery.

Delay

While any legal challenge to a wind farm planning permission will inevitably give rise to delay, there is now the possibility of three avenues of appeals from a decision of the High Court:

- from the High Court to the CoA (with the leave of the High Court),
- from the CoA to the Supreme Court (with the leave of the Supreme Court), and
- from the High Court to the Supreme Court (with the leave of the Supreme Court).

12 [2015] IECA 272

13 *Kelly v An Bord Pleanála* [2014] IEHC 400

14 *Grune Liga Sachsen EV and Others v Freistaat Sachsen*, C-399/14, Judgment of the Court (Second Chamber) of 14 January 2016

15[2013] 1 1 JIC 1904

16 [2014] IEHC 232

17 As well as the Strategic Environmental Assessment and Integrated Pollution Prevention and Control Directives, which are of less relevance to wind farm developers.

18 *Grace and Buckley v. An Bord Pleanala*

At best, this will give rise to a delay of a further 4 months for a decision on a leave application. At worst, it could lead to delay of at least 8 months before a hearing date for the appeal is given. These potential delays will also need to be factored into project schedules.

Questions regarding AA / EIA are European law questions, and are questions which may prompt a Court to grant leave to an applicant to appeal, if they have failed in their challenge before the High Court. To reduce risk of a successful challenge, or an appeal where a challenge has been unsuccessful, and these associated delays and increased costs, a technical and legal review of AA and EIA elements of a planning application is highly recommended in advance of it being submitted to the relevant consenting authority.

REMIT – REPORTING DEADLINE

On 7 April 2016 the second phase of REMIT transaction reporting commences across the EU.

What is REMIT?

REMIT is the European Regulation on Wholesale Energy Market Integrity and Transparency (Regulation (EU) No 1227/2011). It prohibits market manipulation and trading on inside information in wholesale energy markets.

REMIT also establishes a framework for the monitoring of wholesale energy markets in order to detect and deter market manipulation and insider trading.

What contracts are within scope?

- REMIT obligations are applicable to "market participants". This means any person, including transmission system operators, who enters into transactions, including the placing of orders to trade, in one or more wholesale energy markets.
- Wholesale energy markets include regulated markets, multilateral trading facilities and over the counter ("OTC") and bilateral contracts, direct or through brokers.
- Contracts within the scope of reporting obligation include those for the supply of electricity or natural gas where delivery is in the EU or contracts relating to the transportation of electricity of natural gas in the EU (or derivatives relating to these activities).
- Contracts for supply to final customers are generally not wholesale energy products, unless the final customer's consumption is greater than 600 GWh per year.

Registration and reporting obligations

- The first phase of reporting obligations commenced on 7 October 2015. Since that date the reporting of reportable wholesale energy contracts admitted to trading at organised market places and of fundamental data from the ENTSOs central information transparency platforms has been required.
- The second phase begins on **7 April 2016**. From this date, other reportable wholesale energy market contracts (OTC standard and non-standard supply and derivatives contracts, transportation contracts) and additional fundamental data must be reported. Existing contracts need to be reported by 6 July 2016.
- There are certain exemptions from the reporting obligation, including contracts for the physical delivery of electricity produced by a single production unit with a capacity equal to or less than 10 MW or by production units with a combined capacity equal to or less than 10 MW.
- Transaction reporting is to take place through a registered reporting mechanism ("**RRM**"). RRMs are approved by the EU Agency for the Cooperation of Energy Regulators. The current approved list is available here: https://www.acer-remit.eu/portal/list-of-rrm.

Registration

- Market participants must register with the Commission for Energy Regulation (the "CER") under REMIT in its role as National Regulatory Authority prior to entering into a transaction which is to be reported. Market participants were asked to register by 13 March 2015 (i.e. three months after the adoption of the implementing regulation (Regulation (EU) No 1348/2014).
- Market participants not already registered will need to do so prior to the 7 April 2016.

Enforcement

- Under the European Union (Wholesale Energy Market Integrity and Transparency) Regulations 2014 failure to comply with the registration and reporting requirements of REMIT is a criminal offence and is liable to a fine of up to €50,000 on conviction on indictment.
- Breaches of the restrictions on inside dealing and market manipulation are liable to more substantial fines.

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