THE HIGH COURT

[2024] IEHC 390
[Record No. 2022/507JR]

BETWEEN

GR WIND FARMS 1 LIMITED, CNOC WINDFARMS LIMITED, TRA INVESTMENTS LIMITED, BALLYBANE WINDFARMS LIMITED, BEAM WIND LIMITED, MEENAWARD WIND FARM LIMITED, CORDAL WINDFARMS LIMITED, SIGATOKA LIMITED, GLANARUDDERY WINDFARMS LIMITED, GLENCARBRY WINDFARM LIMITED, GORTAHILE WINDFARM LIMITED, KILLALA COMMUNITY WINDFARM DESIGNATED ACTIVITY COMPANY, KILL HILLS WINDFARM LIMITED, KNOCKNACUMMER WIND FARM LIMITED, KNOCKNALOUR WIND FARM LIMITED, SEAHOUND WIND DEVELOPMENTS LIMITED, LISDOWNEY WIND FARM LIMITED, MONAINCHA WIND FARM LIMITED, RONAVER ENERGY LIMITED, TULLYNAMOYLE WIND FARM II LIMITED

PLAINTIFFS

AND

THE COMMISSION FOR REGULATION OF UTILITIES

RESPONDENT

AND

EIRGRID PLC

NOTICE PARTY

THE HIGH COURT

[Record No. 2022/501JR]

BETWEEN

ENERGIA GROUP HOLDINGS (ROI) DAC, ENERGIA CUSTOMER SOLUTIONS LIMITED, WIND GENERATION IRELAND LIMITED, HOLYFORD WINDFARM LIMITED, CORNAVARROW WINDFARM LIMITED AND ESHMORE LIMITED

APPLICANTS

AND

THE COMMISSION FOR REGULATION OF UTILITIES

RESPONDENT

AND

EIRGRID PLC

NOTICE PARTY

JUDGMENT of Mr Justice Mark Sanfey delivered on the 1st day of July 2024.

Introduction

1. On 10 November 2023, I delivered a very lengthy judgment ('**the judgment**') – reported at [2023] IEHC 620– in relation to the applications for judicial review and associated reliefs by the groups of applicants in the two sets of proceedings set out above.

2. At the end of that judgment, I made a number of findings in favour of the applicant which are summarised at para. 367 of the judgment. At paras 368 to 371, I canvassed briefly the issue of the reliefs which should be granted. I expressed the view that an order of *certiorari* in relation to the "Decision" of the respondent, in respect of which relief was sought by the applicants, would be appropriate, but expressed concerns as to the grant sought by the applicants of an order of mandamus. I also invited the parties to consider "in view of the discussion of the issues and findings on each area of controversy, the extent to which declaratory relief is necessary".

3. The parties duly corresponded about what orders would be appropriate. A notable feature of that correspondence was that solicitors representing Eirgrid plc ('**Eirgrid**'), the notice party in both proceedings, took part in the course of correspondence and made

suggestions as to reliefs which might affect their client, notwithstanding that Eirgrid had taken no part in the substantive hearing.

4. Ultimately, a hearing date of 31 January 2024 was fixed for the making of submissions in relation to the orders, and the applicants and respondents each proffered in advance of the hearing detailed written submissions and proposed schedules of orders which they contended should be made. Eirgrid also furnished the court with its amendments to the orders suggested by the other parties. The hearing lasted most of a day, and involved wholesale disagreement between the parties as to what orders should be made, or indeed whether any orders beyond an order of *certiorari* should be made at all.

5. The purpose of this judgment is to set out the orders to be made and to address as briefly as possible why certain orders are being made, and not others. This judgment should be read in conjunction with the substantive judgment, and adopts abbreviations and acronyms used in the latter judgment.

The position of the parties generally.

6. The applicants, Greencoat and Energia, had aligned positions and were *ad idem* as to the orders to be sought, the primary relief being an order of *certiorari* quashing the decision of the respondent, CRU, of 22 March 2022. They sought a number of declarations which they submitted were consistent with the findings set out in the judgment. The applicants did not press an application for an order of *mandamus* which had been sought in their respective statements of grounds; however, they each sought liberty "to apply for further relief in the event that effect is not given by the respondent to the declarations".

7. The respondent, the CRU, accepted that an order of *certiorari* quashing the decision was "an appropriate order in light of the court's judgment [para. 2 written submissions]". It submitted however that, once this order was made, "…the court's judgment is clear and…the making of…declarations is not necessary [para. 4 written submissions]". The CRU however

made submissions as to the content of the declarations proposed by the applicants in the event that the court considered that declarations should be made, and opposed an order providing for liberty to apply for further relief.

8. Eirgrid did not make written submissions, but referred in detail to correspondence which its solicitors had with the other parties in December 2023 – January 2024 setting out its position. In their letter of 08 December 2023 Eirgrid's intention was expressed as follows: -

> "Our client wishes to emphasise that it does not seek to challenge, undermine or engage in any consideration of the merits of the findings of the Judgment. Our client is solely concerned with ensuring that (i) the orders that are made are effective and capable of being complied with by our client and (ii) the orders made by the court do not result in any anomalies or errors in the calculation or payment of compensation due."

9. At the hearing before me, the parties very helpfully presented "a consolidated table of draft orders", which brought together all of the various orders for which the parties contended. I attach this table as "Appendix A" to this judgment.

<u>The legal position regarding declarations.</u>

10. I have no intention of burdening the reader further with a treatise on the law relating to declaratory relief. Thankfully, there was no substantive dispute between the parties in this regard. A brief summary of the applicable principles will suffice.

11. Order 84, r.18(2) of the Rules of the Superior Courts provides that: -

> "An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that, having regard to
>
> > (a) the nature of the matters in respect of which relief may be granted by way of an order of *mandamus*, prohibition, *certiorari*, or *quo warranto*,

(b) the nature of the persons and bodies against whom relief may be granted by way of such order, and

(c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review."

12. Order 84, r.19 of the Rules of the Superior Courts provides that, on an application for judicial review, any relief referred to in r.18 may be claimed in an application for judicial review "as an alternative or in addition to any other relief". Such relief may be granted "if it arises out of or relates to or is connected with the same matter and in any event the court may grant any relief mentioned in r.18(1) or (2) which it considers appropriate notwithstanding that it has not been specifically claimed".

13. The applicants both rely on "the classical Irish authority on the granting of declaratory relief" [para. 5 Greencoat written submissions], the decision of Walsh J in *Transport Salaried Staff's Association v CIE* [1965] IR 180 ['**TSSA**'], in which he stated as follows: -

"In modern times the virtues of the declaratory action are more fully recognised than they formerly were and English decisions and dicta in recent years have indicated a departure from the conservative approach to the question of judicial discretion in awarding declarations. A discretion which was formerly exercised 'sparingly' and 'with great care and jealousy' and 'with extreme caution' can now, in the words of Lord Denning in the *Pyx Granite Co. Ltd.* case [(1958) 1 QB 554 at 571] be exercised 'if there is good reason for so doing,' provided, of course, that there is a substantial question which one person has a real interest to raise and the other to oppose. In *Vine v. The National Dock Labour Board*, [(1957) 2 WLR 106], Viscount Kilmuir L.C., at p. 112, cites with approval the Scottish tests set out by Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd* [(1921) 2 AC 438], who said, at p. 448: -

> ‘The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.’

It is also to be observed that the fact that the declaration is needed for a present interest has always been a consideration of great weight” [p.202].

14. This passage was cited with approval by Costello J in *Recording Artists Actors Performers Limited v Phonographic Performance (Ireland) Limited* [2022] IECA 8 (‘**RAAP**’), noting at para. 59 that “while the grant of a declaration is a discretionary remedy, it will normally be granted once the plaintiff's legal argument is upheld.” The applicants also each relied on the decision of McDonald J in *HSE v Laya Healthcare* [2022] IEHC 405 in which the court, at para. 18 of its judgment, referred to “the systemic importance of the issues between the parties”, and noted that in such circumstances “…it is in everyone’s interest that such a declaration should be made”.

15. The CRU referred to the decision in *TSSA*, emphasising that Walsh J had referred to the “judicial discretion” in awarding declarations, which could be exercised “if there is a good reason for so doing”. It also referred to the decision in *RAAP*, submitting that, on the basis of that judgment, the High Court is not precluded from granting declarations even where the court is of the view that the declarations cannot be enforced by an order of *mandamus*, and that part of that analysis could be deciding whether declarations would serve any useful purpose” [written submissions para. 14].

16. The CRU did not demur from the submission of Greencoat that the dicta of Quirke J in *Heaney v Commissioner of An Garda Síochána* [2007] 2 IR 69 as to the jurisdiction of the court to grant declaratory relief weere apposite:

> "The court will be, however, empowered to grant declaratory relief by way of judicial review where it considers, on the evidence, that it is just and convenient to do so and notwithstanding the fact that consequential injunctive or coercive relief (such as *mandamus* or *certiorari*) may not be claimed or available. The question for determination in such cases is whether the circumstances of the case, (including the nature of the matters in respect of which relief is sought), warrant a grant of the declaratory relief sought".

Should declaratory relief be granted at all?

17. The position of the CRU is that, while an order of *certiorari* requires to be made, no declarations are in fact necessary. It is submitted that the judgment is clear, and that the applicants themselves accept that this is so. Counsel drew an analogy to planning matters; "if a decision of An Bord Pleanála is quashed, while there might be declarations on certain discrete legal points, it would not be usual to make declarations in relation to the procedures erroneously followed by the Board" [pp. 46 to 47 of transcript]. It was suggested that "a mere stark one sentence declaration" may not do justice to what was discussed and decided, and that "declarations can end up being more confusing than bringing clarity and especially in a case like this" [transcript p.50, lines 27 to 29].

18. Eirgrid's position was that there should be no declarations which impose financial obligations on Eirgrid. To the extent that declarations might be deemed necessary, Eirgrid made submissions as to the format of such orders so that any such order would not impose a financial burden on Eirgrid with which it would simply not be able to comply.

19. The applicants submitted that it was "just and convenient" that declaratory orders be made "so that there is guidance and clarity as to what the CRU has to do going forward" [p.98, lines 8 to 10]. Counsel for Greencoat pointed out that, while the CRU contended that the judgment was clear, issue was in fact taken with some of the declarations sought "on the

basis that they don't actually reflect the judgment or that there are words that should be added or they should be reformulated in order to properly reflect the decision of the court" [p.98, lines 13 to 20].

20. There is certainly something to be said for the approach suggested by the respondent. The issues were set out in detail in the judgment, considered exhaustively and conclusions were drawn. I would like to think those conclusions were reasonably clearly expressed. At para. 367 of the judgment, a summary of the main findings of the court was given. One could certainly take the view that declarations run the risk of omitting the context and nuance of what were specialist and complex issues.

21. Also, there is a risk that findings in the judgment which are not made the subject of a declaration for whatever reason may get lost or overlooked or are somehow considered less important when the issues are considered on appeal, or when the CRU is considering the steps it should take to comply with the judgment.

22. As against that, it does seem to me that declarations in relation to legal issues determined in the proceedings bring a focus to what the court has decided which would not be present if the parties were left to extract the essential points and findings from a 158-page judgment. The issue for the court is whether declarations would in fact be helpful to the parties, and to any appeal court. Given that, in the submissions of the parties, there has been substantial debate as to what the text of the declarations should be if the court decides that such orders are appropriate, leaving the parties to argue at some later point about what the court actually decided would seem to be unwise.

23. On balance, I consider it appropriate to make declaratory orders. However, it would be neither practical nor desirable for the parties – or the court – to trawl through the judgment to identify every matter on which the court reached a conclusion, and produce a declaration addressing it. I propose therefore to address the orders suggested by the parties, and I do so

below. However, the judgment speaks for itself, and while the declarations I make address the matters raised by the parties, the entire of the judgment will require to be considered in any appeal, or indeed for the purpose of any remedial action contemplated or undertaken by CRU.

The orders sought.

24. The table of draft orders set out in the appendix to this judgment makes it clear that, while some orders were agreed, there was substantial dispute in relation to what should be comprised in the wording of other orders, and the differences between the parties were addressed in both written and oral submissions.

25. I propose to deal below with each of the orders suggested by the applicants, and consider briefly the amendments suggested, and set out with brief reasons the order which I propose to make. The reader should refer to the appendix in this regard.

(1) The first order proposed by the applicants is as follows:

> "An order of *certiorari* quashing the decision made by the respondent acting through the single energy market committee (the **'SEM Committee**') on 22 March 2022 entitled Decision Paper on Dispatch, Redispatch and Compensation Pursuant to Regulation (EU) 2019/943 (SEM-22-009) (the '**Decision**')."

26. This formulation is acceptable to all parties and to the court. I will accordingly make an order in these terms.

(2) The second order proposed by the applicants is as follows:

> "A declaration that Regulation (EU) 201/943 (the '**Regulation**') entered into force and was directly applicable as of 01 January 2020 and was required to be implemented from that date and has full force of law from that date".

27. The respondent argues that the wording "…and was required to be implemented" is "redundant and superfluous", and that it is sufficient to state that it was "directly applicable as

of 01 January 2020. The respondent contended during the hearing that the Regulation did not require to be implemented from that date, despite accepting that the Regulation was directly applicable; however, I specifically found that the Regulation "required to be implemented and to have full force of law from that date", and the applicants' proposed version does no more than repeat that finding.

28. Accordingly, I accept that the applicants' version is appropriate and I will make an order in those terms.

(3) The third order proposed by the applicants is as follows:

> "A declaration that compensation for non-market based redispatching is required to be paid pursuant to Article 13(7) of the Regulation from 01 January 2020 and that such payments cannot be deferred."

29. The respondent accepts the wording save that it suggests the omission of the final phrase "and that such payments cannot be deferred". Eirgrid accepts the wording proffered by the applicants, but suggests the addition of the phrase "(save insofar as time is required for the notice party to be funded sufficiently to make the payments").

30. In para. 307 of the judgment, I stated that the decision, *inter alia*, "…provides that the payment of [compensation for non-market based redispatch] is deferred until the tariff year 2024/2025," and stated at para. 309 that this initiative, along with other matters set out at para. 207, "…is in clear conflict with the provisions of Article 13(7), and in particular the imperative to provide for payment of compensation from 01 January 2020". Reference was made to the impermissibility of deferring compensation at paras. 342 and 367 (1) of the judgment; the applicants' wording seems to me to reflect the findings of the court with more precision than if the final phrase in their draft were omitted.

31. I do not consider the phrase suggested as an addition by Eirgrid to be appropriate. There is nothing in the Regulation or indeed in the court's judgment which would suggest

that the Regulation does not come into force on 01 January 2020, or that further time should be allowed for Eirgrid to be funded sufficiently to make the payments. Eirgrid's arguments in this regard are addressed in more detail in relation to the eighth order sought below.

32. In the circumstances, I consider the version suggested by the applicants to be appropriate and will make an order in those terms.

(4) The fourth order proposed by the applicants is as follows:

> "A declaration that revenues from foregone financial supports, such as REFIT and RESS, must be included in the calculation of "net revenues" for the purpose of Article 13(7)(b) of the Regulation."

33. This wording is acceptable to all parties and to the court, and I will therefore make an order in those terms.

(5) The fifth order proposed by the applicants is as follows:

> "A declaration that Article 13(7) of the Regulation requires that a generator subject to non-market based redispatch be made 'whole' or indifferent to redispatch and be paid such sum by way of compensation as will put the generator in the same position as if it had not been redispatched."

34. This proposal is unacceptable in its entirety to the respondent. Eirgrid suggests substantial amendments to it. There was very considerable controversy between the applicants and the respondent in particular in relation to this proposed order.

35. The respondent contended in its written submissions that the court "did not reach a definitive conclusion on this issue" [written submissions para. 26], emphasising the use of the phrase "more likely than not" at para. 316 of the judgment. It also objects to the use of the colloquial phrase "made whole" or the phrase "indifferent to redispatch", while acknowledging that the parties, who had used these phrases all through the substantive hearing, understood what they meant.

36. Although relief was not sought in their respective statements of grounds by either applicant in relation to the meaning of "unjustifiably low/high", it is evident to the reader of the judgment that how the compensation for non-market based redispatch is to be calculated was a major area of dispute between the parties, as could be seen from the differing contentions of Mr Roberts and Mr Anstey, the respective experts. The introduction for the first time in the Regulation itself of the "unjustifiably low/high" criterion has undoubtedly given rise to uncertainty as to how compensation should be calculated.

37. It seemed to me that, in circumstances where compensation should have been paid since 01 January 2020, and according to the Decision, will be paid from October 2024, the CRU required a finding from the court which would assist it as to whether it was correct in its view as to how that compensation should be calculated. The court's view was that it was not correct, and preferred the view put forward by the applicants. However, the use of the phrase "more likely than not" was not intended to indicate that the court was not making a finding; that phrase was used to reflect the uncertainty caused by the use of the "unjustifiably low/high" criterion and the absence in the Regulation of assistance as to how it might be interpreted. My view, as expressed at para. 316 of the judgment, that it was "more likely than not that the applicants are correct in contending that the intention behind Article 13(7) is that the operator be "made whole", subject to adjustment for any anomalies…" was intended as a finding as to the meaning of the Regulation, based on the submissions and the evidence.

38. I accept however that the version of the order now proffered by the applicants, while reflective of the terms of my judgment, are imprecise and not appropriate. The omission of the phrases "made whole" and "indifferent to redispatch" render the declaration more consistent with the "intention that all lost income arising from redispatch should be restored" [para. 316], while ensuring that "double compensation" [respondent's written submissions para. 27] does not take place.

39. I will therefore make the following order:

> "A declaration that Article 13(7) of the Regulation requires that a generator subject to non-market based redispatch be paid such sum by way of compensation as will put the generator in the same position as if it had not been redispatched".

40. (6) The sixth order proposed by the applicants is as follows:

> "A declaration that, in accordance with Article 13(7) of the Regulation, a single determination must be made by a single decision-maker in respect of the financial compensation to be paid for non-market based redispatching which cannot be separated into separate determinations in respect of "market revenues" and "foregone financial support" and that the decision as to whether compensation for foregone financial support should be paid cannot be left to the governments of Ireland and Northern Ireland."

41. Eirgrid does not object to this formulation, but the respondent objects to the phrase "a single determination must be made by a single decision maker…". That phrase was not used by me in the judgment; it is an extrapolation by the applicants from what I did say. I accept the criticism made of the applicants' version and will make an order in terms of the version proffered by the respondent as follows:

> "A declaration that, in accordance with Article 13(7) of the Regulation, the financial compensation to be paid for non-market based redispatching cannot be separated into separate determinations in respect of "market revenues" and "foregone financial support" and that the decision as to whether compensation for foregone financial support should be paid cannot be left to the governments of Ireland and Northern Ireland".

42. (7) The seventh order proposed by the applicants is as follows:

"A declaration that participation in ex-ante electricity markets in the Single Electricity Market (the '**SEM**') is not a requirement in order to receive compensation for non-market based redispatching pursuant to Article 13(7) of the Regulation".

43. This version is not challenged by Eirgrid and the CRU, and is acceptable to the court. I will therefore make an order in those terms.

44. (8) The eighth order proposed by the applicants is as follows:

A declaration that, in accordance with Article 13(7) of the Regulation, financial compensation for non-market based redispatching must be paid by the transmission system operator ('TSO') licensed by the respondent pursuant to s.14(1)(e) of the Electricity Regulation Act (the '**ERA**') to the generator."

45. The main opposition to this version is from Eirgrid, which does not object to the reference to payment of compensation being made by the TSO - *i.e.,* Eirgrid – but requires the addition of two further declarations as follows:

"(ix) a declaration that the respondent must ensure that:

(a) methodologies and mechanisms are put in place to calculate, and

(b) the notice party has, or has the means to obtain, the funding necessary to pay the financial compensation identified in (viii);

(x) a declaration that the generators will provide to the [notice party] the information regarding payments previously made through existing mechanisms that is required to calculate the payments to be made;"

46. Counsel for Eirgrid, Nessa Cahill SC, described the "overriding concern" of Eirgrid as being that "it shouldn't be the subject of any declarations that impose financial obligations [on] Eirgrid" [p.80, lines 18 to 20]. Eirgrid did not participate in the hearing, a point addressed by counsel in submissions; as counsel put it, "…we don't want to be in the position

of a notice party seeking relief, but nor do we want to be in a position of a notice party against whom reliefs are ordered" [p.90, lines 23 to 26].

47. It is submitted that the extra declarations sought are with a view to making the TSO's position workable if it is to be in a position of having to pay compensation. Counsel made extensive reference to the letter from Eirgrid's solicitors of 15 December 2023 to the applicants' solicitors, which set out Eirgrid's concerns in detail. In particular, that letter states as follows: -

> "The decision of the respondent that has been quashed pursuant to the judgment envisaged that compensation was to be paid from tariff year 2024/25. Therefore, no allowance for this has been made in tariffs set by the respondent to date, and therefore no tariff funds are available to Eirgrid to make the compensation payments. If the effect of any orders is that payments are required to be made by Eirgrid in the current tariff period (2023/24) this will necessitate a review and immediate uplift of the relevant elements of the TUoS charges in Ireland which is a responsibility for the respondent, and the need for Eirgrid to seek additional funding facilities as supported by the respondent. In addition, if implementation costs and/or payment of compensation are to be supported by a banking facility, a clear and timely mechanism for recovery of the costs would need to be established and set out by the respondent to enable Eirgrid to secure such funding.
>
> For these reasons, it is Eirgrid's position that if orders are to be made which refer to/declare a payment obligation on our client, the orders must recognise that Eirgrid needs to be granted sufficient flexibility to secure funding to discharge its obligations. It is assumed that your clients each require to be "made whole" as quickly as possible. Therefore, the most efficient means to obtain funding seems to be through the

respondent putting in place the funding framework to enable Eirgrid secure the required funding and to recover all costs *via* tariffs/charges.

In the normal course of events, to engage with lenders and work through the various internal and external stakeholder approvals, it could take Eirgrid six-nine months to put in place a banking facility **from the date** that the respondent confirms **a clear mechanism for recovery of costs and a clear methodology for the calculation of compensation payable** (including in relation to whether compensation is based on making generator whole to the support price and not to the prevailing ex-ante or balancing market prices and in relation to the double compensation points set out below). [Emphasis in original]"

48. Counsel for Greencoat, Declan McGrath SC, points out that the applicants sought a declaration in their respective statements of grounds in exactly the terms of the declaration they now seek. It is contended that Eirgrid was joined as a notice party precisely because it would be affected by the reliefs sought. There was never any controversy that the TSO, in accordance with the terms of Article 13(7), was the party required to pay the compensation; the controversy related to whether the payment required to be paid to the generator, or another party. As such, it was submitted that it was inappropriate for Eirgrid to intervene at this point to complain about a declaration that was sought by the parties from the outset.

49. Counsel submitted that, while Eirgrid would clearly have to be put in funds to discharge compensation, its difficulty "stems from the actual language [used] in the Regulation and…from the failure of the CRU to put mechanisms in place to put it in funds" [p.107 lines 6 to 10].

50. I understand the concerns of Eirgrid, and the necessity – if it is to be in a position to discharge compensation – to have a mechanism whereby it is put in funds to do so. However, I do not think it falls to the court to make declarations to protect Eirgrid in this regard. The

two extra declarations sought by Eirgrid do not arise directly from matters considered by the court, or findings made by it. No submissions were made to the court which would suggest that Eirgrid is entitled as a matter of law to declarations protecting its position. The order sought by the applicants was sought by them from the outset, and is simply declaratory of the terms of the Regulation itself, which imposes the obligation of payment on the TSO. I have found that this has been an obligation on the parties since 01 January 2020. It is inappropriate for the court to be requested to make an order further deferring the application of the Regulation in order to protect the position of the notice party, particularly in circumstances where its concerns were not expressed to the court during the hearing.

51. I am satisfied that the wording proffered by the applicants for the proposed order is appropriate, and I will make an order in those terms.

52. (9) The ninth order proposed by the applicants is as follows:

> "A declaration that, in accordance with Article 13(7) of the Regulation, no distinction can be made between electricity generators in respect of their entitlement to compensation for non-market based redispatching or the manner in which it is calculated based on the date of commissioning of the electricity generation facility in question."

53. Eirgrid does not have any difficulty with this formulation. The respondent has redrafted the declaration, but I do not understand this to be a substantive dispute. The version proffered by the applicants reflects more closely the terms of the judgment, and paras. 308 and 367.1 in particular. I will therefore make an order in terms of the applicants' version.

54. (10) The tenth order proposed by the applicants is as follows:

> "A declaration that the term "net revenues from the sale of electricity" in Article 13(7)(b) does not refer only to State supports and requires that net revenues from corporate power purchase agreements ('**CPPAs**') lost by generators as a result of non-

market based redispatching must be taken into account in calculating compensation for the purposes of Article 13(7)(b) of the Regulation.

55. This version is accepted by Eirgrid and the CRU, and it is acceptable to the court. I will therefore make an order in those terms.

56. (11) The eleventh and final substantive order sought by the applicants is as follows:

"Liberty to the applicants to apply for further relief in the event that effect is not given by the respondent to the declarations."

57. Counsel for Energia, Brian Kennedy SC, submitted that an order of *mandamus* is not being sought as it was regarded as something of a "blunt instrument", and as the court put it, "issues would arise as to how it was being framed". Counsel submitted that a better course of action would be to make the declaratory reliefs sought and to give liberty to apply in relation to the question of non-compliance. Counsel for the CRU, Micheal Collins SC, opposed the application, emphasising the necessity for finality: as counsel put it, "…liberty can't be kept hanging like a sword of Damocles over everybody but particularly the respondent…".

58. It does seem to me that there has to be a point at which the court is definitely *functus officio*. If liberty to apply were given, at what point would the applicants be entitled to avail of that liberty if the respondent did not comply with the declarations? Is this Court expected to police the respondent's compliance with the declarations? If such an application were made, is it not the case that there would in any event have to be pleadings, evidence and submissions as to the extent to which the respondents had or had not complied with the declarations?

59. Also, I was informed by Mr Collins that the respondent – as one might expect – has instructed its lawyers to appeal the substantive decision. Counsel for the applicants have requested that I make any stay dependent on expedition of such an appeal. Any application to this Court pursuant to a grant of liberty to apply would clearly be inappropriate until the

appeal process had terminated, by which stage the legal landscape might have changed very considerably.

60. On balance, I think it preferable to bring finality to this stage of the complex litigation. It may well be that the matter comes back before this Court in some shape or form after the appeal process has run its course. It seems to me not to make much difference, or cause any particular difficulty to the parties, whether it does so in the form of new proceedings or pursuant to a liberty to apply. Accordingly, I will grant liberty to apply *simpliciter* – as I would normally do in such a case – but not for the purpose of ventilating any alleged non-compliance with the declaratory orders.

Conclusion

61. Orders will be made in the terms set out above. In relation to the issue of costs and a stay on this Court's order, I will list the matter for mention before me at 10am on Wednesday 10 July 2024. If the parties wish to make a brief written submission in this regard, any such submission must be delivered by close of business on Monday 08 July. Any submission more than 2,000 words long will not be considered.

‘APPENDIX A’

THE HIGH COURT
JUDICIAL REVIEW

Record No. 2022/507 JR

Between:

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Applicants

-AND-

THE COMMISSION FOR REGULATION OF UTILITIES

Respondent

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Notice Party

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-AND-

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Respondent

-AND-

EIRGRID PLC

Notice Party

Consolidated table of draft orders

Draft order by GR Wind Farms (enclosed to the submissions)	Draft order by Energia (enclosed to the submissions)	Draft order by EirGrid (enclosed to its letter of 22 December 2023)	Draft order by the CRU (set out in its submissions)
(i) An Order of Certiorari quashing the Decision made by the Respondent acting through the Single Energy Market Committee (the "**SEM Committee**") on 22 March 2022 entitled Decision Paper on Dispatch, ReDispatch and Compensation Pursuant to Regulation (EU) 2019/943 (SEM-22-009) (the "**Decision**").	(i) An Order of Certiorari quashing the Decision made by the Respondent acting through the Single Energy Market Committee (the "**SEM Committee**") on 22 March 2022 entitled Decision Paper on Dispatch, ReDispatch and Compensation Pursuant to Regulation (EU) 2019/943 (SEM-22-009) (the "**Decision**").	(i) An Order of Certiorari quashing the Decision made by the Respondent acting through the Single Energy Market Committee (the "**SEM Committee**") on 22 March 202 2 entitled Decision Paper on Dispatch, ReDispatch and Compensation Pursuant to Regulation (EU) 2019/943 (SEM-22-009) (the "**Decision**").	The CRU accepts that an order of certiorari, quashing the Decision, is an appropriate order in light of the Court's Judgment. Once that order is made, the CRU submits that no further orders are necessary. Without prejudice to the foregoing, if the Court Is minded to make declarations, then it should not go beyond the following:
(ii) A Declaration that Regulation (EU) 2019/943 (the "**Regulation**") entered into force and was directly applicable as of 1 January 202 0 and was required to be implemented from that date and has full force of law from that date.	(ii) A Declaration that Regulation (EU) 2019/943 (the "**Regulation**") entered into force and was directly applicable as of 1 January 202 0 and was required to be implemented from that date and has full force of law from that date.	(ii) A Declaration that Regulation (EU) 2019/943 (the "**Regulation**") entered into force and was directly applicable as of 1 January 2020 and was required to be implemented from that date and has full force of law from that date.	(i) A Declaration that Regulation (EU) 2019/943 (the "**Regulation**") entered into force and was directly applicable as of 1 January 2020 ~~and was required to be implemented from that date and has full force of law from that date.~~
(iii) A Declaration that	(iii) A Declaration that	(iii) A Declaration that	(ii) A Declaration that

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compensation for non-market based redispatching is required to be paid pursuant to Article 13(7) of the Regulation from 1 January 2020 and that such payments cannot be deferred.	compensation for non-market based redispatching is required to be paid pursuant to Article 13(7) of the Regulation from 1 January 2020 and that such payments cannot be deferred.	compensation for non-market based redispatching is required to be paid pursuant to Article 13(7) of the Regulation from 1 January 2020 and that such payments cannot be deferred (save insofar as time is required for the Notice Party to be funded sufficiently to make the payments).	compensation for non-market based redispatching is required to be paid pursuant to Article 13(7) of the Regulation from 1 January 2020 ~~and that such payments cannot be deferred.~~
(iv) A Declaration that revenues from foregone financial supports, such as REFIT and RESS, must be included in the calculation of "net revenues" for the purpose of Article 13(7)(b) of the Regulation.	(iv) A Declaration that revenues from foregone financial supports, such as REFIT and RESS, must be included in the calculation of "net revenues" for the purpose of Article 13(7)(b) of the Regulation.	(iv) A Declaration that revenues from foregone financial supports, such as REFIT and RESS, must be included in the calculation of "net revenues" for the purpose of Article 13(7)(b) of the Regulation.	(iii) A Declaration that revenues from foregone financial supports, such as REFIT and RESS, must be included in the calculation of "net revenues" for the purpose of Article 13(7)(b) of the Regulation.
(v) A Declaration that Article 13(7) of the Regulation requires that a generator subject to non-market based redispatch be made "whole" or indifferent to redispatch and	(v) A Declaration that Article 13(7) of the Regulation requires that a generator subject to non-market based redispatch be made "whole" or indifferent to redispatch and	(v) A Declaration that Article 13(7) of the Regulation, properly interpreted, was intended to ensure that a generator subject to non-market	~~(v) A Declaration that Article 13(7) of the Regulation requires that a generator subject to non-market based redispatch be made "whole"~~

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be paid such sum by way of compensation as will put the generator in the same position as if it had not been redispatched.	be paid such sum by way of compensation as will put the generator in the same position as if it had not been redispatched.	based redispatch would be made "whole" or indifferent to redispatch (with deductions made to reflect any payments previously recovered through existing mechanisms).	~~or indifferent to redispatch and be paid such sum by way of compensation as will put the generator in the same position as if it had not been redispatched.~~
(vi) A Declaration that, in accordance with Article 13(7) of the Regulation, a single determination must be made by a single decision-maker in respect of the financial compensation to be paid for non-market based redispatching which cannot be separated into separate determinations in respect of "market revenues" and "foregone financial support" and that the decision as to whether compensation for foregone financial support should be paid cannot	(vi) A Declaration that, in accordance with Article 13(7) of the Regulation, a single determination must be made by a single decision-maker in respect of the financial compensation to be paid for non-market based redispatching which cannot be separated into separate determinations in respect of "market revenues" and "foregone financial support" and that the decision as to whether compensation for foregone financial support should be paid cannot	(vi) A Declaration that, in accordance with Article 13(7) of the Regulation, a single determination must be made by a single decision-maker in respect of the financial compensation to be paid for non-market based redispatching which cannot be separated into separate determinations in respect of "market revenues" and "foregone financial support" and that the decision as to whether compensation for foregone financial support should be	(iv) A Declaration that, in accordance with Article 13(7) of the Regulation, ~~a single determination must be made by a single decision-maker in respect of~~ the financial compensation to be paid for non-market based redispatching ~~which~~ cannot be separated into separate determinations in respect of "market revenues" and "foregone financial support" and that the decision as to whether compensation for foregone financial support should be paid cannot

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be left to the governments of Ireland and Northern Ireland.	be left to the governments of Ireland and Northern Ireland.	paid cannot be left to the governments of Ireland and Northern Ireland;	be left to the governments of Ireland and Northern Ireland.
(vii) A Declaration that participation in ex-ante electricity markets in the single electricity market (the "**SEM**") is not a requirement in order to receive compensation for non-market based redispatching pursuant to Article 13(7) of the Regulation.	(vii) A Declaration that participation in ex-ante electricity markets in the single electricity market (the "**SEM**") is not a requirement in order to receive compensation for non-market based redispatching pursuant to Article 13(7) of the Regulation.	(vii) A Declaration that participation in ex-ante electricity markets in the single electricity market (the "**SEM**") is not a requirement in order to receive compensation for non-market based redispatching pursuant to Article 13(7) of the Regulation;	(v) A Declaration that participation in ex-ante electricity markets in the single electricity market (the "**SEM**") is not a requirement in order to receive compensation for non-market based redispatching pursuant to Article 13(7) of the Regulation.
(viii) A Declaration that, in accordance with Article 13(7) of the Regulation, financial compensation for non-market based redispatching must be paid by the transmission system operator ("**TSO**") licenced by the Respondent pursuant to section 14(1)(e) of the Electricity Regulation Act	(viii) A Declaration that, in accordance with Article 13(7) of the Regulation, financial compensation for non-market based redispatching must be paid by the transmission system operator ("**TSO**") licenced by the Respondent pursuant to section 14(1)(e) of the Electricity Regulation Act	(viii) A Declaration that, in accordance with Article 13(7) of the Regulation, financial compensation for non-market based redispatching must be paid by the transmission system operator ("**TSO**") licenced by the Respondent pursuant to section 14(1)(e) of the Electricity Regulation	(vi) A Declaration that, in accordance with Article 13(7) of the Regulation, financial compensation for non-market based redispatching must be ~~paid by the transmission system operator ("**TSO**") licenced by the Respondent pursuant to section 14(1)(e) of the Electricity Regulation Act (the~~

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(the "**ERA**") to the generator.	(the "**ERA**") to the generator.	Act (the "**ERA**") to the generator and not to anyone other than the operator of the electricity generation facility in question (with deductions made to reflect any payments previously recovered by the generator through existing mechanisms);	~~"**ERA**") to the generator~~ made to the generator (with deductions made to reflect any payments previously recovered by the generator through existing mechanisms).
		(ix) A Declaration that the Respondent must ensure that: (a) methodologies and mechanisms are put in place to calculate, and (b) the Notice Party has, or has the means to obtain, the funding necessary to pay the financial compensation identified in (viii);	
		(x) A Declaration that the generators will provide to the [Notice Party] the information regarding payments previously	

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		made through existing mechanisms that is required to calculate the payments to be made;	
(ix) A Declaration that, in accordance with Article 13(7) of the Regulation, no distinction can be made between electricity generators in respect of their entitlement to compensation for non-market based redispatching or the manner in which it is calculated based on the date of commissioning of the electricity generation facility in question.	(ix) A Declaration that, in accordance with Article 13(7) of the Regulation, no distinction can be made between electricity generators in respect of their entitlement to compensation for non-market based redispatching or the manner in which it is calculated based on the date of commissioning of the electricity generation facility in question.	(xi) A Declaration that, in accordance with Article 13(7) of the Regulation, no distinction can be made between electricity generators in respect of their entitlement to compensation for non-market based redispatching or the manner in which it is calculated based on the date of commissioning of the electricity generation facility in question;	(vii) A Declaration that, ~~in accordance~~ insofar as the Decision distinguishes between electricity generators based on whether the date of commissioning is pre-or post-04 July 2019 based on presumptions as to whether compensation for priority dispatch generators will be considered unjustifiably high or low, the Decision is incompatible with Article 13(7) ~~of the Regulation, no distinction can be made between electricity generators in respect of their entitlement to compensation for non-market based redispatching or the manner~~

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			~~in which it is calculated based on the date of commissioning of the electricity generation facility in question.~~
(x) A Declaration that the term "*net revenues from the sale of electricity*" in Article 13(7)(b) does not refer only to State supports and requires that net revenues from corporate power purchase agreements ("**CPPAs**") lost by generators as a result of non-market based redispatching must be taken into account in calculating compensation for the purposes of Article 13(7)(b) of the Regulation.	(x) A Declaration that the term "*net revenues from the sale of electricity*" in Article 13(7)(b) does not refer only to State supports and requires that net revenues from corporate power purchase agreements ("**CPPAs**") lost by generators as a result of non-market based redispatching must be taken into account in calculating compensation for the purposes of Article 13(7)(b) of the Regulation.	(xii) A Declaration that the term "*net revenues from the sale of electricity*" in Article 13(7)(b) does not refer only to State supports and requires that net revenues from corporate power purchase agreements ("**CPPAs**") lost by generators as a result of non-market based redispatching must be taken into account in calculating compensation for the purposes of Article 13(7)(b) of the Regulation.	(viii) A Declaration that the term "*net revenues from the sale of electricity*" in Article 13(7)(b) does not refer only to State supports and requires that net revenues from corporate power purchase agreements ("**CPPAs**") lost by generators as a result of non-market based redispatching must be taken into account in calculating compensation for the purposes of Article 13(7)(b) of the Regulation.
(xi) Liberty to the Applicants to apply for further relief in the event that effect is not given by the Respondent to	(xi) Liberty to the Applicants to apply for further relief in the event that effect is not given by the Respondent to	~~(xii) Liberty to the Applicants to apply for further relief in the event that effect is not given by the Respondent~~	~~(xi) Liberty to the Applicants to apply for further relief in the event that effect is not given by the Respondent~~

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the Declarations.	the Declarations.	~~to the Declarations.~~	~~to the Declarations.~~