RESPONSE OF EIRGRID PLC TO LEGAL ISSUES

RAISED IN SUBMISSIONS DELIVERED TO THE BOARD

BY IVOR FITZPATRICK & CO. SOLICITORS

ON BEHALF OF NV IRISH FARM LLC & BRACCANBY IRISH FARM LLC

The Correct Applicant, Powers of EirGrid & Sufficient Interest

1. EirGrid plc [EirGrid] is a State-owned commercial company, established in July 2006, and licensed by the Commission for Energy Regulation [CER] as the independent Transmission Systems Operator [TSO] for Ireland. In its role as TSO, EirGrid is statutorily required to operate and maintain a safe, secure, reliable, economical and efficient electricity transmission system. EirGrid and System Operator Northern [SONI] are jointly and concurrently proposing the construction of the North-South Interconnector project.

2. Part XI of the Planning and Development Act 2000 [the 2000 Act] has been amended, *inter alia*, by the insertion of two sections dealing with electricity infrastructure development: sections 182A and 182B, and ancillary provisions in section 182E. These provisions are inserted into the 2000 Act by section 4 of the Planning and Development (Strategic Infrastructure) Act 2006 [the 2006 Act].[1]

3. "Strategic infrastructure development" is defined in section 4 of the 2000 Act (as inserted) as including, "any proposed development referred to in section 182A(1)". Section 182A(1) expressly refers to "development comprising or for the purposes of electricity transmission", which term is to be construed, pursuant to subsection 182A(9) as meaning,

   the transport of electricity by means of –
   (a) a high voltage line where the voltage would be 110 kilovolts or more, or
   (b) an interconnector, whether ownership of the interconnector will be vested in the undertaker or not.

4. Section 182B(11) provides that planning permission under section 34 or 37G of the 2000 Act is not required for any development which is approved under section 182B.

5. The European Communities (Internal Market in Electricity) Regulations 2000 [S.I. No. 445 of 2000] provide, *per* regulation 8, that EirGrid shall have, *inter alia*, the exclusive function of developing a safe, secure, reliable, economical and efficient electricity transmission system. Thus, EirGrid enjoys a statutory power that bestows upon it the exclusive function of developing a safe, secure, reliable, economical and efficient

[1] Section 4 of the 2006 Act was commenced on 31st January 2007, by virtue of article 3 of the Planning and Development (Strategic Infrastructure) Act 2006 (Commencement)(No.3) Order 2006.S.I. No. 684 of 2006.

electricity transmission system and, therefore, EirGrid enjoys a statutory power to develop the electrical infrastructure within its control.

6. It is in this context that regulation 18 of the European Communities (Internal Market in Electricity) Regulations 2000 required EirGrid and the Electricity Supply Board to enter into the "infrastructure agreement" for the purpose of enabling EirGrid, as transmission system operator [TSO], to discharge its functions under those Regulations. Thus, pursuant to regulation 18 of the Regulations of 2000, EirGrid entered into "*the infrastructure agreement*" with the ESB, which agreement provides that:

   "*all activities connected with seeking and obtaining planning permission (if needed) and any other consents required by the TSO to discharge its transmission obligations shall be the sole responsibility of the TSO"*.

7. In these circumstances, EirGrid has interest sufficient to submit the application under section 182A in relation to the proposed North-South Interconnection Development and is a person entitled to apply for planning approval in respect of the development of the electricity transmission system. Accordingly, the submission of Ivor Fitzpatrick & Co. Solicitors, to the effect that EirGrid has no powers in respect of the development of structures which form the subject-matter of the application for approval is without merit.

8. Nevertheless, the Electricity Supply Board ("the ESB"), which is the licensed Transmission System Owner, pursuant to regulation 19 of the 2000 Regulations, has consented to the making of the application for planning approval by EirGrid.[2] Accordingly and correctly, EirGrid is the sole applicant for approval and that application under section 182A has been made to the Board with the consent and approval of the Electricity Supply Board (and the ESB is not a "co-applicant").[3]

9. It is also submitted in the letter received by the Board from Ivor Fitzpatrick & Co. Solicitors that the power to acquire a wayleave by compulsion under section 53 of the 1927 Act was not transferred from the ESB. However, in terms of EirGrid's powers, the High Court has recently held that regulation 8(2) of the European Communities (Internal Market in Electricity) Regulations 2000 provides that the power to carry out the survey, pursuant to section 20(4) of the Electricity Supply Act 1927 is shared by both ESB and Eirgrid and thus both are entitled to enter on lands for that purpose. Moreover, in respect of powers under section 53(9) of the 1927 Act, the High Court has determined that the ESB and its authorised undertaker, Eirgrid, have the right to enter on lands: *Electricity Supply Board & Eirgrid plc v. Killross Properties Ltd.* [2014] I.E.H.C. 635.

[2] Letter to An Bord Pleanála dated 14 May 2015 from the Secretary of the Electricity Supply Board [North-South Interconnection Development, Volume 1A, Application Form for Approval, Schedule 2 – Letters of Consent]

[3] North-South Interconnection Development Application Form dated 9th June 2015, Volume 1A of Application Documentation

10. In all these circumstances, the contention that the Board has no jurisdiction to deal with the application for approval under section 182A is without foundation. That being so, there is no question of law arising on the application for approval which is capable of being referred or necessitating referral to the High Court for decision.

11. A related issue is that raised in the submission of Ivor Fitzpatrick & Co. Solicitors in relation to the decision of the Supreme Court in *Frescati Estates v. Walker* [1975] I.R. 177. Article 3 of the Local Government (Planning and Development) Act, 1963, (Permission) Regulations, 1964 as it stood at the time of the events giving rise to those proceedings, provided:

> *An application to a planning authority for a permission for the development of land … shall be accompanied by (a) particulars of the interest held in the land… by the applicant…"*

12. Henchy J. (delivering the judgment of the Supreme Court) concluded that:

> *"[T]he choice of the word* applicant *and the deliberate avoidance of the use of any word or expression to suggest that the person seeking permission should have any legal estate or interest in the property show that the legislature did not intend that possession of such estate or interest by the person applying was to be necessary."*

13. However, Henchy J. went on to hold:

> *"[W]hile the intention of the Act is that persons with no legal interest (such as would-be purchasers) may apply for development permission, the operation of the Act within the scope of its objects and the limits of constitutional requirements would be exceeded if the word "applicant" in the relevant sections is not given a restricted connotation. The extent of that restriction must be determined by the need to avoid unnecessary or vexatious applications, with consequent intrusions into property rights and demands on the statutory functions of planning authorities beyond what could reasonably be said to be required, in the interests of the common good, for proper planning and development.*
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> *Applying that criterion, I consider that an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question. There will thus be sufficient privity between the applicant (if he is not a person entitled) and the person entitled to enable the applicant to be treated, for practical purposes, as a person entitled."*

14. However, in certain instances an applicant for development consent will have an interest given by statute allowing that person to carry out the proposed development. Specifically, in the context of electricity development, the question as to whether the Electricity Supply Board [ESB] was a person with sufficient interest to make a valid application for planning permission, in respect of the development of electric lines over

lands not owned by it, was considered by the High Court in *E.S.B. v. Gormley* [1985] I.R. 129. There, Carroll J. held that the ESB had sufficient interest to support its application for planning permission, which interest was *"given by statute to enable it to carry out the proposed development on the property in question"*. On that basis, it was held that ESB fell within the restricted meaning of the word "applicant" as set out by the Supreme Court in *Frescati*. Although the Supreme Court reversed the decision of the High Court on the issue of the constitutionality of section 53(5) of the Electricity (Supply) Act 1927, as originally enacted, the Supreme Court did not consider or interfere with the finding made by the High Court as to the sufficient interest of the ESB to make the planning application.

15. The statutory wayleave power under consideration in *Gormley*, enabling the ESB to carry out the proposed development on the property in question, was provided under section 53 of the 1927 Act, which the Supreme Court characterised as granting to the ESB "a power compulsorily to impose a burdensome right over land". As set out above, the High Court has recently held that, in terms of EirGrid's powers, regulation 8(2) of the European Communities (Internal Market in Electricity) Regulations 2000 which provides that the power to carry out a survey, pursuant to section 20(4) of the Electricity Supply Act 1927, is shared by both ESB and Eirgrid and thus both are entitled to enter on lands for that purpose. Moreover, in respect of powers under section 53(9) of the 1927 Act, the High Court has determined that the ESB and its authorised undertaker, Eirgrid, have the right to enter on lands.

16. Accordingly, EirGrid enjoys a statutory power or powers that bestows upon it a sufficient interest in the relevant lands to support an application for approval under section 182A.

Designation of the Project as Strategic Infrastructure Development (SID)

17. The application for approval before An Bord Pleanála is made pursuant to section 182A of the Planning and Development Act 2000 as amended, in respect of development comprising or for the purposes of electricity transmission. Under section 2(1) of the 2000 Act, as amended, "strategic infrastructure development" is defined as including, *inter alia*:

    "*(d) any proposed development referred to in section 182A(1)"*

18. The proposed development therefore constitutes "strategic infrastructure development" by virtue of the operation of the 2000 Act and not as a result of any designation by An Bord Pleanála. This is in contrast to development falling within the Seventh Schedule to the Act to which the procedure set out in section 37A of the 2000 Act applies, pursuant to which the Board may designate certain development as strategic infrastructure development taking into account certain criteria. Therefore, the submission made by Ivor Fitzpatrick & Co. is incorrect insofar it suggests at that there was an application to designate the development as strategic infrastructure. Whilst the Board informed EirGrid by letter dated 14th February 2014 that the proposed development was strategic infrastructure development, this was simply confirmation of

its status under the 2000 Act. Moreover, EirGrid entered into pre-application consultations with An Bord Pleanála, as it was statutorily obliged to do so under section 182E of the 2000 Act, which states:

> "(1) A person (a 'prospective applicant') who proposes to apply for approval under section 182B or 182D shall, before making the application, enter into consultations with the Board in relation to the proposed development.
>
> (2) In any consultations under subsection (1), the Board may give advice to the prospective applicant regarding the proposed application and, in particular, regarding—
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> (a) the procedures involved in making such an application, and
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> (b) what considerations, related to proper planning and sustainable development or the environment, may, in the opinion of the Board, have a bearing on its decision in relation to the application".

19. In these circumstances, development comprising or for the purposes of electricity transmission constitutes strategic infrastructure development by operation of law pursuant to the Act and does not require any evaluation by An Bord Pleanála before it constitutes "strategic infrastructure development." The submission made by Ivor Fitzpatrick & Co. is, therefore, erroneous insofar as it suggests that the Board was required to consider the planning and/or economic benefits of the development and reach judgments as to the strategic importance for the region and for the State. Equally misconceived is the submission that the public were excluded from the "decision" of the Board on the purported designation of the development and that, if submissions had been received by the Board, it is unlikely "[the proposed development] would have met any of the tests set under the Strategic Infrastructure provisions of the planning and development Act." For the avoidance of doubt, in respect of "electricity transmission" development as defined in subsection 182A, which includes a high voltage line with a voltage of 110 kilovolts or more or an interconnector (whether the ownership of the interconnector will be vested in the applicant for approval or not), there are no other applicable tests under the Planning and Development Act 2000. Development comprising or for the purposes of electricity transmission under section 182A is, by definition, strategic infrastructure development.

20. It also follows that there is no basis for the submission to the effect that it is not now possible to carry out an EIA due to the fact that significant decisions were made without the involvement of the public. Indeed, this contention was expressly rejected by the High Court in the context of the different statutory scheme under section 37A(2). Accordingly, even were it the case that there were applicable tests for electricity transmission development, which there are not, the High Court has recently determined that, in circumstances where such tests do apply (for example, in respect of development referred to in the Seventh Schedule), as a matter of national law, the Board is not precluded from revisiting those matters when conducting the EIA: *Callaghan v. An Bord Pleanála* [2015] I.E.H.C. 357.

Non-applicability of Articles 22 & 23 of the 2001 Regulations

21. In the submissions delivered to the Board by Ivor Fitzpatrick & Co. Solicitors, it is submitted that the Board "must direct its mind" to the provisions of article 22 of the Planning and Development Regulations 2001 insofar as it is contended that "the Board has a duty to consider whether this application [for approval under section 182A] is a valid application. It is also contended that the requirements of the Planning and Development Regulations 2001 in this regard are mandatory.

22. Chapter 1 of Part 4 of the Planning and Development Regulations 2001, as substituted and amended, (i.e., "the permission regulations") makes provision for the content of a planning application, and a standard application form has been introduced under those Regulations. Specifically, article 22 of the permission regulations, as amended, provides as follows:

> *(1) A planning application under section 34 of the Act shall be in the form set out at Form No. 2 of Schedule 3, or a form substantially to the like effect.*
> *(2) A planning application referred to in sub-article (1) shall be accompanied by –*
> *[…]*
> *(g) where the applicant is not the legal owner of the land or structure concerned, the written consent of the owner to make the application…* [Emphasis added]

23. Accordingly, it is self-evident that the provisions of sub-article 22(2)(g) in relation to the written consent of an owner of land to make the application applies only to "a planning application made under section 34". This application is made for approval under section 182A. In such circumstances, the contention that the Board must direct its mind to the provisions of article 22 or that the failure to submit a letter of consent invalidates the application for approval is manifestly incorrect.

24. It is also contended for and on behalf of NV Irish Farm LLC. and Braccanby Irish Farm LLC that article 23 of the 2001 Regulations has not been complied with and that, consequently, the application made is fundamentally invalid as a matter or Irish law. However, once again the requirements of article 23, in relation to "plans, drawings and maps", are expressly stated to relate to "a planning application in accordance with article 22". As set out above, a planning application in accordance with article 22 is "a planning application made under section 34" to a planning authority and not an application for approval made directly to the Board under section 182A. Accordingly, contrary to the submission made by Ivor Fitzpatrick & Co., there is no requirement to comply with the provisions of articles 22 and 23 of the 2001 Regulations. Moreover, the Board is not under the same duty in respect of an application for approval made under section 182A to "validate" the application in the manner in which a planning authority is required to validate an application for permission made section 34 of the 2000 Act.

Integrated Consideration of Cross-Border Project & Directive 2011/92/EU

25. The current application for development includes an EIS, which incorporates a consideration of cumulative impacts including potential impacts of the portion of the

North South Interconnector development to be located in Northern Ireland. A Consolidated ES and an Addendum to the ES has been prepared by SONI, the applicant for permission in Northern Ireland and these documents have been included as appendices to Volume 4 of the documentation submitted to An Bord Pleanála with the application for approval. The preparation of the EIS in the Republic of Ireland and the ES in Northern Ireland have been coordinated and the cumulative effects and transboundary effects of the proposed interconnector have been appropriately considered, so that a full and coherent EIA process in Ireland and Northern Ireland may be undertaken.

26. In addition to the EIS and ES, a Joint Environmental Report (JER) has also been prepared and is included in the application. This has been prepared in accordance with the European Commission (EC) published Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects which states:

> "*For large-scale transboundary projects, the developer must comply with the requirements of the national EIA requirements of each country in which the project will be implemented. The developer should prepare individual national EIA reports and a joint environmental report that covers the whole project and assesses its overall effects, in particular cumulative and significant adverse transboundary effects (page 10).*"

27. There is nothing incompatible with the EIA Directive in two separate applications being made in Ireland and in Northern Ireland to the respective competent authorities in each jurisdiction. Neither the EIA Directive nor the Guidance Notes issued by or for competent authorities envisage or require that there should be one single application. Unsurprisingly, the submission made by Ivor Fitzpatrick & Co. has not sought to elaborate or explain the mechanism or authority by which such a single application could be made.

Regulation (EU) No.347/2013 - Project of Common Interest (PCI)

28. The submission delivered by Ivor Fitzpatrick & Co. suggests that there is a conflict between the Board in dealing with the application for approval of strategic development infrastructure and its designation as competent authority under Regulation (EU) No.347/2013. It is further suggested that the Board has been identified as, in effect, a promoter or facilitator of the North-South interconnector project which, it is asserted, conflicts with the Board's objective role in determining applications for strategic infrastructure development. The description of An Bord Pleanála as a promoter or facilitator of the project under Regulation 347/2013 is wholly incorrect. An Bord Pleanála was designated as the relevant competent authority by the State under Article 8 of the Regulation, pursuant to which it is responsible for facilitating and coordinating the permit granting process for projects of common interest. This role of competent authority is wholly distinct from that of promoter of the project insofar as Article 2(6) of the Regulation defines 'project promoter' as meaning one of the following:

(a) a TSO [i.e., EirGrid], distribution system operator or other operator or investor developing a project of common interest;

(b) where there are several TSOs, distribution system operators, other operators, investors, or any group thereof, the entity with legal personality under the applicable national law, which has been designated by contractual arrangement between them and which has the capacity to undertake legal obligations and assume financial liability on behalf of the parties to the contractual arrangement."

29. The distinct roles of An Bord Pleanala as competent authority under Regulation 347/2013 and in determining strategic infrastructure applications, is described in Paragraph 2.2 of its Manual of Permit Granting Process Procedures as follows:

"An Bord Pleanála's role as Competent Authority in the permit granting process for Projects of Common Interest is to collate and co-ordinate the issuing of all the consents and decisions required from all relevant authorities and to monitor compliance with time limits by the concerned authorities in accordance with the Collaborative Scheme. An Bord Pleanála also has a role under Article 5.6 reporting, on an annual basis, on progress and, where relevant, on delays in the implementation of Projects of Common Interest located on Ireland's territory with regard to the permit granting processes, and on the reasons for such delays. An Bord Pleanála's statutory planning role in determining any application lodged with it continues to be one of independent assessor. Its duties under the Regulation will not affect its impartial assessment of planning applications.

To emphasise this An Bord Pleanála will establish a PCI Unit to administer the PCI process separate from its Strategic Infrastructure or Planning Appeals Units. This Unit will be responsible for the co-ordination of the various consents and collaboration with the consent-giving bodies, and other Competent Authorities, updating the Manual of Permit Granting Process Procedures, and issuing the comprehensive decision.

An Bord Pleanála's role under the Collaborative Scheme is such that An Bord Pleanála as a consent granting body in its own right feeds into the PCI process as do the other authorities concerned. With a PCI project which is also a Strategic Infrastructure project, it may assist in thinking of An Bord Pleanála as having two roles: one role as a decision making body in the planning sphere and another role as Competent Authority in the PCI process. Neither role will impinge on the other and the separate administrative unit will maintain this division of function".

30. An Bord Pleanala's role as competent authority under Regulation (EU) No. 347/2013 is therefore administrative and does not involve an evaluation or promotion of the project.

31. The submission delivered by Ivor Fitzpatrick & Co. further claims that the "…*role of the Board under the process of common interest required that processes be put in place to streamline a project which it must consider to be a priority project and to ensure that the documentation as lodged by the Applicant to be considered is in such a manner as to*

promote acceptance of the project". This statement is, with respect, both confused and erroneous.

32. Article 7(3) of the Regulation provides that where such status exists in national law, projects of common interest shall be allocated the status of the highest national significance possible and be treated as such in the permit granting processes. Article 7(5) further says that Member States shall assess, taking due account of the guidance referred to in paragraph 4, measures to streamline the environmental assessment procedures. Article 8 concerns the organisation of the permit granting process by the competent authority with Article 8(3)(c) describing the "collaborative scheme" (which has been adopted by the Board) as:

> *"the comprehensive decision shall be coordinated by the competent authority. The competent authority shall, in consultation with the other authorities concerned, where applicable in accordance with national law, and without prejudice to time limits set in accordance with Article 10, establish on a case-by-case basis a reasonable time limit within which the individual decisions shall be issued. It shall monitor compliance with the time limits by the authorities concerned".*
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> Article 8(3) further states that:
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> *"If an individual decision by an authority concerned is not expected to be delivered within the time limit, that authority shall inform the competent authority without delay and include a justification for the delay. Subsequently, the competent authority shall reset the time limit within which that individual decision shall be issued, whilst still complying with the overall time limits set in accordance with Article 10".*

33. Article 9 concerns transparency and public participation, while Article 10 relates to the duration and implementation of the permit granting process. Article 10 comprises the pre-application procedure and the permit granting process. It sets out a number of procedural steps and time limits to be met by the project promotor and the competent authority.

34. It can be observed from the brief summary above, that contrary to the submission made to the Board by Ivor Fitzpatrick & Co. Solicitors, Regulation (EU) No.347/2013 does not require a competent authority to put processes in place to streamline "a project". Insofar as EIA procedures are to be streamlined under Article 7(5), these measures are to be taken by the Member State (and not the competent authority) taking into account guidance by the European Commission. While the competent authority acting in accordance with the collaborative scheme is to establish on a case-by-case basis a reasonable time limit within which the individual decisions shall be issued, this takes place within the maximum time limits specified by the Regulation and does not involve the competent authority streamlining procedures. Finally, while the organisation of the permit granting process involves certain procedural steps being taken by the competent authority, these are specifically prescribed under Article 10 by the Regulations.

35. The submissions made on behalf of NV Irish Farm LLC. and Braccanby Irish Farm LLC state that, in the light of the purported conflict, the Board must consider whether it can further consider the application. However, aside from the fact that there is no conflict, An Bord Pleanala is required to act as competent authority under Regulation 347/2013 and also to determine the strategic development application under the Planning and Development Act 2000 as amended. It has no discretion to step aside from such roles. Insofar the submission further questions why An Bord Pleanala was designated the competent authority under Regulation 347/2013 this was a matter for the Irish State and is entirely irrelevant to determination of the present application.

Appropriate Assessment

36. The submission delivered by Ivor Fitzpatrick & Co. suggests that the test which has been adopted in the documentation submitted with the application for approval does not accord with the Advocate General's opinion and judgment of the Court of Justice in *Sweetman v. Ireland & Ors*. However, the submission does not identify the manner in which the test adopted in the documentation is suggested not to accord with the opinion and judgment in *Sweetman*.

37. In any event, screening for Appropriate Assessment has been carried out by specialist ecologists on behalf of EirGrid and a Natura Impact Statement has also been submitted with the application. Accordingly, complete information has been provided by the applicant to the Board to enable the Board, as competent authority, to carry out a Stage One Screening assessment and a Stage Two Appropriate Assessment pursuant to the separate and distinct tests laid down in EU and Irish law for those distinct assessments.

Conclusion

38. EirGrid reserves its entitlement to further expand on any issue raised in the submission as may be appropriate, whether at any oral hearing which may held in relation to this application or otherwise.