THE HIGH COURT
JUDICIAL REVIEW

Record no. 2022/859 JR

EPUK INVESTMENTS LIMITED

Applicant

and

ENVIRONMENTAL PROTECTION AGENCY

Respondent

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Record No. 2022/860 JR

Between:

EPUK INVESTMENTS LIMITED

Applicant

And

COMMISSION FOR REGULATION OF UTILITIES

Respondent

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 10 FEBRUARY 2023

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THE IMPUGNED DECISIONS[1]

1. In its above-entitled proceedings against the Environmental Protection Agency ("EPA"), the Applicant ("EPUKI") seeks certiorari[2] quashing what it calls the "Unlimited Operation Decision"[3] by the EPA, by its e-mail dated 18 July 2022[4] to EPUKI[5], that the interpretation of BAT 40 of the LCP[6] BAT Conclusions[7] which it "*will apply*" in Industrial Emissions Licence ("IEL") applications and decisions is that Open Cycle Gas Turbine[8] electricity generation plants ("OCGT") can be operated *".... in excess of 1,500 hrs per annum provided the plant meets the relevant specified BAT-AEEL[9] of 36 — 41.5% net electrical efficiency". "*

This e-mail related to the question whether the EPA would apply, in IELs of OCGTs, "*Annual Run Hour Limits*" ("*ARHL*") limiting, as the name implies, the annual hours of operation of such plants. An issue arises as to what exactly the EPA said in its e-mail of 18 July 2022 is its interpretation of BAT 40 – what does the e-mail mean?

2. In its above-entitled proceedings against the Commission for Regulation of Utilities ("CRU"), EPUKI seeks certiorari quashing what it calls the "De-Rating Decision"[10] by the Single Electricity Market Committee[11] ("SEMC") dated 5 September 2022 and entitled "*Capacity Market Code Urgent Working Group Modification Decision Paper. WG26b CMC 11 22 — De-rating for Annual Run Hour Limits, SEM-22-063*".[12] I will call that the "2022 Code Modification Decision" as it carries into effect, by way of adoption of specific text modifying the Code, an earlier SEMC Decision of 11 August 2022[13] (the "2022 Parameters Decision") to de-rate generation plant which is subject to ARHLs. That decision required modification of the Code accordingly. The CRU says that decision of 11 August 2022 is the true "De-Rating Decision". The relationship between those two decisions is roughly analogous to the relationship between a judgment of the High Court and the final order made on foot of it.

1 Headings in this judgment are for ease of navigation only and are not prescriptive or definitive.
2 Some doubt was cast in written submissions whether certiorari is still sought but that was clarified by counsel for EPUKI confirming that certiorari is sought- Day 2 p72.
3 A controversial description.
4 EPA to AECOM 18 July 2022 - Tab 4 to Exhibit "JC1" - Affidavits of James Crankshaw in both claims 11 October 2022 - Core Book 14.
5 Via AECOM, consulting engineers to EP Energy Developments Limited an EPUKI subsidiary.
6 Large Combustion Plant. Includes Combined Cycle Gas Turbines and Open Cycle Gas Turbines.
7 See below – BAT stands for Best Available Techniques. BAT Conclusions are issued by the EUI Commission and identify BAT for specific industrial activities. They do so by specifying Emission Limit Values for pollutants and Energy Efficiency Levels and by non-prescriptively describing Techniques which can achieve both values and levels them and, more generally, a high level of environmental protection.
8 All turbines create rotational energy rather than thrust. In power generation gas turbines this rotational energy is used to spin a generator and hence create electricity.
9 See below - Best Available Techniques - Associated Energy Efficiency Levels.
10 A controversial description.
11 Established by S.8A Electricity Regulation Act 1999
12 Tab 7 to Exhibit "JC1" - Affidavits of James Crankshaw 11 October 2022 in both judicial reviews – Core Book Tab 19.
13 Single Electricity Market (SEM) Capacity Remuneration Mechanism 2026/27 T-4 Capacity Auction Parameters & Annual Run Hour Limited Plant De-Rating Factor Decision Paper SEM-22-044 11 August 2022 - Tab 12 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.

THE PARTIES

3. In relevant respects, EPUKI acts and will act through various subsidiaries but as no point is taken in that regard and as nothing turns on the precise identity of the subsidiaries, I will refer to "EPUKI" as including all compendiously.

4. These proceedings against the CRU are in substance against the SEMC. Where judicial review is sought in Ireland of a decision of the SEMC[14], the CRU is the proper respondent[15]. As reflecting the substantive reality, I will hereafter generally refer to the SEMC as if it were the respondent to proceedings 2022/860 JR. And the reader should bear in mind that references to the relevant public bodies in the documents relevant to this case are not always precisely correctly addressed – for example some letters to the CRU and/or the NIUR[16] are intended, and understood by all concerned, to be to the SEMC. However, in practice little, if any, confusion results.

EPUKI'S COMPLAINT – AND CHANGE OF GROUND

5. Before considering the pleadings it may assist to describe EPUKI's substantive complaints. The case concerns, primarily, two types of electricity generation plants - OCGTs and Combined Cycle Gas Turbines[17] ("CCGT").

6. No doubt simplifying (perhaps excessively), the nub of EPUKI's complaint as first made[18], is that the EPA's alleged decision, allegedly unlawful, to allow OCGTs in Ireland to operate for unlimited hours[19] (i.e. without ARHLs) has two unsatisfactory outcomes:

- It will continue the absence of differentiation in Capacity Auctions[20] between OCGTs and CCGTs in Ireland such that developers will build OCGTs in preference to CCGTs, to the detriment of the environment as low efficiency OCGTs will operate for long periods. Note that this complaint contrasted OCGTs and CCGTs. That contrast was articulated in the case but not by way of an allegation of unlawful discrimination.

- ARHL De-Rating[21] will be redundant in Ireland but will significantly impact and discriminate against OCGTs in Northern Ireland, which will be ARHL-limited, thereby unfairly distorting competition by commercially advantaging OCGT operators in Ireland who, not being subjected to ARHLs, will qualify to bid for far greater "Capacity" in "Capacity Auctions" in the Single

14 Established by the Electricity Regulation Act 1999 Part II s.8A (1).
15 Viridian Power v Commissioner for Energy Regulation [2011] IEHC 266.
16 Northern Ireland Utility Regulator. A.k.a. "UREGNI".
17 Combined Cycle Gas Turbines are defined in the EU Commission's "Implementation Decision" – see below.
18 Affidavit Of James Crankshaw 11 October 2022 §52 Et Seq & 59.
19 assuming they meet the BAT-AEEL's for energy efficiency.
20 See below.
21 See below.

Electricity Market[22]. Note that this complaint contrasted OCGTs in Ireland and OCGTs in Northern Ireland and the pleadings allege unlawful discrimination in that respect.

7. EPUKI complains that the SEMC De-Rating Decision seeks to disincentivise OCGTs by reducing their Capacity Market income substantially. Though, as on EPUKI's case that disincentivisation occurs only in Northern Ireland, it is notable and a little surprising that EPUKI's posited solution (admittedly based on a view of the proper understanding of the law) is to disincentivise OCGTs in Ireland also by similarly reducing their Capacity Market income substantially.

8. EPUKI seeks declaratory relief in both sets of proceedings in the form of the very general plea for such relief required of pleadings in the SID list.[23] However, and notably, its original grounds it sought a declaration against the EPA that that a *"maximum operating limit of 1,500 operating hours per annum applies to OCGTs".* Equally notably, its original grounds sought a declaration against the SEMC that its *"De-Rating Decision is based on an error of law in so far as it is premised on the position that no maximum operating limit of 1,500 operating hours per annum applies to OCGTs*".

9. Deletions from pleadings remain apparent on amended pleading. As stated, the deletion of those claims for declaratory relief was in order to comply with relevant practice directions as to form of pleadings and not by way of a substantive change in the gravamen of EPUKI's case. Accordingly, I consider that the respondents were, despite the deletions, entitled to point to that content as illuminating the true gravamen of the case made by EPUKI – though I do not say that the deleted content is essential to a view in that regard.

10. For example the deleted content is consistent with EPUKI's twice-pleaded[24] acceptance "*as the legally correct position*" "*that an ARHL of 1,500 was required for OCGTs"* and its remaining pleas against the SEMC that:

- the SEMC had premised its De-Rating Decision on the position *"that no maximum operating limit of 1,500 operating hours per annum applies to OCGTs".*
- *"This position amounts to an error in the interpretation of the IED and the CID[25]. EU law limits run times of OCGTs to 1,500 hours per annum."*

22 See below for an explanation of the Single Electricity Market and Capacity Auctions.
23 See Practice Direction PD HC 107 as amended by PD HC 114.
24 In its Grounds in both actions.
25 Commission Implementing Decision (EU) 2021/2326 of 30 November 2021 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU … for large combustion plants – IED Art 13(5). also Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU … for large combustion plants (OJ L 212, 17.8.2017, p. 1).

- *".... gas turbines must operate in combined cycle* [i.e. be CCGTs] *in order to operate for in excess of 1,500 hours per year. Therefore, ... OCGT, must be operated less than 1,500 hours per year."*

- *"OCGTs are less efficient and ultimately worse for the environment making a 1,500 annual hours run limit necessary. Only CCGTs because of their higher efficiency rates and consequently lower emissions per unit of electricity generated can operate for greater than 1,500 hours per annum. .... The legislative aim is to discourage the use of OCGTs.*"

- 1,500 hours per annum is a "*legal limit prescribed by the IED and the CID".*

11. EPUKI complains that the EPA misinterpreted §4.1.1, BAT 40 and Table 23 of the CID/BAT Conclusions. It deposes, per Mr Crankshaw,[26] in bald and absolute terms:

> *"BAT 40 requires a maximum limit of 1,500 operating hours per annum for new OCGTs because they are not combined cycle."*
>
> *"The approach adopted by the European Commission in the CID to stipulate that only CCGT plants are allowed to operate for significant hours per year and to adopt a 1,500 h/yr as the cut-off point for the use of OCGT is understandable in light of the difference in efficiency."*
>
> *"The EPA in Ireland is applying the opposite interpretation of BAT 40 to that of the NIEA and is of the view that OCGTs can be operated in excess of the 1,500 ARHL."*
>
> 1,500 annual hours run limits for OCGTs are *"necessary and an annual run time over 1,500 hours must therefore only be done by a CCGT."*

12. However, at trial, EPUKI's position[27] was that a particular OCGT <u>can</u> run over 1,500 hours:

a. if its technique offers environmental protection equivalent to that achieved by a CCGT generating the same amount of energy;

or

b. if it is not technically and economically viable to apply the BAT and it would be disproportionate in the particular circumstances. (Cost/Benefit analysis).

Notably, a. amounts to an acceptance that it is <u>legally</u> possible for a <u>BAT-compliant</u> OCGT to be permitted to run over 1,500 hours. This is apparent on the position set out above and confirmed by EPUKI's note that whether that is technically possible is a matter for the EPA.[28] The essential point

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26 Affidavit of James Crankshaw 11 October 2022 §28 & 29 & 37.

27 Day 1, pages 37; 89; 119: Note submitted during trial. I have paraphrased the latter slightly but to the same meaning.

28 The Note reads, in part: "In our view the precise nature of the features of operation of the combined cycle comparator, and thus the detail of whether you are comparing a combined cycle running like hours, generating a like amount of energy, etc, with the proposed OCGT, are all matters for assessment by the competent body. To determine whether the EPA's interpretation is correct, the court does not need to address precisely how the comparison would be made. The point is that these are not the conditions applied by the EPA to allow OCGT running over 1500 hrs."

here is EPUKI's acceptance that there are circumstances in which an OCGT running over 1,500 hours can be BAT-compliant.

Possibility b. refers to a BAT non-compliant OCGT getting a derogation under IED Article 15(4) from Emission Limit Values ("ELV") required by BAT-AELs[29]. Possibility b. differs from a. in that the implication of a derogation is non-compliance with BAT.

13. The SEMC and EPA say this position taken by EPUKI at trial is a Damascene and impermissible conversion from its case as pleaded by EPUKI and set out in its Grounding Affidavits and which, as a new case not pleaded, EPUKI cannot now make.

14. In reply counsel for EPUKI argued[30] that its position hadn't changed – that its position is and always was that, specifically, as to gas turbine power plants, BAT 40 "*says that if it's going over 1,500 hours it has to be combined cycle*." He said *"That's what I am attacking; the interpretation of BAT 40. Everything else doesn't really matter, it's just that, the legal test."*[31]

15. EPUKI asserts that, by reason of the EPA's misinterpretation of the regime created by the Industrial Emissions Directive[32] *"(on industrial emissions (integrated pollution prevention and control))"* ("IED"), the EPA and its equivalent north of the Border, the Northern Ireland Environment Agency ("NIEA") will differ in their IED Permitting[33] of OCGTs in their respective jurisdictions – the NIEA intending, and the EPA intending not, to apply ARHLs. Broadly, ARHLs are applied to reduce environmental disadvantages of plant operation as perceived by the EPA or NIEA.[34] As will be obvious, reducing the operating time of a plant reduces its emissions. ARHLs can be significantly restrictive: that postulated here – a 1,500-hour ARHL - limits a plant to running only 17% of the number of hours in a year – or, put another way, for a little more than 2 months out of 12.[35]

16. This difference as between the EPA and NIEA will, EPUKI says, result in otherwise identical OCGTs being treated very differently, as between those in Northern Ireland and those in Ireland, in the Capacity Market. That is because the SEMC has adopted "ARHL De-Rating" in Capacity Auctions. In a Capacity Auction, a plant can bid, at most, for capacity equal to its de-rated capacity. So, it is in the interest of electricity generators ("Generators"[36]) to minimise de-rating of their power plants and to ensure that their power plants are not de-rated to a greater extent than their competitors'. Broadly, and given, not least, the high costs of developing and operating power plants, EPUKI says

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29 "Emission Levels Associated with the Best Available Techniques" – see definition below.
30 D3 p152 & 153.
31 Day 3 p165.
32 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast).
33 Industrial Emissions Directive – see below.
34 Limits on Run Hours may also arise for technical/engineering reasons and are reflected in Standard Derating Factors described below. But they can be ignored for the purposes of this judgment, which is concerned with ARHLs applied in IED Permits for reasons of environmental protection.
35 There are 8760 hours in a year.
36 This is a term adopted for convenience in this judgment. It is not a term of art.

de-rating has appreciable potential to reduce return on investment in power plants, to discourage investment in new plants likely to be de-rated and to encourage investment in new plants unlikely to be de-rated.

17. In essence, EPUKI says that if ARHL De-Rating proceeds in the present alleged circumstance of difference between the EPA and NIEA, new OCGTs in Ireland will have no ARHLs in their IED Permits[37] and will be able to bid to supply more capacity than those in Northern Ireland which will have ARHLs in their IED Permits. This will disadvantage the latter as compared to the former as to return on investment and will incentivise investment in plants less likely to have ARHLs imposed. This, EPUKI allege, will inter alia incentivise OCGTs, and investment in OCGTs, in Ireland as compared to Northern Ireland. All this, EPUKI say, will distort the all-island Single Electricity Market ("SEM") and competition in the SEM and discriminate against operators of OCGTs in Northern Ireland as compared to operators of OCGTs in Northern Ireland.

18. EPUKI repeatedly emphasises that it has no objection in principle or in general to ARHL De-Rating in Capacity Auctions.[38] It says it objects to ARHL De-Rating only for as long as the distortion allegedly wreaked by the EPA's alleged misinterpretation of the IED regime subsists. Mr Melvin, Director of the CRU and for the SEMC, cites Mr Crankshaw for EPUKI,[39] in my view fairly, to the following effect:[40]

- EPUKI is not challenging "*the introduction of ARHL De-Rating in general*".

- EPUKI does not dispute (as he says it is irrelevant) that
    - *"there is a benefit in adopting ARHL De-Rating".*
    - *"there was sufficient material before the SEMC to support the introduction of ARHL De-Rating" and "good reasons to introduce de-rating".*
    - *"in general, ARHL De-Rating is considered to promote the CRU's objectives".*

- Rather, Mr Crankshaw limits EPUKI's objection to ARHL De-Rating in Capacity Auctions in the specific context of what it says are the differing interpretation of the IED regime as between the EPA and the NIEA and what it says are the predictable results that OCGTs in Northern Ireland will be subject to ARHLs whereas OCGTs in Ireland will not be subject to ARHLs.[41] Mr Crankshaw states:

    "the present challenge is not to the introduction of ARHL De-Rating in and of itself, but rather to its introduction in the context in which different approaches (one of which is unlawful) are taken to the application of ARHLs to OCGTs in Ireland and Northern Ireland".[42]

37 By which I mean both IELs and, in Northern Ireland, PPC Permits.
38 E.g. Day 1 p129 – "We're fine with the principle of de-rating."
39 Affidavit #2 of James Crankshaw 1 December 2022 – CRU Case §23.
40 Affidavit #2 of James Melvin 15 December 2022 §5 et seq – CRU Case.
41 Affidavit #2 of James Crankshaw 1 December 2022 §12 & 13 – CRU Case.
42 Crankshaw #2 1 December 2022 §12 – 16; See also EPUKI Submissions 21 December 2022.

19. Mr Melvin[43] for the SEMC suggests that it follows from the foregoing that EPUKI's real complaint is against the EPA. The EPA assert that EPUKI's real complaint is against the SEMC.

20. As a separate matter, it will assist the reader, in appreciating what follows, to note that EPUKI's first explicit complaint of a difference between the approach of the EPA and the NIEA to the imposition of ARHLs in IED Permits for OCGTs was by way of its letters before action dated 29 September 2022.[44]

EPUKI V EPA - PLEADINGS

EPUKI Grounds[45]

21. EPUKI seeks certiorari quashing the "EPA Unlimited Operation Decision" on the following grounds:

- D1[46] - as irrational and in significant and serious error in creating a situation in which OCGTs in Northern Ireland and Ireland are treated differently both in their permissible runtimes and (in light of the context of the De-Rating Decision) in their treatment in the SEM Capacity Auction.
- D2 - for the EPA's failure to consult in accordance with its duty under Common Law prior to reaching its Unlimited Operation Decision.
- EU1[47] - As based on an error of law in the interpretation of Articles 11 and 14 of the IED and the Implementing Decision.
- EU2 - for the EPA's acting in breach of its duties under Articles 11 and 14 of the IED and of those articles as transposed by S.86A(3)(a) of the Environmental Protection Agency Act, 1992 ("EPAA 1992") which require it to ensure OCGTs and CCGTs are operated in accordance with the relevant BATs and that permits include all measures necessary for compliance with such BATs.
- EU3 - for the EPA's acting in breach of its duties under Article 3(1) and 3(4) of the Recast Electricity Directive of 2019 (the "RED").[48]

43 Affidavit #2 of James Melvin 15 December 2022 §5 et seq – CRU Case.
44 Tab 5 to Exhibit "JC1" - Grounding Affidavits of James Crankshaw in both claims 11 October 2022 – Core Book Tab 20. See Day 2 p43 et seq.
45 The Original Grounds were amended on 20 October 2022 (to comply with PD HC 107 as amended by PD HC 114 and facilitate entry to the SID judicial review list) and were re-amended on 27 October 2022 to correct the absence of a plea of breach of statutory duty by the EPA at domestic law.
46 Domestic Law Ground 1.
47 EU Law Ground 1.
48 Directive 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU on energy efficiency.

D1 & D2 – Irrationality, Error & Failure to Consult - Particulars

22. EPUKI pleads, as to the allegation that the EPA acted irrationally and erroneously that,

a. The IED establishes general rules, inter alia setting ELVs for Combustion Plants. The CID establishes the relevant BAT Conclusions by reference to which the EPA must set conditions in IED Permits.

b. The history of variation of EPUKI's Ballylumford PPC Permit is recited[49] - including EPUKI's acceptance in that process "*as the legally correct position*" "*that an ARHL of 1,500 was required for OCGTs".* In planning for a new OCGT at Tynagh in Ireland EPUKI, learnt that an SEMC Information Note of December 2021 asserted the EPA's confirmation that technologies other than CCGTs, including OCGTs, could be BAT-compliant without being subject to a 1,500-hour ARHL. That is contrary to the view taken by the Northern Ireland regulators. EPUKI[50] sought clarification from the EPA[51]. That came by the EPA e-mail of 18 July 2022 – which is recited.

c. The result of this difference in view as between the NIEA and the EPA is that the ARHL De-Rating Decision will bear differently on identical OCGTs: OCGTs in Northern Ireland will be de-rated on foot of their 1,500-hour ARHLs; OCGTs in Ireland will not be similarly de-rated as they will not be subject to 1,500-hour ARHLs. So, OCGTs in Northern Ireland will be disadvantaged in Capacity Market Auctions compared to OCGTs in Ireland which will, ceteris paribus, be able to bid for far greater capacity.

23. EPUKI pleads, as to the allegation that the EPA failed to consult before making the Unlimited Operation Decision that had it consulted, the EPA would have learnt that its interpretation of the relevant BAT conclusion:

i. is contrary to the IED and CID.
ii. diverges from the correct understanding of those provisions reached by other relevant public bodies in other states.

I may as well say now that, this plea seems to me unstateable. To put it simply, they were engaged in consultation and the EPA answered a question asked of it.

EU1 & EU2 – IED, CID & EPAA 1992 - Particulars

24. EPUKI pleads that Unlimited Operation Decision is unlawful as

49 See further below.
50 Via AECOM Consulting Engineers.
51 At the meeting of 14 March 2022 and by the letter dated 2 May 2022.

a. based on an erroneous interpretation of Articles 11 and 14 IED and of the Annex to the CID (i.e. the BAT Conclusions).

b. in breach of the EPAs' duty under Articles 11 and 14 IED to ensure that installations are operated in accordance with BAT and to ensure that IELs include all measures necessary for compliance with BAT.

c. Article 11 IED provides that "*Member States shall take the necessary measures to provide that installations are operated in accordance with the following principles: … (b) the best available techniques are applied;…".*

d. Article 14(1) IED provides that "*Member States shall ensure that the permit includes all measures necessary for compliance with the requirements of Article 11…".*

e. Article 14(3) IED provides that *" BAT Conclusions shall be the reference for setting the permit conditions"*

f. in breach of the domestic transposing measure – S.86A(3)(a) EPAA 1992 which provides that the *"Agency shall, …. apply BAT Conclusions as a reference for attaching one or more conditions to a licence …."*

g. EU law limits OCGT run times to 1,500 hours per annum.

h. the Annex to the CID sets out the BAT Conclusions.
   - §4 sets out the BAT Conclusions for the combustion of gaseous fuels. §4.1, entitled *" BAT Conclusions for the combustion of natural gas*", provides that these BAT Conclusions, "*unless otherwise stated, … are generally applicable to the combustion of natural gas*".
   - §4.1 BAT 40 provides that "in *order to increase the energy efficiency of natural gas combustion, BAT is to use an appropriate combination of the techniques given in BAT 12 [which sets out the BAT to implement and adhere to an environmental management system with certain prescribed features] and below*".
   - Table 23, below BAT 40, specifies as "*Technique (a)*" the use of "*combined cycle*" as "*generally applicable to new gas turbines and engines except when operated < 1500h/yr*".

25. EPUKI pleads accordingly that

- (1) the BAT Conclusions are generally applicable to the combustion of natural gas; and
- (2) combined cycle is generally applicable to new gas turbines except when operated less than 1,500 hours per year.
- This interpretation is not only clear from text of the CID - it also reflects the purpose of IED regime to discourage the use of less efficient and more pollutant OCGTs, which are worse for the environment, making a 1,500-hour ARHL necessary. Only CCGTs because of their higher efficiency and consequently lower emissions per unit of electricity generated can operate for greater than 1,500 hours per annum. The legislative aim is to discourage the use of OCGTs.

26. In other words, gas turbines operating in excess of 1,500 hours per year must operate in Combined Cycle (i.e. be CCGTs) in order to be IED- and BAT-compliant. Other forms of natural gas combustion, such as OCGTs, must be operated less than 1,500 hours per year. This is pleaded as the legal limit prescribed by the IED and the CID. I pause here to note the bald pleas that OCGTs operating greater than 1,500 hours per year are unlawful – both as not complaint with BAT and as non-compliant with the IED. No possibility of exceptions is admitted in the pleadings.

27. While EPUKI's re-amended grounds, properly, sought declaratory relief in general terms, it helpfully clarified at trial the terms of the declaration it now seeks in the following terms (though terms to which it was not "*wedded*")[52]:

> *"A declaration that BAT 40 does not, on its proper interpretation, allow an OCGT to be operated in excess of 1500 hours per annum provided that the plant meets the relevant specified BAT AEEL of 36-41.5% of net electrical efficiency."*

Note – BAT-AEELs are Best Available Techniques - Associated Energy Efficiency Levels. They are set in BAT Conclusions.

EU3 - Recast Electricity Directive - Particulars

28. EPUKI pleads that the EPA has breached its duty under Article 3(1) and 3(4) of the RED.[53]

a. Article 3(1) RED provides that "*Member States shall ensure their national law does not unduly hamper cross-border trade in electricity, consumer participation, including through demand response, investments into, in particular, variable and flexible energy generation, energy storage, or the deployment of electromobility or new interconnectors between Member States, and shall ensure that electricity prices reflect actual demand and supply*".

b. Article 3(4) RED provides that *"Member States shall ensure a level playing field where electricity undertakings are subject to transparent, proportionate and non-discriminatory rules, fees and treatment, in particular with respect to balancing responsibility, access to wholesale markets, access to data, switching processes and billing regimes and, where applicable, licensing".*

c. These duties are directly effective as against the EPA as an emanation of the State.

d. In adopting the Unlimited Operation Decision and in its interpretation of the CID the EPA is acting in breach of these duties.

52 Day 3 p183.
53 Directive 2019/944 of 5 June 2019.

e. In the context of the De-Rating Decision, the Unlimited Operation Decision adopted unduly hampers cross-border trade in electricity and investments into variable and flexible energy generation and does not ensure a level playing field where electricity undertakings are subject to non-discriminatory treatment

EU1, EU2 & EU3 - Damages

29. EPUKI pleads that the foregoing EU Law provisions confer clearly identifiable rights and the EPA's breaches of those duties are manifest and serious. If the Unlimited Operation Decision and/or the De-Rating Decision are not quashed, the Applicant will suffer loss by reason of those breaches and the consequent the difference in treatment between its Northern Irish OCGTs and the treatment of OCGTs and other power plants in Ireland. If so, the EPA is liable in "Francovich/ Bonifaci" damages.[54]

Justiciability

30. This pre-emptive plea[55] pleaded that the EPA had stated[56] that it had not taken a decision justiciable in judicial review and that it had merely indicated its probable approach to licensing of OCGTs in respect of an intended licence application by the Applicant. EPUKI disagrees, pleading that the EPA had set out its position on the interpretation of the IED and CID definitively in its e-mail dated 18 July 2022 and its letter dated 3 October 2022.

<u>EPA Opposition</u>

Preliminary Objections – Justiciability, Discretion & Time Limits

31. The EPA pleads that it has no power to make and has not made any general decision on the interpretation of §4.1.1 or any other element of the CID BAT Conclusions. Any general view taken has no general legal effect and can have no specific legal effect until it should crystallise in a decision as to the conditions of an IEL. EPUKI has not applied for an IEL and the EPA has made no specific decision affecting EPUKI. There is no justiciable decision and the proceedings are premature.

32. Alternatively, the Court should limit its review and exercise its discretion against exercising its jurisdiction in judicial review given the high-level and preliminary nature of any justiciable decision.

54 Cases C6/90 and C-9/90 EU:C:1991:428.
55 §3.10.
56 In pre-action correspondence dated 3 October 2022.

33. Alternatively, any justiciable decision constituted in the e-mail of 18 July 2022 is no more than a repetition of earlier statements by the EPA of its interpretation of the BAT Conclusions including as published by the SEMC Information Note as to ARHLs in December 2021 - of which EPUKI was aware at the time as it had previously bid into Capacity Auctions. EPUKI sought leave to seek judicial review only on 17 October 2022 – outside the three months allowed by Order 84 Rule 21(1) RSC. Alternatively EPUKI is guilty of delay. There is no good and sufficient reason to extend time.

Preliminary Objections – Standing/Sufficient Interest/Prematurity

34. The EPA pleads that EPUKI lacks sufficient interest to seek the reliefs sought.

a. EPUKI's complaint is in substance not as to licensing of OCGTs in Ireland or of its OCGT in Ireland and it will suffer no detrimental legal impact in Ireland. If the purported Unlimited Operation Decision took effect it would benefit operators in Ireland of present and future OCGTs, including EPUKI. It is the capacity of the Northern Irish OCGT which will be restricted. In reality, EPUKI complains of harm to, and seeks to vindicate its rights to as to, its existing and proposed OCGTs in Northern Ireland, which are outside the jurisdiction of both the EPA and the court. EPUKI initially challenged the NIEA application of ARHLs to OCGTs but abandoned that challenge.

b. Any disparity in treatment between OCGTs in Ireland and Northern Ireland, whether lawful or unlawful, would benefit EPUKI's proposed Irish OCGTs. It denied that any disparity is unlawful and/or is within the control or regulatory remit of the EPA.

c. The Applicant therefore lacks standing to complain in this court of such a disparity.

35. The proceedings are a collateral attack, in the wrong jurisdiction, on the ARHLs applied to EPUKI's Northern Ireland OCGTs on 28 October 2021 and, further, are out of time.

36. EPUKI has no standing to seek, and the court has no jurisdiction to grant, declaratory relief sought by EPUKI not only on its own behalf but on behalf of "*persons similarly situated*".

Preliminary Objection – Improper Constitution/Abuse of Process

37. Inter alia, the EPA pleads a fundamental misconception by EPUKI as to the difference between, on the one hand, the regulation of the all-island SEM (based on the Memorandum of

Understanding[57] between the CRU and the and the NIUR) and, on the other hand, the regulatory roles of EPA and the NIEA as to industrial emissions. And as to industrial emissions there is no equivalent all-island regulation or relationship between the EPA and the NIEA. EPUKI's real dispute is with the SEMC's De-Rating Decision.

Preliminary Objection – No Case Pleaded Against EPA

38. The EPA pleads that the original Grounds (opened to the court on 17 October 2022) and the amended Grounds[58] (dated 20 October 2022) pleaded no breach of statutory duty by the EPA. The Grounds were re-amended dated 27 October 2022[59] to correct that defect but the amendments were limited to the insertion of minimal and insufficient references to statutory provisions that do not lay down a statutory duty of the character alleged by EPUKI, still fail to plead a stateable case against the EPA, and so the claim should be dismissed.

EPA Opposition - Substance[60]

39. While pleaded separately, the degree of overlap in the EPA's substantive opposition, as between Domestic and EU Law Grounds, permits that I record all together.

40. Apart from traverses, in essence the EPA affirms its interpretation of Articles 11 and 14 IED and §4.1.1 of the BAT Conclusions. There is no EU law requirement that OCGTs be limited to 1,500 hours per year. §4.1 of the BAT Conclusions as a whole necessarily allows for circumstances in which OCGTs can be licensed to operate for over 1,500 hours per year. Footnote 1 to Table 23 states that its BAT-AEELs do not apply to plant operated for less than 1,500 hours per year. Yet Table 23 sets Net Electrical Efficiency BAT-AEELs for new OCGTs at 36–41.5%.

41. EPUKI also misunderstands and/or misapplies the meaning of the phrase "*generally applicable*" in the BAT Conclusions. The BAT Conclusions are not prescriptive and §4.1.1 does not require a specific outcome for all OCGTs.

42. Alternatively the EPA's interpretation of §4.1.1 of the BAT Conclusions is permissible where the IED allows a significant margin of discretion to competent authorities as to BAT-AEELs and prescribing run hour limits provided ELVs are adhered to. The BAT Conclusions are not prescriptive and §4.1.1 does not require a specific outcome for all OCGTs.

57 25 February 2014.
58 Amended on foot of order of the court of 18 October 2022 that they be formatted in accordance with Practice Direction HC 107, as amended by Practice Direction HC 114.
59 Re-amended on foot of order of the court of 24 October 2022.
60 The Opposition paper addresses the Grounds discretely but it suffices to recount it here without doing so.

- §4.1 sets out the BAT Conclusions for the combustion of natural gas. §4.1.1 concerns energy efficiency and encompasses BAT 40 and Table 23.
- BAT 40 provides that BAT is to "*use an appropriate combination of the techniques given in BAT 12 and below*".
- There follows a table that lists CCGT as generally applicable to new gas turbines unless operated for less than 1,500 hours per year.
- This is followed by Table 23, which sets BAT-AEELs for LCP operated more than 1,500 hours per year. It sets a BAT-AEEL of 36–41.5% for a new OCGT. On EPUKI's case, this BAT-AEEL is redundant (as there can be no such thing as an OCGT operating more than 1,500 hours per year).[61]

The only viable reading of Section 4.1.1 as a whole is that there must be circumstances in which OCGTs can be licensed to operate for more than 1,500 hours per year. This seems to be a view no longer in dispute.

43. The purpose of the IED is environmental protection by considering all relevant factors. EPUKI's contention that environmental protection requires the blanket discouragement of OCGTs contradicts the EPA's statutory duty, on receipt of a specific IEL application, to consider all relevant circumstances and reflect that consideration in conditions to any IEL granted.

44. The EPA has no duties under Articles 11 and/or 14 IED, save as transposed into national law by way of the EPAA 1992. By S.86A(3)(a) EPAA 1992 its duty to apply BAT Conclusions arises only when it is attaching conditions to an IEL and that duty is not engaged on the facts of the EPUKI's case. Alternatively the EPA's interpretation of the BAT Conclusions does not breach its duties under S.86A(3)(a) EPAA 1992.

45. The EPA has no duties in respect of plant in Northern Ireland and no duty to ensure consistency between the conditions attached by it to IELs in Ireland and those attached to PPC Permits[62] in Northern Ireland.

46. The EPA has no responsibility for the SEM or, for the wholesale electricity market in Ireland.

47. The EPA has no duties under the RED. Its obligations are imposed on member states. A plea of direct effect of articles of the RED is irrelevant absent a plea of failure to transpose them, given EPUKI's confirmation to the Court[63] that it alleged no failure to transpose EU Law and absent Ireland as a respondent. Alternatively, any direct effect does not enable reliance on those articles against the EPA.

61 The words in brackets are my gloss but do convey the gravamen of the plea.
62 The Northern Ireland equivalent of an IEL.
63 On 24 October 2022.

48. The EPA had no duty to consult EPUKI. Its alleged decision was communicated to EPUKI between two pre-application consultations requested by EPUKI.

49. Any error by the EPA has not caused loss to EPUKI and EPUKI has no right to damages.

EPUKI V SEMC – PLEADINGS

EPUKI Grounds[64]

50. EPUKI seeks certiorari quashing the SEMC's "De-Rating Decision"[65] dated 5 September 2022 on the following grounds:

- D1[66] - as irrational and in error in
    - creating a situation in which OCGTs in Northern Ireland and Ireland are treated differently in their permissible run-times, in their treatment in the SEM Capacity Auction.
    - failing to meet the intended purpose of the De-Rating Decision.

- D3 - failure to properly consult in accordance with its Common Law duty before making the De-Rating Decision.

- D2 & EU2[67]- breach of its duties under section 9BC(1) and 9BC(2) Electricity Regulation Act 1999 ("ERA 1999") which transpose Articles 3(1) and 3(4) of the RED.

- EU1 - as based on an error of law in
    - the interpretation of Articles 11 and 14 of the IED and the CID.
    - failing to adopt and/or recognise the legal limit prescribed by the IED and the CID, and in determining that it will award contracts without regard thereto.

D1 & D3 – Irrationality, Error & Failure to Consult - Particulars

51. EPUKI pleads, as to the allegation that the SEMC acted irrationally and erroneously that,

64 The Original Grounds were amended on 20 October 2022 (to comply with PD HC 107 as amended by PD HC 114 and facilitate entry to the SID judicial review List) and were re-amended on 27 October 2022
65 Entitled Capacity Market Code Urgent Working Group Modification Decision Paper: WG26b CMC_11_22 – De-rating for Annual Run Hour Limits, SEM-22-063
66 Domestic Law Ground 1.
67 EU Law Ground 1.

a. The IED establishes general rules, inter alia setting ELVs for Combustion Plants. The CID establishes the relevant BAT Conclusions by reference to which the EPA must set IED Permit conditions. In deciding whether to grant an IEL the EPA is bound by the IED and the CID.

b. EPUKI's present and planned OCGTS and CCGTs in Ireland and Northern Ireland are briefly described – as are the SEM, the Capacity Market, the Capacity Market Code[68], Capacity Payments[69] and EPUKI's intention to bid into the upcoming Capacity Auction.

c. The history of variation of EPUKIs' Ballylumford PPC Permit is recited[70] – including EPUKI's acceptance in that process "*as the legally correct position*" "*that an ARHL of 1,500 was required for OCGTs"* – a position allegedly taken by the NIEA.

d. EPUKI pleads the EPA's decision adopting, as to OCGTs, the opposite approach to that taken by the NIEA. The Information Note of 7 December 2021 and the EPA e-mail of 18 July 2022 are pleaded.

e. In the passive tense, EPUKI pleads that "*There was no further discussion or consultation with the Applicant … or other interested parties prior to the issuance of this Decision*." I presume that this allegation is against the SEMC. On that view, the word "further" runs from 7 December 2021. The plea is demonstrably factually incorrect.

(I pause to observe that the Decision dated 11 August 2022 adopting ARHL De-Rating is not mentioned in the Grounds.)

f. EPUKI pleads the "De-Rating Decision" on 5 September 2022 as being to modify the Code – introducing ARHL De-Rating, the essential effect of which is briefly described.

g. EPUKI pleads that the difference in approach between the EPA and the NIEA as to whether OCGTs are subject to an ARHL, combined with the De-Rating Decision, has the consequence that identical OCGTs in Northern Ireland and Ireland will be treated differently in the Capacity Market auction. The Irish OCGT, unrestricted by any ARHL, will be able to bid for much greater capacity than the ARHL-limited Northern Irish OCGT.

h. EPUKI pleads that the SEMC "*has acted irrationally, and committed a manifest, serious and significant error, in creating a situation in which OCGTs in Northern Ireland and Ireland are treated differently both in their permissible run-times and in their treatment in the SEM Capacity Auction*."

I observe that the proposition that the SEMC has created a situation "*in which OCGTs in Northern Ireland and Ireland are treated differently … in their permissible run-times*" is unstateable on the facts and I will consider it no further. There is no evidence before me that the SEMC in any degree affected the view taken by the EPA and NIEA respectively as to the

68 See below.
69 See below.
70 See further below.

application of ARHLs to OCGTs. However, I will take this plea as asserting irrationality in that ARHL De-Rating, in the specific context of the differing views taken by the EPA and NIEA respectively as to the application of ARHLs to OCGTs, treats identical OCGTs in Northern Ireland and Ireland differently. Essentially, the irrationality alleged is unfair discrimination.

i. EPUKI pleads that given the EPA's approach, the De-Rating Decision will in practice have no effect in Ireland and so fails to meet its intended purpose and so is perverse and irrational.

j. EPUKI pleads that the 7-day consultation period allowed in its Consultation Paper SEM-22-055 dated 18 August 2022 was inadequate and that the SEMC had never intended to properly consider, and did not properly consider, any responses received, in that it had initially expressed an intention to issue a decision one day after the close of the consultation period.

D2 & EU2 - Recast Electricity Directive & Electricity Regulation Act 1999 - Particulars

52. EPUKI pleads that the SEMC has breached its duty under Article 3(1) and 3(4) of the RED and sections 9BC(1) and 9BC(2) ERA 1999 in that:

a. Articles 3(1) and 3(4)[71] confer clearly identifiable rights and impose duties directly effective against the SEMC as an emanation of the State and they are transposed by sections 9BC(1) and 9BC(2) ERA 1999.

b. By S.9BC(1) ERA 1999 the SEMC's principal objective is to protect the interests of consumers of electricity wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with the sale or purchase of electricity through the SEM.

c. By S.9BC(2) the SEMC must carry out its functions in the manner which it considers best calculated to further the principal objective, having regard (amongst other things) to: (a) the need to secure that reasonable demands for electricity in the State and Northern Ireland are met; and (e) the need to avoid unfair discrimination between consumers in the State and consumers in Northern Ireland.

d. The SEMC's De-Rating Decision, in the specific context of the view taken by the EPA and NIEA respectively as to the application of ARHLs to OCGTs, manifestly and seriously breaches these duties in that it unduly hampers cross-border trade in electricity and investments into variable and flexible energy generation and does not ensure a level playing field where electricity undertakings are subject to non-discriminatory treatment.

71 Set out in full above in describing the pleaded grounds in the EPA Case.

e. In adopting the De-Rating Decision with full knowledge of the differing views taken by the EPA and NIEA respectively as to the application of ARHLs to OCGTs, the SEMC has acted in breach of these duties. The decision distorts competition and is discriminatory.

f. EPUKI's Northern Irish OCGTs, correctly subject to ARHLs, must bid at a disadvantage to identical Irish OCGTs erroneously not subject to ARHLs.

g. If the De-Rating Decision and/or the EPA's Unlimited Operation Decision are not quashed, EPUKI will suffer loss by reason of the difference in treatment between its Northern Irish OCGTs and the treatment of OCGTs and other generators in Ireland. "Francovich/Bonifaci" damages are claimed.[72]

EU1 – Articles 11 and 14 IED and the CID - Particulars
Error in interpreting Articles 11 and 14 IED and the CID and failure to adopt and/or recognise the legal limit prescribed by the IED and the CID, and in determining that it will award contracts without regard thereto.

53. EPUKI pleads that the SEMC has erred in misinterpreting and misapplying Articles 11 and 14 IED and the CID in that

a. Articles 11, 14(1) and 14(3) of the IED[73] and §4 of the Annex to the CID setting out BAT Conclusions, including §4.1, BAT 40, the First Table of Bat 40,[74] have the combined effect that:

> *"gas turbines must operate in combined cycle (i.e. be CCGTs) in order to operate for in excess of 1,500 hours per year. Therefore, ……. OCGT, must be operated less than 1,500 hours per year."*

b. This interpretation is clear from the language of the CID and reflects the purpose of the regulatory regime.

> *"OCGTs are less efficient and ultimately worse for the environment making a 1,500 annual hours run limit necessary. Only CCGTs because of their higher efficiency rates and consequently lower emissions per unit of electricity generated can operate for greater than 1,500 hours per annum. …. The legislative aim is to discourage the use of OCGTs."*

c. By its De-Rating Decision, the SEMC has ignored this legislative aim and resolved to conduct the Capacity Auction and promote, and award contracts for, unlimited electricity generation by OCGTs in Ireland - contrary to the State's obligations under EU law, with which, as an emanation of the State, the SEMC must comply.

72 Cases C6/90 and C-9/90 EU:C:1991:428.
73 Set out in full above in describing the pleaded grounds in the EPA Case.
74 All set out in full earlier in this judgment.

d. The SEMC, by the Information Note of 7 December 2022, and in reciting therein the EPA's position, premised its De-Rating Decision on the position *"that no maximum operating limit of 1,500 operating hours per annum applies to OCGTs". This position amounts to an error in the interpretation of the IED and the CID. EU law limits run times of OCGTs to 1,500 hours per annum.*"

e. The SEMC erred in law in failing to adopt and/or recognise that 1,500 hours per annum is a "*legal limit prescribed by the IED and the CID"* and in determining to award contracts without regard thereto.

CRU Opposition

54. Beyond traverses, the CRU pleads as follows.

Preliminary Objections

55. The SEMC decision to introduce ARHL De-Rating was made by its 2022 Parameters Decision of 11 August 2022[75], which is not impugned. The Impugned 2022 Modification Decision merely amended the Code to effect the 2022 Parameters Decision. Impugning the Modification Decision is an impermissible collateral attack on the 2022 Parameters Decision. Quashing the 2022 Modification Decision would not affect the validity of the 2022 Parameters Decision or the decision to introduce ARHL De-Rating.

56. The SEMC's 2022 Modification Decision was not based on any EPA error as to conditions in OCGT IELs as:

a. The Modification Decision applied the same de-rating approach to all new generating capacity subject to ARHLs, irrespective of how or why those ARHLs arose.

b. The SEMC or CRU has adopted no position on whether the EPA is correctly applying EU law, in particular BAT 40, in setting IEL conditions. Deciding such conditions is an EPA function - the SEMC has no such function.

c. Even if the EPA incorrectly failed to apply ARHLS to certain OCGTs (on which the SEMC takes no position), that would not invalidate the SEMC's decision to introduce ARHL De-Rating.

75 "SEM-22-044 CRM 2026/27 T-4 Capacity Auction Parameters and Annual Run Hour Plant De-Rating Factor – Decision Paper"

D1 & D3 – Irrationality, Error & Failure to Consult

57. The 2022 Modification Decision was not irrational or erroneous.

a. There was sufficient material before the SEMC, and a sufficient logical and evidential basis, for the SEMC to decide to introduce ARHL De-Rating.

b. Any difference between OCGTs in Ireland and Northern Ireland as to ARHLs is due to decisions on IED Permits by the EPA and the NIEA - it is not due to any decision by the SEMC.

c. The 2022 Modification Decision does not treat OCGTs in Ireland and Northern Ireland differently in Capacity Auctions. The same Code rules apply to all generation units. (it is fair to describe this as a central plank of the SEMC's defence of the discrimination allegation)

d. "*identical*" OGCTs in Northern Ireland and Ireland will not be treated differently in the Capacity Market auction due to the 2022 Decisions. From a capacity adequacy perspective, a generation unit that can operate only 17% of the time is not "*identical*" to a generator with no ARHL.

e. ARHLs – whether in Ireland or Northern Ireland - make a real difference to the contribution to capacity adequacy by the affected unit. That difference is reflected in Capacity Auctions by ARHL De-Rating.

f. The 2022 Modification Decision did not fail to meet its intended purpose – which purpose EPUKI do not correctly identify. It is not correct that the 2022 Decisions[76] will *"in practice have no effect in Ireland"*.

58. As to the allegation of failure to adequately consult:

a. No common law duty to consult is applied. Even if it did it was not breached.

b. EPUKI failed to plead that the introduction of ARHL De-Rating had been the subject of several consultations and detailed papers over a number of years.

c. 37 days of consultation preceded the decision to introduce ARHL De-Rating made in the 2022 Parameters Decision. 16 parties made submissions. They were properly considered and the ARHL De-Rating proposal was modified in light thereof.

d. 7 days of consultation preceded the impugned 2022 Code Modification Decision. The proposed Code Modification were considered by a working group that included market

76 The 2022 Parameters Decision and the 2022 Modification Decision.

participants. 12 parties made submissions. They were properly considered and the Code Modification proposal was modified in light thereof.

e. The 2022 Modification consultation was carried out in accordance with the Code provisions on consultations.

f. The 2022 Modification Decision was urgent because it was necessary to amend the Code before the T-4 26/27 auction[77] process started in September 2022.

g. The allegation that the SEMC "*never intended to properly consider … any responses received*" is an unfounded allegation of bad faith, made without adequate evidential basis and on an incomplete account of the facts. The allegation is scandalous and should be struck out.

D2 & EU2 - Recast Electricity Directive & Electricity Regulation Act 1999 - Particulars

59. To these Grounds the SEMC pleads:

a. Article 3(1) or 3(4) RED do not create directly effective obligations and if they did the SEMC did not breach them and if it had such breaches are irrelevant.

b. The SEMC did not breach any duties set out in S.9BC(1) or (2) of the Electricity Regulation Act 1999 and if it had, such breaches would not invalidate the 2022 Modification Decision.

c. No adequate evidence of any loss has been adduced and any such loss would not ground a claim for *Francovich* damages

Discretionary Refusal

60. The Court should in any event refuse relief (or alternatively tailor any relief to avoid interfering with the upcoming T-4 26/27 and T-1 23/24 capacity auctions) given:

a. the importance of the capacity auctions to securing adequate electricity generating capacity and security of electricity supply on the island of Ireland.

b. that before the proceedings were started the Code Modifications had already been implemented, and capacity auction qualification processes had commenced based on those modifications. Other market participants have formulated and submitted applications, and made business decisions, based on ARHL De-Rating. The SEMC and other state authorities have incurred costs and spent months of work in progressing auction processes based on ARHL De-Rating.

77 T minus 4. T stands for Time. The number is the number of years (roughly) between the Auction and the Capacity Year to which it relates.

c. that amending the capacity auction parameters and running the capacity auctions with no ARHL De-Rating would significantly delay the auctions, and the consequent risk to electricity generation capacity and supply security.

d. The absence of any evidence of, or the limited extent of, financial harm or other prejudice to EPUKI due to the 2022 Modification Decision.

e. EPUKI's delay and failure to challenge the 2022 Parameters Decision.

f. EPUKI's non-disclosure of relevant facts (identified in the Affidavit of Verification accompanying this Statement of Opposition).

BACKGROUND

61. As will have been seen, the proceedings concern, and concern the interaction between, on the one hand, the regulation of gas turbine electricity generation plants pursuant to IED as transposed to Irish law[78] and Northern Irish Law and, on the other hand, the regulation and operation of the All-Island Single Electricity Market[79] ("SEM") in Ireland[80] and Northern Ireland. In an important sense, the proceedings derive from the fact that, whereas the SEM is regulated on an All-Island basis and so is regulated uniformly as between Ireland and Northern Ireland, IED regulation proceeds separately, in Ireland by the EPA, and in Northern Ireland by the NIEA.

62. The emissions from gas turbine electricity generation plants can be broadly divided into pollutants (such as NOx[81], SOx[82], CO[83]) and greenhouse gas emissions (CO_2[84]). The EU Clean Energy Package addresses greenhouse gas emissions.[85] The IED addresses pollutants and addresses greenhouse gasses only as necessary to avoid significant local pollution.[86]

63. The terminology of electricity generation can confuse – and did a little at trial. So I will briefly address it. We colloquially speak of "power plants" and the usage is endemic, such that I will use it. It might be more accurate to speak, as we sometimes do, of "energy plants".

78 References to the IED hereafter, save as context requires, include reference to its transposition to Irish Law.
79 Established under the Electricity Regulation Act 1999 as amended. See generally but see S.9BA & S.9BC in particular.
80 Which word I will use to describe, specifically, the State.
81 Oxides of Nitrogen.
82 Oxides of Sulphur.
83 Carbon Monoxide.
84 Carbon Dioxide.
85 The Clean Energy Package (CEP) is a series of European legislative acts adopted aimed at enabling the EU to transition to cleaner energy and facilitating a reduction in greenhouse gas emission levels.
86 S.I. No. 490 of 2012 Greenhouse Gas Emissions Trading Regulations 2012; Art 33(2)(a).

- Energy is work and is conventionally[87] measured in joules. A joule measures the work done in moving 1kg by 1m. That is relevant here only in illustrating the concept of energy as, in electricity generation a different unit of energy is used, to which I will come.

- Energy can take different forms and can be transmuted from one form to another. Combustion plants burn fossil fuels such as natural gas and use the heat energy thus produced to generate electrical energy for the grid. The energy efficiency of their doing so reflects the fact that energy is lost in the process. The more efficient the plant, the less the loss.

- Power is the rate - the speed - of production of energy. It is measured in watts[88] – 1 watt produces 1 joule of energy per second. A Megawatt ("MW"), the unit used in electricity generation, is 1,000,000 watts. The "Capacity" of an electricity generation plant is measured in terms of power – the amount of energy it can produce in one second – in MW. That concept of capacity – a rate of production of energy – is important in this case.

- As power is the rate of production of energy, the quantum of energy produced in a given period of time can be measured by multiplying power by time.[89] The result can be expressed in joules but conventionally, and sometimes confusingly to laypeople, in electricity generation it is expressed in Megawatt Hours (MWh).[90] That concept is less prominent in this case but it must be borne in mind that, from the perspective of the SEM, it is the absolute production of energy when it is required by consumers which is, in the end, what matters.

IED

64. The IED is transposed to Irish law primarily by Part IV, of the EPAA 1992 - entitled "*Integrated Pollution Control*". [91] The EPA correctly says its duties derive from the EPAA 1992 not from the IED – though the latter will inform the interpretation of the former.

65. The IED regime operates by requiring, inter alia, electricity generation plants to hold, and operate pursuant to, IED Permits which set conditions relating to their pollutant emissions to the environment and to energy efficiency. Domestic transposing laws accordingly require, for IED activities, in Northern Ireland, Pollution Prevention and Control Permits ("PPC Permit")[92] and, in Ireland, Industrial Emissions Licences ("IEL") issued by the EPA. I will use the term "IED Permits" to encompass both IELs and PPC Permits. CCGTs and OCGTs require IED Permits.[93]

87 i.e. in the SI system - The International System of Units.
88 In the SI system.
89 To use an analogy familiar to all: speed x time = distance.
90 Not to be thought of as MW/h – Megawatts per hour.
91 Sections 82 to 99H. Sections 3 to 5 also contain relevant content.
92 A.k.a. "Integrated Pollution Control Licence" - Granted by the NIEA.
93 The First Schedule to the EPAA 1992 lists at §2.1 "Combustion of fuels in installations with a total rated thermal input of 50 MW or more" as amongst the activities for which an IEL is required. The Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations 2013 (SI 137/2013), as amended, detail the procedure followed by the EPA in considering IEL applications.

66. IED Permit conditions are informed by the IED concept of Best Available Technology ("BAT"). Specifically as to Large Combustion Plants[94] ("LCP"), including OCGTs and CCGTs, BAT is expressed in "BAT Conclusions" issued by Implementing Decisions of the European Commission ("CID") in 2017[95] (the "2017 CID") and November 2021[96] (the "2021 CID"). BAT Conclusions set out of what, in substance, BAT is deemed to consist as to the industrial activities to which they apply. The 2017 CID was annulled[97] (though kept temporarily in force pending its replacement) and in due course replaced by the 2021 CID. However, as between the 2017 CID and the 2021 CID, their substantive content, as relevant to this case, is identical. In terms therefore of market and regulator awareness of their substantive content, the relevant BAT Conclusions have been known since 2017. BAT 40 is one of them.

67. As they do not differ in substance, I will refer to the 2017 CID and the 2021 CID at times indiscriminately as "the CID". I will also refer to the CIDs and the "BAT Conclusions" interchangeably as is convenient in context.

<u>The RED and the SEM</u>

68. The SEM was introduced in 2007[98] and has survived Brexit.[99] It is part of the wider EU internal market in electricity which, now, is governed by the RED.[100] The CRU is the Irish competent authority for purposes of the RED. The SEM is a wholesale market in which generators such as EPUKI sell power to retail suppliers – that is to say, suppliers to the ultimate consumers of electricity. The SEM is highly complex and requires regulation for very many reasons including, in no particular order, the promotion of competition between Generators, facilitation of competitive prices to consumers, ensuring security of supply both in the short-term[101] and long-term, environmental protection generally and promotion of renewable electricity generation in particular. The potential for sale of electricity to and purchase of electricity from Great Britain ("GB") via the Ireland/Great Britain electricity interconnector adds further complexity to the market.

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94 The total rated thermal input of which is equal to or greater than 50 MW - IED Art 28.
95 Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU … for large combustion plants (OJ L 212, 17.8.2017, p. 1).
96 Commission Implementing Decision (EU) 2021/2326 of 30 November 2021 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU … for large combustion plants – IED Art 13(5).
97 By judgment of the General Court of the EU of 27 January 2021 in Case T-699/17, Poland v the Commission. Notably, the 2017 decision was annulled for legal reasons unconnected with its substantive technical content.
98 A brief account of its introduction is found in Capacity Remuneration Mechanism (CRM) State Aid Update, 2019/20 T-1 Capacity Auction Parameters and Enduring Storage De-Rating Methodology Consultation Paper SEM-18-009 13 March 2018 - Tab 1 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
99 Protocol on the withdrawal of the UK from the EU: Article 9 & Annex IV.
100 Directive 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU on energy efficiency.
101 As short as the Balancing Market which runs in real time.

69. The SEM comprises a number of separate sub-markets. Generators sell power in the short- to medium-term via the ex-ante Day Ahead and Intraday markets and a Balancing market which operates into real time.[102]

70. This case, however, is primarily concerned with the “Capacity Market” or “Capacity Remuneration Mechanism” (“CRM”) of the SEM, via which Generators sell power generation “Capacity”. Pursuant to “Capacity Contracts”[103] awarded in “Capacity Auctions” they sell medium- to long-term commitments to provide capacity to provide power in the future – to make generation plants available to the electricity system. The objective of these competitive auctions is to secure the most efficient capacity at the lowest cost. This is intended to ensure the security of power supply by reference to a “Regulatory Generation Adequacy Standard”. By its Capacity Contract a successful bidder is awarded a quantified capacity and is obliged to *"dedicate and use its reasonable endeavours to make available the Awarded Capacity"* to the SEM.[104] In return, Generators receive periodic “Capacity Payments”, the broad rationale of which is to enhance security of power supply by financially facilitating the construction and availability of power plants. Capacity Payments are proportional to the quantum of capacity which the generator is awarded. Importantly Capacity Payments are made for making available to the market the capacity to generate electricity: they are not related to actual generation of electricity.[105] At the heart of this case is the fact that Generators are limited in the amount of capacity for which they may bid, in turn limiting their capacity to obtain a return on their investment in power plants.

71. The Capacity Market is regulated by the “Capacity Market Code”[106] (the “Code” or “CMC”) adopted in June 2017 and modified from time to time by the SEMC. Participants in the SEM must sign up as parties to the Code.[107] The SEMC is composed of representatives of the “Regulatory Authorities”[108] (“RAs”), – the CRU and its Northern Ireland equivalent, the NIUR and independent members.[109]

72. Broadly speaking, while regulated by the SEMC via the Code and processes laid down by the Code, the Capacity Market is administered by the Single Electricity Market Operator (“SEMO”) which comprises the two “Market Operators” – EirGrid in Ireland and SONI Ltd[110] in Northern Ireland. EirGrid and SONI also operate the respective transmission systems which link power plants to the more localised distribution systems.

102 There is also a system services market, whereby the Transmission System Operators procure system services.
103 A.k.a. “Reliability Options”.
104 Capacity Market Code §1.1.2.1(b).
105 Which is sold via the other sub-markets of the SEM.
106 This is a highly complex document – over 270 pages long. The most recent version, dated 12 August 2022, is at Tab 6 of the exhibits to Mr Crankshaw's affidavit #1 11 October 2022. For the avoidance of doubt, that version does not reflect the Code Modifications to incorporate ARHL De-Rating as described below.
107 Via a Capacity Market Framework Agreement. See generally Code §B5.
108 As defined by the Capacity Market Code.
109 The SEM Committee is supported by staff employed by the RAs.
110 System Operator of Northern Ireland.

73. Importantly, Generators may bid in Capacity Auctions to supply capacity by means of power plants not yet built but which they intend to build and to come into operation at the start of the Capacity Year to which that Auction relates. Such plants are referred to as "New Capacity". Bidding on that basis necessarily involves certain risks not applicable, or not applicable in the same degree, to bids made for the provision of capacity by power plants already in existence when the bid is made. Without attempting to fully describe such risks, they will include regulatory risk as to whether, when, and if so on what terms, the intended plant will get planning permission and/or an IED Permit. They may include financial risks and risks as to construction completion and quality. It seems in very general terms inevitable that the risk profile of a bid as to an intended plant will be different to that as to an existing plant and that that risk must be allocated as between the interested parties.

74. Generators will naturally wish to identify, minimise, manage and value such risks or contractually relocate them to counterparties, all in order to inform and facilitate, inter alia, investment decisions and decisions as to the terms of bids in Capacity Auctions. The SEMC and other participants in the SEM will have similar aims as to such risks – but from their own respective and different perspectives and interests. All will have an interest in certainty, to whatever degree it can be achieved.

75. Mr Melvin asserts[111] that Ireland is in a short- and medium-term security of power supply "crisis" - for which he cites a CRU Information Paper of September 2021.[112] It does not use the word "crisis" but does identify a deficit which "*clearly poses a significant risk*" and "*acute risk to security of supply*" out to 2025/26. The "*critical"* and *"vital"* core of the "*Programme of Actions*", which it is "*confident*" *"will address the capacity shortfall"*[113]*,* is to procure at least:

> *" … 2000MW of flexible gas-fired plant, providing an enduring and efficient market capacity, additional flexibility to support our 2030 renewable targets and ensuring security of supply in the medium to long term. Gas-fired generation will remain a critical enabler of the decarbonisation of the electricity system in 2030 and beyond …. As our 2030 generation fleet is increasingly comprised of renewables back up by flexible gas-fired generation, the security of gas supply will be increasingly important."*

Mr Melvin says that Capacity Auctions are central to this programme and that considerable efforts have been devoted to encouraging developers to invest in new generation capacity. It is important to record that the SEMC has stated, "*For the avoidance of doubt*", its belief that:

> *"… the introduction of ARHL De-Rating is critical to achieving security of supply, and any stay on the implementation of ARHL De-Rating would give rise to risks to the security of future electricity supply on the island of Ireland."* [114]

111 Affidavit #1 of John Melvin 17 November 2022 §222 et seq.
112 CRU Information Paper, Security of Electricity Supply - Programme of Actions, CRU21115; Tab 30 Exhibit JM1 Affidavit #1 of John Melvin 17 November 2022 §224.
113 In context the phrase clearly means "will successfully address the capacity shortfall".
114 Affidavit #2 of John Melvin 15 December 2022 §67.

76. The SEMC's objection even to a stay on the impugned SEMC decision serves to emphasise the strength of the SEMC's view. There can be no doubt but that the Impugned SEMC decision engages a risk to a high interest of the public and of the State. A modern society must have reliable power. Occasional power failures happen. But frequent, endemic or chronic power failures are a grave matter. It may be that EPUKI disagrees with the strength of the SEMC's view but as it accepts the principle of ARHL De-Rating, any difference between them can be only of degree. Even if, and to whatever extent, they disagree, I see no basis for any suggestion that the SEMC's view in this respect is irrational. That being so, and it being the competent expert statutory authority I must defer to its view as to the criticality of ARHL De-Rating such that even a stay on its operation would put the security of future electricity supply on the island of Ireland at at least some appreciable degree of risk.

Clean Energy Package

77. As stated, the EU Clean Energy Package ("the CEP") addresses greenhouse gas emissions. It comprises a package of legislative provisions and non-legislative initiatives, including the RED. Other than the RED, it was not addressed in detail at trial. Inter alia, it does prohibit capacity payments to power plants which emit more than 550g of CO_2 of fossil fuel origin per kWh of electricity.[115] EPUKI say[116] that it is the CEP which drives achievement of thermal efficiency of gas turbine power plants as it requires an efficiency of at least 36.7% for natural gas combustion.[117] EPUKI say, as for OCGTs, that BAT 40[118] requires a minimum efficiency of 36 to 41.5%, so a CEP-compliant OCGT will also meet the minimum efficiency required by BAT 40.[119] Mr Melvin for the SEMC disagrees that CEP drives achievement of thermal efficiency and says that the CEP's CO_2 emission limits depend on parameters including but not limited to thermal efficiency.[120] Also, BAT imposes NOx emission limits in addition to thermal efficiency limits whereas CEP requirements do not relate to NOx. All that having been said, it is not apparent to me that any issue I must decide turns on a consideration of CEP other than the RED.

OCGTs & CCGTs and EPUKI's OCGTs & CCGTs

78. Much of the technical detail of the operation and uses of OCGTs and CCGTs is not in great dispute. They differ primarily in how they deal with hot exhaust gasses[121] the product of

115 See Single Electricity Market (SEM) Roadmap to Clean Energy Package Implementation Information Paper SEM-19-073 16 December 2019 – Tab 1 Exhibit 2JC1 Affidavit #2, James Crankshaw 1 December 2022 – CRU case.
116 Affidavit #2, James Crankshaw 1 December 2022 – CRU case.
117 Calculated using the methodology provided in the European Union Agency for the Co-Operation of Energy Regulators (ACER) Opinion Number 22/2019 – Tab 2 Exhibit 2JC1 Affidavit #2, James Crankshaw 1 December 2022 – CRU case.
118 See below.
119 Affidavit #2, James Crankshaw 1 December 2022 – CRU case.
120 Affidavit #2 of John Melvin 15 December 2022 §59.
121 They contain significant amounts of energy as their temperature usually exceeds 600oC.

combustion. OCGTs emit them to the atmosphere. CCGTs recirculate them to use in a steam turbine for power generation.[122] In simple terms and generally, their "re-using" of exhaust gasses to create more electricity renders CCGTs appreciably more energy efficient in terms of quantity of electricity produced per unit of fuel consumed and hours run of the plant. Consequentially and generally, their emissions per unit of electricity produced are lower than those of OCGTs. OCGTs tend to be smaller than CCGTs and more flexible – they can be turned on and off more quickly, raise and lower their power output more quickly and run for shorter periods than CCGTs.[123] Generally, in plants operating lesser numbers of hours per year, OCGTs produce electricity more cheaply than CCGTs. As that number rises that cost comparison reverses. Thus, OCGTs tend to be used for more or less urgent and short-term peak demand – to fill gaps in generation. They are sometimes called "peaking plant". The parties also agree that "*Depending on the turbine model selected and application there is a wide range of efficiencies in both OCGT and CCGT configuration*."[124]

79. Renewable generation is weather-dependent and so is more or less unreliable and unpredictable - when the wind doesn't blow and the sun doesn't shine. So it must be complemented by other forms of generation – preferably available at short notice. For reasons not in dispute, gas turbines are a preferred option.[125] As they can respond quickly and for short periods to loss of renewable generation capacity, OCGTs can facilitate use of renewable electricity supply by ameliorating its unreliability. In that indirect way OCGTs can be more environmentally advantageous than one might expect on a simple comparison of their efficiency with CCGTs. In contrast, it may be inefficient and environmentally disadvantageous, relative to OCGT, to have to run a CCGT, by reason of its relative inflexibility, for a relatively long period to cover a relatively short period of loss of renewable generation capacity. Doing so may even, in the short term, require that renewable generation be shut down ("constrained") at times to avoid overproduction of electricity. In the longer term, this may disincentivise investment in renewables by tending to reduce their return on investment. However, as to serving generally predictable and constant baseline electricity demand, the efficiencies of CCGTs tend to render them more environmentally advantageous than OCGTs. However, some CCGTs can operate in "OCGT mode" – in which, instead of recirculating the hot combustion products to a steam turbine, they are emitted to the atmosphere. In that mode, it seems, they can provide flexibility characteristic of OCGTs.

80. One general effect of the general situation just described is that CCGTs historically tended to run more or less constantly to serve baseline demand, though now less so given renewable supply. But even now, OCGTs tend to be operated more intermittently and for a shorter number of hours each year than CCGTs. A further issue in the mix of their respective advantages and disadvantages is

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122 Via a Steam Bypass Stack and a Heat Recovery Steam Generator (HRSG). The steam thus produced is used to drive a steam turbine to create electric power in addition to that generated in the gas turbine(s).
123 Two concepts are relevant: start rate is the time taken to get the turbine generating from a cold start. Ramp Rate is the speed at which turbine generation can be altered to meet demand. If a HRSG is warmed too fast it can be damaged. EPUKI say that typically, a modern OCGT can go from cold to full power in less than 20 minutes and, if warm, much faster. Typically, a modern CCGT can go from cold to full power in about 3.5 hours and, if warm in about 90 minutes. Whatever about the figures/detail, the general point was not disputed.
124 Affidavit #1 of Robert Denison 28 October 2022 - Denison Report #1 exhibited thereto. Affidavit #1 of John Melvin 17 November 2022 §148.
125 See, for example Affidavit #1 of John Melvin 17 November 2022 §142 & 143.

that CCGTs are, over their lives, considerably more expensive to build and run than OCGTs, which are simpler plants. CCGTs also take longer to build.

81. While the foregoing are generalities and more or less common case, the EPA says that the devil is in the detail and whether one or the other of CCGTs and OCGTs is more or less environmentally advantageous can be a highly complex issue turning on the particular circumstances of their respective use. It accepts that CCGTs may lead to better environmental outcomes in some circumstances but does not accept that that they will do so in all circumstances. It says that each specific IEL application must be considered on its individual merits.[126]

82. EPUKI operates both OCGTs and CCGTs in Northern Ireland and Ireland.[127] OCGTs are an essential part of its business. It operates two OCGTs and two CCGTs in Ballylumford, County Antrim, Northern Ireland. The CCGTs provide the "*principal load generation*" on site. "*The OCGTs are primarily used to provide black start capability, emergency generation purposes and peak lopping, and as such the plant spends much of the time on standby*."[128] Only the larger CCGT can operate in OCGT mode. EPUKI operates four distillate-fuelled OCGTs in Kilroot, County Antrim, and is building two more gas-fired OCGTs there, for which it already has Capacity Contracts.[129] Including the latter two, it has eight OCGTs and two CCGTs in Northern Ireland. In Ireland, EPUKI operates a CCGT at Tynagh, County Galway and is seeking planning permission for an OCGT in Tynagh for which it already has Capacity Contracts. More generally, EPUKI intends to develop more OCGTs in Northern Ireland (at Kilroot) and Ireland (including at Tynagh).[130] EPUKI intends to bid in Capacity Auctions based on its existing and intended CCGTs and OCGTs in Northern Ireland and Ireland.

Interaction of Regulatory Roles & Competences & an Initial Conclusion

83. The issues are complicated by differences between the concerns of the respective regulators. Broadly, the EPA and NIEA, as IED regulators, are concerned with environmental matters only and each as to its separate geographical jurisdiction. Equally broadly, the SEMC is concerned with the operation of the SEM in both Ireland and Northern Ireland and, as concerns specifically the Capacity Market, with ensuring security of supply of electricity by incentivising the availability of what it may consider to be the correct mix of generation plant – including OCGTs and CCGTs.

84. Essentially, EPUKI says that, in accepting Capacity Market bids from OCGTs in Ireland the IELs of which do not include ARHLs such that they are not subject to ARHL De-Rating, the SEMC will be

126 Affidavit #2 of Marie O'Connor 14 December 2022.
127 It operates assets in the Czech Republic, the Slovak Republic, Germany, Italy, the United Kingdom, Ireland, and Hungary.
128 A brief history and description of the Ballylumford plant is found in the Introductory note to the NIEA PPC Permit Variation Notice dated 29 October 2021 – Core Book p128 et seq. Despite the jargon, the general thrust of this description is adequately clear.
129 See below.
130 See below.

acting in breach of what it alleges is the CID requirement that OCGTs be subject to ARHLs.[131] It also says that the SEMC, being aware of "*concern about the approach to ARHLs adopted by the licensing authorities",* was obliged *"to investigate the position"* and that this obligation is reflected in the fact that the SEMC has liaised with the EPA and NIEA on the ARHL issue.

85. Essentially, the SEMC replies that it has no competence or function in determining IED Permit conditions – that is the competence and function of the EPA and NIEA, which operate independently of the SEMC.[132] It says that any differences between IED Permit conditions imposed on otherwise identical OCGTs north and south are a consequence of decisions by EPA and the NIEA – not of any decision by the SEMC, including its decision to apply ARHL De-Rating. The SEMC has no authority to review, overturn or change the approach taken by either to ARHLs.

86. On these issues I agree with the SEMC. The SEMC has a predictably keen practical interest in knowing, at least in general terms, the intentions of the EPA and NIEA as to IED Permitting generally and ARHLs specifically. Its recorded concern that uncertainty as to how ARHLs were likely to be applied by the EPA in Ireland could affect the behaviour of potential bidders in the Capacity Market and resultant liaison with the EPA and NIEA on the issue of ARHLs and its further drawing the attention of the market to what it understood to be the EPA's position in that regard, are entirely understandable. But those concerns in no way imply a legal power in or responsibility on, the SEMC to determine whether or in what circumstances or in what form ARHLs may or should be imposed by the EPA and NIEA.

87. Indeed the "breach" alleged in EPUKI's written submissions as justifying Francovich damages – that *"the CRU has (wrongly) adopted the position that it has a discretion as to whether to apply the BAT-AEELs"* - is utterly misconceived. The CRU does not apply or disapply BAT-AEELs. It has no function or power to do so. BAT-AEELs are none of its business. BAT-AEELs are applied by the EPA in deciding IEL applications. As to IELs, the SEMC is what I might term an "ARHL-Taker" not an "ARHL-Maker". The SEMC does not decide – it has no power or jurisdiction to decide - whether or in what terms to impose ARHLs in IED Permits. Nor can it decide the legality of such ARHLs once imposed – or indeed the legality of their non-imposition. Nor can it interrogate the respective legalities of allegedly differing decisions of the EPA and NIEA as to the imposition of ARHLs or whether any such difference may be due to differing interpretations of the law or to permissible or impermissible exercise by the EPA and NIEA of any discretion as to the imposition of ARHLs in IED Permits. As Mr Melvin says[133], the SEMC has no power, still less any duty, to "investigate" whether the EPA or NIEA are carrying out their own statutory functions correctly, much less again to review, overturn or change their decisions.

131 Affidavit #2 of James Crankshaw 1 December 2022 §10 – CRU Case
132 See generally on these issues Affidavit #1 of John Melvin 17 November 2022 §110 et seq, §124 et seq & Affidavit #2 of John Melvin 15 December 2022.
133 Affidavit #2 of John Melvin 15 December 2022 §54et seq.

88. Though not cited, for completeness I should say that S.9BC(4) ERA 1999 obliges the SEMC to perform its functions as to the SEM in the manner which it *"consider[s] is best calculated— (a) to promote efficiency and economy on the part of authorised persons[134], (b) to secure a diverse, viable and environmentally sustainable long-term energy supply in the State and Northern Ireland"* S.9BC(5) ERA 1999 obliges the SEMC when performing its functions as to the SEM to *"have regard to (a) the effect on the environment in the State and Northern Ireland of the activities of authorised persons".* However I do not see these very general and light duties as entitling it to second-guess the EPA as competent authority in its issuing IELs.

89. As a matter of law the SEMC, just as much as any other person subject to law, must presume IELs, and any ARHLs they contain, valid unless and until they are quashed on judicial review. The SEMC must take IELs, and any ARHLs they contain, as it finds them unless and until they are quashed. The SEMC is not empowered or competent to interpret or apply the IED or BAT Conclusions.

90. I accept, contrary to EPUKI's assertion, that the SEMC takes no position on those issues of interpretation or application of the IED or BAT Conclusions or on the correctness or otherwise of the EPA's position on those issues. Nor, it says, is its decision on ARHL De-Rating premised on, or on the correctness of, the EPA's position or, for that matter, the NIEA's position. It reacts to – it does not generate – the prospect of ARHLs. Indeed, it points out that ARHLs imposed or not imposed in IED Permits will apply or not regardless whether the SEMC applies ARHL De-Rating.

91. The SEMC points out that in the event of conflict between a party's obligations under the Code and its obligations under an IED Permit, the permit prevails and there is therefore no question of the Code requiring any party to act in breach of its licence conditions.[135] Indeed, the Code also prefers "*any applicable … determination, decision, … of any Competent Authority*". The Code's definition of "*Competent Authority*", though not naming the EPA or NIEA, includes any national authority of a public nature with power and competence to make binding decisions or decisions.[136] That seems apt to include the EPA or NIEA as competent authorities for purposes of IED Permitting.

92. EPUKI considers the SEMC's positions, as just stated, unreal and as permitting distortion of the market to the detriment of consumers. It says the SEMC "*put its head in the sand*" on the issue of difference between the approaches of the EPA and NIEA.[137] I respectfully disagree. As I have said, it had no rights, powers or competence to determine what the competent IED Permitting authorities should do. It did what it could. It sought to ascertain the EPA's position, conveyed it to the market and advised the market to take it up with the EPA. If idioms are appropriate, the truth is not that the

134 Which includes EPUKI.
135 Affidavit #2 of John Melvin 15 December 2022 §38 citing Code §B-4.1.1
136 This formulation is extracted from a much longer definition.
137 Affidavit #2 of James Crankshaw 1 December 2022 §12 & 13 – CRU Case.

SEMC "*put its head in the sand*" on the issue but that, as will be seen, EPUKI "*dragged its feet*" in taking the good advice the SEMC had given it.

93. The SEMC says that even if, which the SEMC disputes, ARHL De-Rating was environmentally disadvantageous, that would not of itself render its decisions unlawful. In my view, the manner of resolution of any tensions between environmental objectives on the one hand and objectives of electricity capacity adequacy and supply security on the other is not inevitable or legally pre-determined. Neither environmental objectives nor objectives of electricity capacity adequacy and supply security automatically and universally "trump" the other as a matter of law. Both are essential to society. They are, rather, to be reconciled by legislative provisions and by the competent and expert authorities in accordance with law, in accordance with their respective competencies and in the exercise of their respective expert judgements.

94. Generally, the EU Treaty obligation to integrate environmental considerations in other areas of law is intended to take effect at a policy and legislative level - though it may inform interpretation of legislation. **Kramer**[138], though referring to EU legislation rather than domestic legislation, usefully illustrates the error of calls on regulators to apply environmental considerations based on some sort of implied or generally infused obligation to carry EU Law into effect:

> "*Environmental requirements should be taken into consideration at the formulation and implementation of policies, not of individual measures. …….. Only in extreme cases could it be argued that EU policies do not take into account environmental protection requirements in their definition and implementation. Normally the wide discretion which is available under article 11 TFEU*[139] *would not make such an action successful*."

95. EPUKI, citing "**Schrems II**", suggest that as an emanation of the State the SEMC has something akin to a roving commission to ensure the compliance with EU Law of administrative decisions of other competent authorities wherever those decisions impinge on its activities.[140] That case is not a warrant for State organs, such as the SEMC, to interfere in areas of law in which, explicitly, pursuant to EU law and for the purposes of carrying EU Law into effect, competence has been assigned to other emanations of the State. An emanation of the State can generally only act in accordance with its statutory remit.[141] In both Schrems cases what was in issue was the powers of the Data Protection Commissioner within its remit of data protection. To hold that every public body has from the EU a roving commission to second-guess and invigilate the decisions, in the exercise of their competence, of other public bodies designated as competent authorities pursuant to and for purposes of EU law, when the legal effect of such decisions is relevant to the exercise of its own

138 See Kramer on EU Environmental Law 8th Ed'n p22.
139 Article 11 TFEU - Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. See also Article 191.
140 Case C-311/18 - Data Protection Commissioner v Facebook Ireland Ltd et al [2021] 1 WLR 751 at §§117-118, in turn citing C-362/14 Schrems at §51 to the effect that by Article 288 §4 TFEU, a Commission implementing decision binds Member States "and is therefore binding on all their organs" (citing also Albako Margarinefabrik, 249/85, EU:C:1987:245, §17, and Mediaset, C-69/13, EU:C:2014:71, §23) …".
141 E.G. Friends of The Irish Environment CLG v The Legal Aid Board [2023] IECA 19 §105.

competence, would undermine the very idea of a competent authority, the presumption of validity of those decisions, the legal certainty of its decisions, and the ability of interested parties to rely on those decisions. Given the extent of interaction between decisions made by different emanations of the State, it is no exaggeration to state that the result of effecting such a view would be chaotic sclerosis in public administration.[142] It does not appear to me that the cases cited in Schrems - **Mediaset**[143] and **Albako Magarinefabrik**[144] - require such a view or result. These considerations are all the more acute when what is suggested is that, on becoming aware of a view of the law expressed by a licensing authority - a properly designated competent authority - in a non-binding pre-application consultation, another public body must, if it disagrees with that view, suspend, in part or in whole, the operation of its own statutory obligations and the scheme it regulates, pending litigation of that view and all in anticipation of a possible licensing decision not yet made – or even applied for. The undesirability of such a situation is amplified where, in exercise of its right of procedural autonomy, the State provides, in the form of judicial review, a procedure to test the legality of any decision by a competent authority. Indeed, in Schrems itself, the CJEU expressed a similar rationale as to the presumption of validity of measures of EU institutions.[145]

96. The SEMC correctly points out that, beyond asserting a duty on it to investigate the alleged discrepancy between the licencing approaches of the EPA and the NIEA, EPUKI does not say what precisely the SEMC must do about the alleged discrepancy. Assuming, for example, that neither the EPA nor the NIEA is for turning, EPUKI's position appears to be that the SEMC must litigate any uncertainties for as long as they persist, and meanwhile (and EPUKI is clear on this) the SEMC is debarred from carrying into effect its judgment, as competent authority in the exercise of its statutory duties to ensure that the security of electricity supply, that such security requires the application of ARHL De-Rating in capacity auctions. That would be a conclusion fundamentally damaging the proper operation of the statutory scheme under which the SEMC operates and of its capacity to carry out its statutory duty to regulate the fundamental public interest in security of power supply. I would draw such a conclusion only very reluctantly and decline to do so in this case.

<u>Conclusion of Background</u>

97. The account of matters given to this point is pitched at a general level. It is intended in considerable part as an overview to enable the reader more easily to understand and contextualise what follows. I hope it especially conveys that the issues as to environmental regulators', utility

142 McKechnie J expressed similar concerns in An Taisce, Applicant v An Bord Pleanála, J. McQuaid Quarries Limited, et al [2021] 1 IR 119 §164 et seq.
143 Mediaset SpA v Ministero dello Sviluppo economico (Case C-69/13) EU:C:2014:71; [2014] 3 CMLR 8, ECJ
144 Albako Margarinefabrik Maria von der Linde GmbH & Co KG v Bundesanstalt für landwirtschaftliche Marktordnung (Case 249/85) EU:C:1987:245; [1987] ECR 2345, ECJ.
145 Case C-362/14 Schrems v Data Protection Commissioner and another - [2016] QB 527 §52 - Thus, until such time as the Commission Decision is declared invalid by the court, the member states and their organs, which include their independent supervisory authorities, admittedly cannot adopt measures contrary to that Decision, such as acts intended to determine with binding effect that the third country covered by it does not ensure an adequate level of protection. Measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality: judgment in Commission of the European Communities v Hellenic Republic (Case C-475/01) [2004] ECR I-8923, para 18 and the case law cited.

regulators' and investors' preferences, as between OCGTs or CCGTs and as to the desirable balance as to the quantity of each to be made available to the system and at what price, are highly complex and highly technical. Priorities and interests as to those issues also differ significantly as between the many relevant actors involved.[146] Also, decisions on these matters are made in part, and especially as to future security of supply of electricity and provision of generation capacity, on the basis of predictions and assumptions as to the future operation of the wholesale and retail markets in electricity and as to the likely behaviour of potential investors in the provision of such capacity. No doubt they are also informed by anticipated developments in policy and regulation. So such decisions are not merely highly complex and highly technical, they are highly multifactorial, in considerable degree seek to predict the future and call for very considerable exercise of expert judgment by regulators and commercial judgment by market participants. Generally, and though subject to judicial review for lawfulness, decisions by statutory regulators in that context are emphatically for expert regulators and not for courts to make.

98. These cases ran in substance as a single trial on affidavit. No cross-examination occurred. Between the two cases, no less than 21 affidavits were sworn – some of very considerable length and most of some complexity. However, there was a considerable overlap between their content as between the affidavits in the two cases and EPUKI's case was very much directed at what it alleged was the combined effect of the two impugned decisions. It will do no injustice – indeed the opposite – to consider both cases together in this judgment.

99. These cases were given an early trial date and heard in January 2023 as the T-4 2026/27 Capacity Auction[147] is timetabled for a Run Start Date on 23 March 2023[148] and, by the Code, the run must start at latest on 1 April 2023.[149] The SEMC says that, given the three to four years typically needed to build a new generation unit, if the auction is delayed a significant risk to the security of electricity supply for the period of the delay may ensue. Indeed, resultant investor uncertainty could result in withdrawal of participants or their deferring projects.[150] The SEMC also fears the consequences of any delay by reason of these proceedings in the procedures intended to result in a T-1 23/24 Capacity Auction which, by the Code[151], must be held at latest two months before 1 October 2023 and which it considers critical to short term security of electricity supply in Ireland to mitigate the risk of blackouts in winter 2023/24.[152] To meet that T-4 2026/27 Capacity Auction timetable, I have been asked to give judgment by the Final Qualification Submission Date, 14 February 2022.

146 Only some of whom I have identified.
147 Explained below.
148 Affidavit #1 of John Melvin 17 November 2022 §103.
149 Tab 21 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022 – see also that affidavit §227 et seq & §247.
150 Affidavit #1 of John Melvin 17 November 2022 §250 et seq.
151 §D.2.1.5.
152 Affidavit #1 of John Melvin 17 November 2022 §246.

INDUSTRIAL EMISSIONS DIRECTIVE & IED PERMITS

Obiter

100. As will be seen, I will dismiss the action against the EPA on the basis that its impugned e-mail is non-justiciable. The reasons for my doing so are such that I should not make a finding as to the question whether its statement in that e-mail of the meaning of BAT 40 is correct. I also hold that, contrary to the view pressed by EPUKI, the impugned decision by the SEMC is not premised on any interpretation of BAT 40. However, the case and this judgment cannot be understood without an understanding of the IED regime. In what follows therefore, any view I express as to the meaning of BAT 40 is obiter. To put that in context, it may help to repeat the terms of the declaration it seeks and which I will refuse :

> *"A declaration that BAT 40 does not, on its proper interpretation, allow an OCGT to be operated in excess of 1500 hours per annum provided that the plant meets the relevant specified BAT AEEL of 36-41.5% of net electrical efficiency."*

Environmental Protection

101. It is useful at this point to note the wide definition of '*environmental protection'* in S.4(1) **EPAA 1992** as including:

> *"(a) the prevention, limitation, elimination, abatement or reduction of environmental pollution, and*
> *(b) the preservation of the quality of the environment as a whole".*

IED Regime, IED Permits & ELVs

IED Articles 11, 14, 15

102. **Article 11** as to "*General principles governing the basic obligations of the operator*" provides in part as follows:

> *"Member States shall take the necessary measures to provide that installations are operated in accordance with the following principles:*
> *(a) all the appropriate preventive measures are taken against pollution;*
> *(b) the best available techniques are applied;*
> *(c) no significant pollution is caused;*
> *……*
> *(f) energy is used efficiently;*
> *….."*

103. **Article 14** as to "*Permit conditions*" provides in part as follows:

1. Member States shall ensure that the permit includes all measures necessary for compliance with the requirements of Articles 11 and 18[153].
Those measures shall include at least the following:
(a) emission limit values for polluting substances ….. likely to be emitted from the installation concerned in significant quantities, having regard to their nature and their potential to transfer pollution from one medium to another;
…….

2. For the purpose of paragraph 1(a), emission limit values may be supplemented or replaced by equivalent parameters or technical measures ensuring an equivalent level of environmental protection.

3. BAT Conclusions shall be the reference for setting the permit conditions.

4. Without prejudice to Article 18, the competent authority may set stricter permit conditions than those achievable by the use of the best available techniques as described in the BAT Conclusions. ……

5. Where the competent authority sets permit conditions on the basis of a best available technique not described in any of the relevant BAT Conclusions, it shall ensure that:
(a) that technique is determined by giving special consideration to the criteria listed in Annex III; and
(b) the requirements of Article 15 are complied with.
Where the BAT Conclusions referred to in the first subparagraph do not contain emission levels associated with the best available techniques, the competent authority shall ensure that the technique referred to in the first subparagraph ensures a level of environmental protection equivalent to the best available techniques described in the BAT Conclusions.

6. Where an activity or a type of production process carried out within an installation is not covered by any of the BAT Conclusions or where those conclusions do not address all the potential environmental effects of the activity or process, the competent authority shall, after prior consultations with the operator, set the permit conditions on the basis of the best available techniques that it has determined for the activities or processes concerned, by giving special consideration to the criteria listed in Annex III.

7. …….."

153 IED Art 18 - Where an environmental quality standard requires stricter conditions than those achievable by the use of the best available techniques, additional measures shall be included in the permit, without prejudice to other measures which may be taken to comply with environmental quality standards.
IED Art 3(6) "environmental quality standard" means the set of requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Union law;

104. **Article 15** as to "*Emission limit values, equivalent parameters and technical measures*" provides in part as follows:

> *"1. ………*
> *2. Without prejudice to Article 18*[154]*, the emission limit values and the equivalent parameters and technical measures referred to in Article 14(1) and (2) shall be based on the best available techniques, without prescribing the use of any technique or specific technology.*[155]
>
> *3. The competent authority shall set emission limit values that ensure that, under normal operating conditions, emissions do not exceed the emission levels associated with the best available techniques as laid down in the decisions on BAT Conclusions referred to in Article 13(5) through either of the following:*
>
> *(a) setting emission limit values that do not exceed the emission levels associated with the best available techniques. ……..*
>
> *(b) setting different emission limit values than those referred to under point (a) in terms of values, periods of time and reference conditions.*
>
> *Where point (b) is applied, the competent authority shall, at least annually, assess the results of emission monitoring in order to ensure that emissions under normal operating conditions have not exceeded the emission levels associated with the best available techniques.*
>
> *4. By way of derogation from paragraph 3, and without prejudice to Article 18, the competent authority may, in specific cases, set less strict emission limit values. …… only where an assessment shows that the achievement of emission levels associated with the best available techniques as described in BAT Conclusions would lead to disproportionately higher costs compared to the environmental benefits due to:*
> *(a) the geographical location or the local environmental conditions of the installation concerned; or*
> *(b) the technical characteristics of the installation concerned.*
> *…………..*
> *The emission limit values set in accordance with the first subparagraph shall, however, not exceed the emission limit values set out in the Annexes to this Directive, where applicable.*
>
> *The competent authority shall in any case ensure that no significant pollution is caused and that a high level of protection of the environment as a whole is achieved.*
> *……………*

154 IED Art 18 - Where an environmental quality standard requires stricter conditions than those achievable by the use of the best available techniques, additional measures shall be included in the permit, without prejudice to other measures which may be taken to comply with environmental quality standards.
IED Art 3(6) "environmental quality standard" means the set of requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Union law;
155 Emphasis added.

5. [allows for temporary derogations for the testing and use of emerging techniques]*"*

IED – Scheme & Academic Commentary

105. The paucity of caselaw and other clear or detailed authority on the interpretation and legal effect of the IED Directive is striking.[156] Somewhat disconcertingly, **Kingston et al**[157] refer to the IEDs' "*model of integrated environmental governance*" and *"distinctive approach to environmental standardisation - a combined approach organised around the concept of 'best available techniques' (BAT) and effectuated through an extensive body of reference documents that are situated in the penumbra between binding law and guidance document".* As to the IED, the authors "*reflect on the difficult, constantly evolving, yet persistent challenges of reconciling calls for flexibility in environmental regulatory decision making with legal expectations of uniformity and predictability*". It is far from a criticism of the authors' treatment of the issue that it amply justifies those observations. Indeed in 2015 such an authority as **Kramer**[158] felt able to say of BAT Conclusions that those,

> *".... adopted so far, are so general in nature that it is difficult to consider them legally binding. In any way*[159]*, it appears that they are not enforced."*
>
> *"… conditions in the permit on emissions may be less strict than according to the best available technique and take into consideration the geographical location, the local environmental conditions and the technical characteristics of the installation concerned …."*[160]

Contrasting earlier Directives, Kramer states:

> *"The fixing of binding emission limit values in the individual permit had led under directive 2008/1 to different emission limit values being fixed for the same type of industrial installation, according to its location, economic situation [costs and benefits] and other circumstances. The possibilities for the competent authorities in the Member States to deviate from BAT Conclusions in this regard and fix less stringent requirements, have been made more difficult, but continue to exist. Therefore, the present situation will probably not change under Directive 2010/75. For example two cement kilns at a distance of five miles from each other, might still have different emission limit values fixed in their permits. Also, the bargaining on less stringent conditions for emission limit values for the location of new installations is likely to increase, since the installations are able to threaten that they might look for another location with more favourable permit conditions. The words of Recital 3 of Directive 2010/75*

156 For a recent example but not of great present assistance see the Opinion of Advocate General Kokott in Case C-375/21 "Sdruzhenie 'Za Zemyata". Similarly the judgment of the CJEU of 2 June 2022 in Case C-43/21 FCC Česká republika, s.r.o. EPUKI cites Case C-375/21 as explaining that it is Article 14 sets out the "basic requirements for a permit", with the particular rules on the setting of ELVs being in Article 15.
157 European Environmental Law, Kingston et al, Cambridge University Press 2017 p323. Ms Kingston is now a judge of the General Court of the EU.
158 Kramer, EU Environmental Law 8th Edition, 2015 §4-40 et seq. Professor Dr Ludwig Kramer, former judge at Landgericht in Kiel, L.L.D, former head of the Unit for Governance in DG Environment of the European Commission.
159 Sic.
160 Citing article 15(1).

> *that the chosen approach "will also contribute to the achievement of a level playing field in the Union by aligning environmental performance requirements for industrial installations" are rather wishful thinking, as long as the different emission limit values are not fixed EU wide."*
>
> *"To what extent Directive 2010/75 ….. will lead to a high level of protection of the environment as a whole, and objective which is announced several times in Directive 2010/75, will have to be seen… "*

Though he does allow that the 2010 Directive is "*significantly stricter*" than its predecessor.

106. The review of the IED by Kingston et al is also comparative – contrasting earlier iterations of emissions regulation.[161] It concludes that "*Genuine flexibility appears desirable in theory but difficult to maintain in practise*" and while the IED *"retains vestiges of flexibility, its stronger emphasis on normalisation and centralisation is equally apparent. The assumption now is that national competent authorities determine permit conditions with reference to BAT Conclusions …." "… flexibility is very much on the defensive*." "*If they wish to deviate from this expectation, national authorities must show that following BAT Conclusions would impose disproportionate costs compared to the environmental benefits*"[162]. But, the authors say that though pursuing "*a considerably higher degree of uniformity*" than did its predecessor directives, "*the regime stops short of exhaustive and universal technical standardisation*".

107. This analysis by authors of the highest standing, in the absence of caselaw of consequence since, can only be described as discouraging to those seeking "black-letter" answers to specific questions as to the legal obligations flowing from the IED and its transposition to Irish law. It should be said that the applicable 2017 CID/BAT Conclusions post-date the views of both Kramer and Kingston. However it should also be said that in light of their analysis and speaking generally, different IED Permits emanating from different competent authorities in respect of broadly similar installations, should come as no surprise.

108. The IED lays down[163], with the aim of an "*integrated approach",* rules as to industrial activities within its scope

- to prevent and control pollution[164] by such activities.
  and
- designed to prevent or, where that is not practicable, to reduce emissions by such activities.

It also is concerned to achieve energy efficiency in such activities.[165]

161 P333 et seq.
162 Citing IED Art 15(4).
163 Art 1 Subject Matter. See also Recitals 2 & 3 and the title to the Directive
164 Pollution is defined by Art. 3(2) in terms, inter alia, of harm to the environment or to legitimate uses of the environment.
165 Also IED Art 11(f)

These rules seek to achieve the Directive's objectives of "*a high general level of protection of the environment as a whole*" and "*the improvement of environmental quality*" and reduction of "*impact on the environment as a whole*".[166]

109. The IED envisages that this integrated approach will "*contribute to the achievement of a level playing field in the Union by aligning environmental performance requirements for industrial installations*"[167] and aims at ensuring "*uniform conditions for implementation*"[168] and "*Union-wide minimum requirements for emission limit values*".[169] Nonetheless, it also envisages "*taking into account, when necessary, the economic situation and specific local characteristics of the place in which the industrial activity is taking place*."[170]

Kingston et al consider that **"***integration*" includes the idea that regulation and licensing of industrial activities is to be "*fully co-ordinated*",[171] holistic, coherent and effective in considering, as a whole, the installation at which the activity occurs and all its "*polluting and consuming potential*".

110. The IED regime seeks to achieve its purpose by first prescribing the industrial activities to which it applies. Annex 1 of the IED[172] lists "*combustion of fuels*" such that Chapter II[173] - Articles 10 to 24 - of the IED apply to the operation of "*Combustion Plants*".[174] Chapter III[175] contains Special Provisions for Combustion Plants, of which only Article 30[176] as to ELVs is here relevant. Gas turbines[177], including OCGTs and CCGTs, are Combustion Plants.

111. Next, the IED regime seeks to achieve its purpose by imposing a general requirement[178] on Member States to take the necessary measures to provide that installations in which the prescribed industrial activities are carried on, are operated in accordance with the general principles set out in Article 11 (set out above)[179] and in pursuit of that general obligation the IED prescribes:

- that such activities require permits[180] - to be issued by national Competent Authorities.[181]
- compliance with such permits by the operators of such activities.

166 See also Recitals 12 & 16 & 44, Art 3(10)
167 Recital 3. See Kramer's pessimistic observation above.
168 Recital 39.
169 Recital 41.
170 Recital 2.
171 IED Art 5(2).
172 See also Recitals 28 to 33.
173 transposed into Irish law by the European Union (Industrial Emissions) Regulations 2013 (SI 138/2013), by which amendments were made to the Environmental Protection Agency Act 1992.
174 IED Art 3(25) - "combustion plant" means any technical apparatus in which fuels are oxidised in order to use the heat thus generated;
175 IED Articles 28 to 31.
176 IED Art 30 & Annex V.
177 IED Art 3(33) - "gas turbine" means any rotating machine which converts thermal energy into mechanical work, consisting mainly of a compressor, a thermal device in which fuel is oxidised in order to heat the working fluid, and a turbine.
178 IED Art 11.
179 including that: "(a) all the appropriate preventive measures are taken against pollution; (b) the best available techniques are applied; (c) no significant pollution is caused; (f) energy is used efficiently;"
180 IED Art 4. The First Schedule to the Environmental Protection Agency Act, 1992 ("EPAA 1992") lists at §2.1 "Combustion of fuels in installations with a total rated thermal input of 50 MW or more" as amongst the activities for which a permit is required. That includes CGTs and CCGTs.
181 IED Art 71 - by S.3C(2) EPAA 1992", the EPA. Also the NIEA.

112. Thereafter and very broadly, the IED regime seeks to achieve its purpose by provisions designed to affect the terms and conditions of permits. It does so by way of the adoption of

- ELVs[182] as to the various polluting emissions of an activity[183]. Notably the IED sets ELVs for emissions of gas turbines of CO & NOx to air.
- Best Available Techniques ("BAT").[184]

113. Specific ELVs for NOx and CO set by Article 30 and Annex V of the IED for gas turbines are mandatory[185] and have been transposed verbatim into Irish law.[186]

Though it seems that BAT-AELs[187] may require and Member States may impose stricter ELVs.[188] Neither has occurred relevant to the present case.

BAT & Role of BAT and ELVs in Informing IED Permit Content

114. The concept of Best Available Techniques[189] ("BAT") as the "*reference*"[190] and "*basis*"[191] for setting permit conditions, is central to the IED. EPUKI criticises[192] the EPA for describing BAT Conclusions as a "*general guide*" to permitting – though it agrees they are not exhaustive. EPUKI says BAT Conclusions set "*minimum standards*" which bind all organs of member states.[193] **Kingston et al** refer to the "*Anchoring function*" [194] and "*centrality*"[195] of BAT, embedded as a "*general principle*"[196] in the IED and they state that *"the aim of the BAT standard, is to support the development of conditions to prevent or reduce impacts on the environment as a whole."*[197]

115. The IED defines BAT as follows:

> *"best available techniques" means the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit*

182 IED Art 3(5) Art 14(1)(a) & Art 15; S.86 EPAA 1992.
183 Including but not limited to the pollutant substances identified in IED Annex II.
184 IED Art 3(10).
185 IED Art 30(3). All permits for installations containing combustion plants not covered by paragraph 2 shall include conditions ensuring that emissions into the air from these plants do not exceed the emission limit values set out in Part 2 of Annex V.
186 By the European Union (Large Combustion Plants) Regulations 2012 (SI 566/2012).
187 See below.
188 IED Art 14(4) & 18
189 IED Art 3(10)
190 the imprecise word used by the IED - IED Art 3(13) and Art 14(3).
191 The somewhat more precise word used by the IED – IED Recital 12, Art 3(10), Art 14(6).
192 Submissions 21 December 2022.
193 Citing Schrems II at §117.
194 European Environmental Law, Kingston et al, Cambridge University Press 2017 p328 et seq.
195 P330.
196 P329.
197 P324.

> *conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole:*
>
> *(a) "techniques" includes both the technology used and the way in which the installation is designed, built, maintained, operated and decommissioned;*
>
> *(b) "available techniques" means those developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages, whether or not the techniques are used or produced inside the Member State in question, as long as they are reasonably accessible to the operator;*
>
> *(c) "best" means most effective in achieving a high general level of protection of the environment as a whole;"*[198]

Notably, **S.5 EPAA 1992**, adds, presumably by way of clarification, the words "*in principle*" to the definition, to yield the phrase "…. *techniques for providing, in principle, the basis for emission limit values and other permit conditions* …." That transposition has not been challenged.

116. In this definition of BAT and consistent with its purpose as the "*reference*" for setting permit conditions, the words and phrases "*indicates*", "*practical suitability*", "*basis for*", "*where that is not practicable*" and "*reasonably accessible to the operator*" and the invocation of concepts of economic and technical viability conditions and consideration of costs and advantages suggest a less than rigid role for BAT in informing the substantive content of permit conditions – at least conditions other than as to ELVs - prescribed by the IED.[199] Note that this analysis is of, as it were, the internal definition of BAT – not of the possibility of derogation from it. Kingston et al cite the concept of "*availability*" as infusing a "*dose of pragmatism*" but subject to the "*overarching expectation that a high level of Environmental Protection will be maintained*" and that "*no significant pollution should be caused*".[200]

117. Those ELV and other permit conditions to be informed by BAT are to be designed to prevent or reduce not merely emissions but impact on the "*environment as a whole*" and seek a "*high <u>general</u> level of protection of the environment <u>as a whole</u>*".

118. National competent authorities, as to activities they are asked to permit, are required to themselves identify BAT in accordance with principles set out in the IED and to "*set the permit conditions on the basis of*" such BAT.[201] However that is to occur only in the absence of applicable BAT Conclusions. The IED empowers the Commission to adopt, after consultation with stakeholders,

198 IED Art 3(10).
199 IED Art 30 & Annex V.
200 European Environmental Law, Kingston et al, Cambridge University Press 2017 p326 & 328 – citing IED Art 15(4) & art 11.
201 IED Recital 12 Art 14(6) and Annex III Criteria for determining best available techniques.

BAT Reference documents ("BATREF") as to specific industrial activities, which documents are to contain BAT Conclusions applicable to those activities, Those BAT Conclusions are in turn adopted by Implementing Decisions of the Commission[202]. Such decisions are binding EU acts.[203]

119. The IED defines "BAT Reference document" and "BAT Conclusions" as follows[204]:

> *"(11) "BAT reference document" means a document, … drawn up for defined activities and describing, in particular, applied techniques, present emissions and consumption levels, techniques considered for the determination of best available techniques as well as BAT Conclusions and any emerging techniques, giving special consideration to the criteria listed in Annex III;*
>
> *(12) " BAT Conclusions" means a document containing the parts of a BAT reference document laying down the conclusions on*
> - best available techniques, their description, information to assess their applicability,
> - the emission levels associated with the best available techniques,
> - associated monitoring,
> - associated consumption levels and, where appropriate, relevant site remediation measures;[205]

In essence, BAT Conclusions stipulate of what, as to a particular activity, BAT is deemed in substance to consist. **S.5(3) EPAA 1992** permits the EPA to specify BATS at least as strict as those set by any relevant EU Commission Implementing Decision.

120. "*The criteria listed in Annex III*" to which "*special consideration*" must be given in composing a BAT Reference document are entitled "*Criteria for determining best available techniques*". Those criteria include "*energy efficiency*", "*the nature, effects and volume of the emissions concerned*" and "*the need to prevent or reduce to a minimum the overall impact of the emissions on the environment and the risks to it*".

121. Having regard to the definition of "BAT Conclusion", it is notable that the IED defines *"emission levels associated with the best available techniques"* ("BAT-AEL") as meaning:

> *"… the range of emission levels obtained under normal operating conditions using a best available technique or a combination of best available techniques, as described in BAT Conclusions, expressed as an average over a given period of time, under specified reference conditions".*[206]

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202 IED Art 13 and Art 75.
203 European Environmental Law, Kingston et al, Cambridge University Press 2017 p332 citing the 1999 Comitology Decision – Council Decision 1999/486/EC
204 IED Art 3(11)&(12). The same definitions are used in S.3 Environmental Protection Agency Act 1992.
205 The bullet points do not appear in the definition. I have added them for ease of exposition.
206 IED Art 3(12) & (13). The same definition appears in S.3 Environmental Protection Agency Act 1992.

122. The Commission has adopted practical guidance for the drawing up of BATREFs, including BAT Conclusions.[207] That Guidance provides, inter alia, for the inclusion in BATREFs of economic and financial information as to the costs, benefits, cost-effectiveness and economic viability of techniques for the sector concerned and possible economic limitations to their applicability.[208] The Guidance provides[209] that BAT Conclusions, inter alia,

- will consist of a number of individual conclusions indicating which technique(s) or combination(s) of techniques is (are) BAT for achieving a particular environmental objective.

- will mention that the list of techniques described in the BAT Conclusions is neither prescriptive, nor exhaustive. Other techniques may be used that ensure at least an equivalent level of environmental protection.

  As EPUKI observes, it is merely the techniques, not the BAT Conclusions, which are thus deemed neither prescriptive, nor exhaustive.

- may associate an environmental performance level with each BAT. It may either be an emission level or another kind of performance level, such as energy consumption.[210]

123. Accordingly, and though not explicitly provided for in the IED, given that its purposes include energy efficiency and that energy efficiency is identified as a criterion in Annex III, BAT Conclusions may contain, where relevant to the activity in question, "*BAT-associated energy efficiency levels*" (BAT-AEELs).

124. **Kingston et al** state that despite its "*fulsome definition in article 3(10) IED, BAT is an essentially open standard: its concrete meaning depends on where, when and under which general economic circumstances it is applied ….. it accommodates a degree of regional differentiation and discretion in implementation consistent with the demands of subsidiarity and which may help to smooth over differences in national preferences regarding environmental standardisation*". [211] The authors refer to the flexibility inherent in the BAT standard.

125. I pause to observe that this observation implies that, while any given BAT Conclusion has only one meaning, it should at least generally come as no surprise to find that its meaning will allow appreciable flexibility, margin of appreciation and discretion to the authorities of Member States

207 Commission Implementing Decision (2012/119/EU) laying down rules concerning guidance on the collection of data and on the drawing up of BAT reference documents and on their quality assurance referred to in Directive 2010/75/EU … on industrial emissions. Adopted pursuant to IED Art 13(3).
208 §2.3.7.2.7.
209 §3.1.
56 3.3.2. Individual BAT Conclusions with associated environmental performance levels other than emission levels.
211 European Environmental Law, Kingston et al, Cambridge University Press 2017 p327. – emphasis added.

competent as to IED Permitting. That inevitably implies that the mere fact that otherwise identical industrial activities on either side of a border between Member States are subject to IED Permits which differ in their terms as to the application of BAT is not, per se, a legally cognisable complaint.

126. For that reason, if the SEMC has correctly identified the premise of EPUKI's argument as being that any difference in licensing approach between the EPA and the NIEA necessarily implies that one or other regulator is incorrectly applying EU law, then I agree with the SEMC that the premise is flawed. In this context the repeated use of the word "approach" in the papers is unhelpful – an "approach" can proceed as much from a policy as to the exercise of a discretion as from compliance with black-letter requirements of the law. Differences in outcomes of EID Permitting procedures in respect of apparently similar installations and permit applications will not, per se, imply illegality – illegality will arise, if at all, only if the EPA has misinterpreted the law.

127. However, Kingston et al say the flexibility and discretion as to BAT is "*not unconstrained*". They refer to BATREFs and BAT Conclusions as laying down the particular modes for determining BAT for defined activities and as importantly indicating the ELVs associated with BAT for those activities. They say that BAT Conclusions do "*not obviate the role of national permitting authorities - they typically cannot simply be cut and pasted into individual permits but instead require further detailing and application. However the BAT Reference Documents and BAT Conclusions incontrovertibly give a strong steer to the permitting process*." They observe that the most immediate, and intentional, impact of the IED reforms is that "*it is now much harder for national authorities to avoid applying BREF*[212] *guidelines in the determination of the ELVs and related standards. …. One of the stated objectives of … reform was to iron out unevenness in the interpretation of BAT ….*"[213]. Nonetheless, to someone in search of clearly applicable black letter law, the phrase "*strong steer*" might be considered as notable for its weakness as for its strength.

128. Significantly, they state "*BAT Conclusions function as a primary and, in principle, mandatory reference point for national authorities in their determination of the ELVs*."[214]

129. I should add that the IED[215] allows Member States to adopt General Binding Rules for use directly to set permit conditions for certain categories of installations. These must be based on BAT and may prescribe ELVs or other conditions - but without prescribing the use of any technique or specific technology in order to ensure compliance with Articles 14[216] and 15.[217] That has not been done in Ireland or Northern Ireland. It has been done in Germany.

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212 BAT Reference Document.
213 Pp 331 & 332.
214 P326 & 328 – citing IED Art 15(4) & art 11.
215 See IED Art 17 & 3(8).
Recital (7) states: In order to facilitate the granting of permits, Member States should be able to set requirements for certain categories of installations in general binding rules.
216 Permit Conditions.
217 Emission limit values, equivalent parameters and technical measures.

EPAA 1992 & LCP Regulations 2012

130. **Part IV EPAA 1992**, as to Integrated Pollution Prevention and Control, is long and complex. A complete account is impossible here. Generally, it transposes, inter alia, the IED as to IED Permits and states the jurisdiction of the EPA as the competent authority in that regard.[218] That is important as, once a directive is transposed, it is the transposition which is the applicable law and questions of direct effect no longer arise. Though, of course, the directive will often inform the interpretation of the transposition.

131. Before describing Part IV, I should first mention that **Ss.3, 4 and 5 EPAA 1992** define various relevant terms, in terms consistent with the IED, including *'BAT reference document', ' BAT Conclusions', 'best available techniques', 'emission', 'emission levels associated with the best available techniques', 'emission limit value', 'environmental protection', and 'environmental pollution'*.

132. Returning to Part IV, **S.82 EPAA 1992** imposes the obligation to hold an IEL for an industrial activity.[219] **S.83 EPAA 1992** empowers the EPA "*where an application is made to*" it to grant an IEL, after EIA[220] if required, and after such investigation and subject to such conditions as it considers appropriate. Generally, the EPA may not grant an IEL unless satisfied that BATs will prevent or eliminate or, where that is not practicable, generally reduce an emission from the licensed activity.[221] **Ss.83 and 86 EPAA 1992** provide, inter alia as follows:

> **S.83(4)(a)** and **S.86(1)(a)(i) EPAA 1992** require the EPA, in granting an IEL, to specify ELVs *"for environmental pollutants likely to be emitted from the activity in significant quantities, having regard to their nature and their potential to transfer from one environmental medium to another*".
>
> **S.83(5)** prohibits the grant of an IEL unless the EPA is satisfied of various matters, including as to the effect of emissions, notable amongst which are that:

- *"(v) any emissions from the activity will not cause significant environmental pollution,*
- *(vi) the best available techniques will be used to prevent or eliminate or, where that is not practicable, generally to reduce an emission from the activity,*
- *(viii) energy will be used efficiently in the carrying on of the activity."*

> **S.86(1)(a)(ii)** requires conditions specifying requirements

- *for minimising pollution.*
- *to ensure a high level of protection for the environment as a whole.*

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218 S.3(C)(2) makes the EPA the competent authority for the purposes of the IED. As specific to Large Combustion Plants including gas turbines, see the European Union (Large Combustion Plants) Regulations 2012. S.I. No. 566 of 2012 Article 5.
219 Non-compliance with an IEL condition is an offence – S.86(6) EPAA 1992. As specific to Large Combustion Plants including gas turbines, see the European Union (Large Combustion Plants) Regulations 2012. S.I. No. 566 of 2012 Article 6.
219 Non-compliance with an IEL condition is an offence – S.86(6) EPAA 1992.
220 Environmental Impact Assessment.
221 S.83(5) & S.86A EPAA 1992.

S.86(1)(b) authorises the EPA to impose a wide variety of conditions, including a “catch-all” provision, **(xv)**, authorising such other conditions or requirements, which the EPA considers necessary for the purposes of the IED.

S.86(3)(b) allows that ELVs may, where appropriate, be supplemented or replaced by equivalent parameters or technical measures.[222]

S.86(3)(c) provides that ELVs, and equivalent parameters and technical measures shall be based on the best available techniques, without specifying the use of any technique or specific technology[223], but taking into account the technical characteristics of the activity concerned, its geographical location and the local environmental conditions.

133. The very lengthy **S.86A EPAA 1992** is specific to IELs and overlaps appreciably with the foregoing provisions. Without prejudice to the generality of those provisions, it relates BATs, ELVs, equivalent parameters and IEL conditions. it provides, inter alia, as follows as to the role of BAT and ELVs in IEL licensing by the EPA:[224]

(2) The EPA shall not grant a licence unless satisfied that BAT “will be utilised to prevent or eliminate or, where that is not practicable, to minimise emissions and the impact on the environment as a whole”.

(3)(a) The EPA shall apply BAT Conclusions as a “reference” for attaching conditions to a licence.

(3)(b) The EPA may supplement or replace ELVs[225], by attaching conditions “which specify equivalent parameters or technical measures, where the Agency is satisfied that to do so would secure an equivalent level of environmental protection”.[226]

(3)(c)(ii) Where relevant BAT Conclusions describe a BAT but do not contain an associated BAT-AEL, the EPA shall determine a BAT which provides environmental protection equivalent to the BATs described in the BAT Conclusions and shall attach conditions accordingly. (But see below as to the LCP Regulations 2012[227])

(4)(a)&(b) & 5(b) The EPA shall attach conditions which specify ELVs so that, under normal operating conditions, emissions do not exceed the BAT-AELs laid down in the BAT Conclusions. Those ELVs shall not exceed BAT-AELs or shall differ from BAT-AELs in terms of values, periods of time and reference conditions only on terms as to monitoring to establish

222 This proceeds from Article 14(2) IED which, as to permit conditions, allows that ELVs “may be supplemented or replaced by equivalent parameters or technical measures ensuring an equivalent level of environmental protection.”
223 See IED Art 15.2
224 What follows is paraphrase, not verbatim.
225 Referred to in s.83(4)(a) or 86(1)(a)(i).
226 See IED Art 14(2) & Art 15.
227 As specific to Large Combustion Plants including gas turbines, see the European Union (Large Combustion Plants) Regulations 2012. S.I. No. 566 of 2012 Article 5 & Schedule 2 §6.

if emissions, under normal operating conditions, have not exceeded the BAT-AELs. (But see below as to the LCP Regulations 2012[228])

(6) The EPA, if satisfied that a condition specifying ELVs so that, under normal operating conditions, emissions do not exceed BAT-AELs would lead to disproportionately higher costs compared to the environmental benefits due to —
(i) the geographical location or the local environmental conditions of the installation concerned, or
(ii) the technical characteristics of the installation concerned,
may, specify less strict ELVs than would otherwise be required. If so, the licence must state the reasons justifying doing so.

134. It is convenient at this point to note that as specific to gas turbines, see the Large Combustion Plants Regulations 2012[229] transpose to Irish law the specific ELVs for NOx and CO set in Annex V of the IED.

135. There is no doubt but that, in deciding IEL applications, the EPA acts as an expert decision-maker.[230] Indeed it does so in a field clearly requiring a high level of technical, engineering and scientific expertise – to be brought to bear in the scrutiny and analysis of IEL applications by reference to their specific circumstances. The EPA took some pains to emphasise not merely its expertise but its independence.[231] None of this was in dispute.

The Parties' Views of BATs and ELVs in IEL licensing

136. As to the role of BAT and ELVs in IEL licensing, the EPA's position[232] is set out below. As EPUKI agrees with significant elements of it[233], I will note such agreement.

a. The EPA's duties as to BAT Conclusions arise only in considering an IEL Application - and not before or otherwise.

b. IED Recital 13 contemplates that BAT reference documents incorporating BAT Conclusions be drawn up "*to determine best available techniques and to limit imbalances in the Union as regards the level of emissions from industrial activities*". They are to be "*the reference for setting permit conditions*" but can be supplemented by other sources.

228 As specific to Large Combustion Plants including gas turbines, see the European Union (Large Combustion Plants) Regulations 2012. S.I. No. 566 of 2012 Article 5 & Schedule 2 §6.
229 As specific to Large Combustion Plants including gas turbines, see the European Union (Large Combustion Plants) Regulations 2012. S.I. No. 566 of 2012 Article 5 & Schedule 2 §6.
230 The procedural steps in an IEL Licensing application are found in the Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations 2013. Ms O'Connor has briefly described them – including by reference to the ESB Corduff Road Licence. Affidavit #2 of Marie O'Connor 14 December 2022.
231 Affidavit #2 of Marie O'Connor 14 December 2022.
232 Affidavit of Marie O'Connor #1 17 November 2022. Affidavit of Maria Martin #1 25 November 2022.
233 Affidavit #3 of Robert Denison 7 December 2022 and Denison Report #3 6 December 2022.

c. Application of the IED, ELVs and BAT to IEL applications is more complex and flexible than EPUKI suggests.

d. BAT Conclusions are not exhaustive binding rules but are the reference points - general guides - that assist it in setting permit conditions. In setting IEL conditions, the EPA may depart from BAT Conclusions.

e. BAT-AEELs are not binding in that the EPA may choose not to apply them. Equally it may choose to do so.[234]

f. However BAT-AELs are binding.[235] The EPA must set ELVs in IELs such that, under normal operating conditions, emissions do not exceed BAT-AEL, (i.e., an "*equivalent level of environmental protection*" must be ensured) unless the strict conditions for a derogation are met.[236] EPUKI agrees.[237]

g. The EPA goes further – it submits that *"the only indicator of environmental performance that is both binding and related to the BAT conclusions is that of BAT-AELs."* For example Article 9(2) IED makes that clear as to energy efficiency requirements – i.e. BAT-AEELs. Indeed, it says this explains the fact that in providing for derogations Article 15(4) IED relates only to ELVs – derogations as to other environmental performance indicators are unnecessary as they are not mandatory in the first place. It seems to me that this position is correct. Though that should not be mistaken for a suggestion that once imposed in an IEL environmental performance conditions are less than mandatory.

h. The conditions necessary to meet BAT-AELs will differ from case to case.

i. Techniques listed and described in BAT Conclusions are neither prescriptive nor exhaustive. Other techniques may be used that ensure at least an equivalent level of environmental protection to that provided by the listed techniques.[238] EPUKI agrees[239] - as its counsel put it:

> *".. you are allowed to propose a different technique and it has got to be as good as the BAT. .. it has got to have equivalent level of environmental protection as the BAT. That's going to be something that's, I fully accept, a margin of appreciation matter for the environmental authority"*[240]

234 Citing Art 9(2) IED and Art 33(2) European Communities (Greenhouse Gas Emissions Trading) Regulations 2012 (SI 490/2012).
235 IED Art 14(3) & 15(3). S.86A EPAA 1992.
236 IED Art 15(4) – An IEL may in specific cases, set less strict ELVs - but only where an assessment shows that achieving BAT-AELs would lead to disproportionately higher costs compared to the environmental benefits due to: (a) the geographical location or the local environmental conditions of the installation concerned; or (b) the technical characteristics of the installation concerned. In such a case an annex to the IEL must set out the reason for the derogation including the result of the assessment and the justification for the conditions imposed.
237 Affidavit #3 of Robert Denison 7 December 2022 and Denison Report #3 6 December 2022.
238 Citing the "General Considerations" of the 2021 CID BAT Conclusions. One may also cite, to similar effect, Commission Implementing Decision (2012/119/EU) laying down rules concerning guidance on the collection of data and on the drawing up of BAT reference documents and on their quality assurance referred to in Directive 2010/75/EU … on industrial emissions §3.1.
239 Affidavit #3 of Robert Denison 7 December 2022 and Denison Report #3 6 December 2022.
240 Day 1 p120.

j. IED Article 14(6) allows the EPA to itself determine BAT where BAT Conclusions do not address all potential environmental effects of an activity.

137. I should refer in particular to the EPA's proposition that BAT-AEELs are not binding. EPUKI does not agree.[241] As the EPA's Impugned e-mail of 18 July 2022 explicitly contemplates its imposing a requirement of compliance with the relevant BAT-AEEL if licensing OCGTs, it seems little, if anything, turns on this disagreement for present purposes. That said, it does seem to me that the EPA is correct.[242]

138. I should also refer in particular to one controversial agreement.[243] Mr Denison for EPUKI[244] agrees with Ms Martin of the EPA[245] to the effect that:

> "*BAT 40 does not in itself rule out the running of an …OCGT… from running for more than 1,500 hours per year*".

However, Mr Denison asserts that the technical requirements of the BAT Conclusions, including a requirement of Net Electrical Efficiency of an OCGT equal to that applicable to a CCGT, combine to produce that result. Ms Martin, in turn,[246] asserts that Mr Denison's agreement undermines EPUKI's pleaded case – which she understands to be that BAT requires a 1,500-hour ARHL in all IELs for all OCGTs - and she asserts that his technical argument represents a new and unpleaded case. Ms O'Connor takes the same view.[247]

139. Notably, Ms Lyden, engineer for the EPA,[248] in commenting on Mr Denison's citation[249] for EPUKI of GB PPC Permits as exemplifying his interpretation of BAT, cites excerpts from BAT Guidance drafted by the Environment Agency with regulatory authority in England (the "EA(E)").[250] I cite those excerpts here, not as illuminating the interpretation of BAT, but for its description of the role of BAT in licensing.

> *"BAT in your permit application*
> *When you apply for an environmental permit you must state whether you're going to follow each BAT that applies to your activity, or propose an alternative.*
> *You need to do this in the 'operating techniques' section of the application form.*
> *For BAT that you're proposing to follow, you must explain how you're going to either:*

241 Affidavit #3 of Robert Denison 7 December 2022 and Denison Report #3 6 December 2022; EPUKI Submissions 21 December 2012.
242 Art 9(2) IED and Art 33(2) European Communities (Greenhouse Gas Emissions Trading) Regulations 2012 (SI 490/2012).
243 Apologies for the oxymoron.
244 Affidavit #3 of Robert Denison 7 December 2022 and Denison Report #3 6 December 2022.
245 Affidavit #3 of Robert Denison 7 December 2022 and Denison Report #3 6 December 2022. Affidavit of Maria Martin #1 25 November 2022. Ms Martin is Senior Manager in the Emissions Trading & Energy Regulation Team of the EPA.
246 Affidavit of Maria Martin #2 14 December 2022.
247 Affidavit #2 of Marie O'Connor 14 December 2022.
248 Affidavit #1 of Ria Lyden 18 November 2022.
249 Affidavit #1 of Robert Denison 28 October 2022.
250 UK Environment Agency Guidance Best available techniques: environmental permits https://www.gov.uk/guidance/best-available-techniques-environmental-permits, accessed November 2022.

- *follow the BAT Conclusions and meet the BAT-associated emissions level (for BAT that are contained in BAT Conclusions)*
- *follow the BREF note and the technical guidance for activities that don't have BAT Conclusions*

For any BAT you're not going to follow, you must propose an alternative technique.

How to propose an alternative technique
If your alternative technique will provide a level of environmental protection that's equivalent to the BAT, you need to explain how it will do so in the operating techniques section of the application form.

If your technique won't provide equivalent environmental protection, but you want to make a case that it's justified on cost benefit grounds, you'll need to provide a justification in the operating techniques section of the form and through your risk assessment and cost benefit analysis.

You will only be granted a permit for activities which don't comply with BAT-associated emissions levels (AELs) if you can show that the costs of achieving the BAT AELs[251] are disproportionately high compared to the environmental benefits, for a particular reason. The reason must be either:

- *the geographical or local environmental conditions of the site*
- *the technical characteristics of the site (for example, the effect of reducing excess emissions on other emissions, leading to an increase in water use or waste from your site)*

Making this kind of proposal is called 'applying for a derogation'."

140. Oddly, though the EPA at trial declined to endorse this procedural description by the EA(E)[252], it tenders the report of Ms Lyden as evidence. While she does not explicitly endorse this EA(E) guidance, she does cite it as undermining Mr Denison's evidence and criticises Mr Denison for not citing it. Specifically, Ms Lyden notes that the EA(E) Guidance recognises that it will consider an application for a proposal

- for what she terms an "*alternative to BAT which provides an equivalent level of environmental protection".* Though I accept that the Guidance doesn't quite frame it that way, for the avoidance of doubt, I understand that this reference to an "*alternative to BAT*" in fact refers to the possibility of <u>BAT-compliance </u>by use of an alternative <u>technique.</u>

- subject to a cost benefit analysis, which does not provide an equivalent level of environmental protection. For the avoidance of doubt, I understand this to refer to the possibility of a derogation from BAT ELVs under Art 15(4) IED and S.86A(6) EPAA 1992 subject to the

251 See below.
252 Day 3 p39 et seq.

achievement nonetheless of a high level of protection of the environment as a whole and the proviso that no significant pollution is caused.

141. Despite the EPA's diffidence having adduced it, I have to say that that EA(E) Guidance does not seem to me inconsistent with the position of the EPA as I have understood and described it above. EPUKI also agrees with it.[253]

142. In considering the important distinction between techniques falling within the flexibility of a BAT Conclusion and those falling without it and requiring derogation, it seems to me that the foregoing guidance reflects the fact that techniques are non-prescriptively identified in BAT Conclusions. Accordingly, techniques not described in a BAT, but which provide equivalent environmental protection, are BAT-Compliant. Only techniques which fail to provide equivalent environmental protection are BAT-non-compliant and require a derogation if the activities to which they are applied are to obtain an IED Permit.

The LCP CIDs

143. The 2021 CID[254] for Large Combustion Plants, including OCGTs and CCGTs, recites that:

> *(1) Best available techniques (BAT) conclusions are the reference for setting permit conditions for installations covered by Chapter II of Directive 2010/75/EU[255] and competent authorities are to set emission limit values that ensure that, under normal operating conditions, emissions do not exceed the emission levels associated with the best available techniques as laid down in the decisions on BAT Conclusions.*

144. The 2021 CID also recites that the 2017 BAT Conclusions were being "*readopted unchanged*".[256] In the Annex to the CID, the BAT Conclusions for Large Combustion Plants are set out – to which what here follows refers. Those BAT Conclusions consist in essence of lists of specific numbered BATs applicable in the circumstances variously described therein.

145. It is common case that, as a means of controlling or reducing their emissions (of whatever kind), and with the consequence that certain specific BATs (by their terms) do not apply to them, the EPA, by ARHL conditions in IELs, may limit the hours for which such power plants may operate in a

253 Day 2 p55/56.
254 Commission Implementing Decision (EU) 2021/2326 of 30 November 2021 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU … for large combustion plants – IED Art 13(5). also Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU … for large combustion plants (OJ L 212, 17.8.2017, p. 1).
255 IED - the installations covered by Chapter II are listed in Annex 1 and include "1.1. Combustion of fuels in installations with a total rated thermal input of 50 MW or more." That includes OCGTs and CCGTs.
256 Recital 8.

given year. However it seems to me at least that such ARHLs do not render the plant compliant with those specific BATS – it takes them outside the scope of application of those BATs.

146. The CID does not, in terms, stipulate a technique consisting of the imposition of ARHLs. Rather, as will be seen, it stipulates that certain BATS do not apply at all to gas turbine power plants running for less than 1,500 hours per year. This seems to me a significant observation. The definition of "*technique*" in the IED includes *"… the way in which the installation is … operated".* Clearly, it would have been possible for the Commission in the CID to prescribe, with greater or lesser specificity, ARHLs or other run-time limits as applicable techniques for BAT purposes. That is particularly so when, as will be seen, the CID does contemplate installations running for greater or lesser numbers of hours annually – yet the Commission chose not to specify techniques in those terms.

CID - General Considerations

147. The following are excerpts from the CID BAT Conclusions under the heading "*General Considerations":*

> *"<u>Best Available Techniques</u>*
> *The techniques listed and described in these BAT Conclusions are neither prescriptive nor exhaustive. Other techniques may be used that ensure at least an equivalent level of environmental protection.*
> *Unless otherwise stated, these BAT Conclusions are generally applicable."*
>
> *"<u>Emission levels associated with the best available techniques (BAT-AELs)</u>*
> *Where emission levels associated with the best available techniques (BAT-AELs) are given for different averaging periods, all of those BAT-AELs have to be complied with."*
>
> *"<u>Energy efficiency levels associated with the best available techniques (BAT-AEELs)</u>*
> *An energy efficiency level associated with the best available techniques (BAT-AEEL) refers to the ratio between the combustion unit's net energy output(s) and the combustion unit's fuel/feedstock energy input at actual unit design. ……. BAT-AEELs are expressed as a percentage."*

Again, we see that techniques not described in a BAT but which provide equivalent environmental protection are BAT-Compliant. We also see that BAT-AELs must be complied with.

BAT 12, BAT 40, Tables 23 & 24

148. The following are excerpts from the CID BAT Conclusions under the heading "*1 General BAT Conclusions":*

"The fuel-specific BAT Conclusions included in Sections 2 to 7 apply in addition to the general BAT Conclusions in this section."

"1.4. Energy efficiency

BAT 12. In order to increase the energy efficiency of combustion …. units operated ≥ 1500h/yr, BAT is to use an appropriate combination of the techniques given below.

(There follows a list of 19 techniques – some of which Mr Denison for EPUKI identifies as applicable to OCGTs.)[257]

149. Under the heading *"4. Bat Conclusions for the Combustion of Gaseous Fuels"*[258]*,* the following excerpts appear in the CID:

"4.1. BAT Conclusions for the combustion of natural gas
Unless otherwise stated, the BAT Conclusions presented in this section are generally applicable to the combustion of natural gas. They apply in addition to the general BAT Conclusions given in Section 1. ……

4.1.1. Energy efficiency

BAT 40. In order to increase the energy efficiency of natural gas combustion, BAT is to use an appropriate combination of the techniques given in BAT 12 and below.

Technique		***Description***	***Applicability***
a.	*Combined cycle*[259]	*See description in Section 8.2*[260]	*Generally applicable to new gas turbines and engines except when operated < 1,500h/yr.* *………* *Not applicable to existing gas turbines and engines operated < 1,500h/yr.* *….*

257 They include Combustion Optimisation, Optimisation Of The Working Medium Condition, Minimisation Of Energy Consumption, Pre-Heating of Combustion Air, Fuel Preheating, Advanced Control System, Use Of Advanced Materials. Mr Denison for EPUKI identifies these techniques as applicable to OCGTs.
258 CID Annex Pg L496/50.
259 As the name suggests the "Combined Cycle"– "Technique" is the technique employed in CCGTs.
260 In terms inclusive of CCGTs, CID Annex §8.2 defines "Combined Cycle" as here relevant, as a "Combination of two or more thermodynamic cycles, e.g. …. (Gas turbine..) with a .. (Steam turbine/boiler), to convert heat loss from the flue-gas of the first cycle to useful energy by subsequent cycle(s)."

Note, this has been cited, usefully, as the "First Table" to BAT 40. Note also that it explicitly incorporates BAT 12 by reference.

Table 23 *(Extracts[261])*
BAT-associated energy efficiency levels (BAT-AEELs) for the combustion of natural gas

Type of combustion unit	***BAT-AEELs(1)***	
	Net electrical efficiency (%)[262]	
	New unit	***Existing unit***
Open cycle gas turbine, ≥ 50 MW_{th}[263]	*36–41,5*	*33–41,5*
Combined cycle gas turbine (CCGT)		
CCGT, 50–600 MW_{th}	*53–58,5*	*46–54*
CCGT, ≥ 600 MW_{th}	*57–60,5*	*50–60*

fn(1) These BAT-AEELs do not apply to units operated < 1500h/yr.[264]

150. The EPA argues that footnote (1) above necessarily means that the BAT-AEELs for OCGTs prescribed in Table 23 do not apply to OCGTs "*operated < 1500h/*yr" – which in turn necessarily implies that it must be possible for at least some BAT-Compliant OCGTs to operate for more than 1,500 hours per year. That means that ARHLs are not inevitable in IED Permits for BAT-Compliant OCGTs and that, it says, is entirely consistent with its impugned e-mail of 18 July 2022. As counsel for EPUKI observed, rarely has so much weight in a case been said to be borne by a footnote.[265] While that may be an understandable observation, nonetheless proper effect must be given to the footnote.

In reply, counsel for EPUKI agreed[266] that Table 23

- is part of BAT 40
- contemplates an OCGT running more than 1,500 hours.

151. §4.1.2 of the BAT Conclusions relates to "*NO_X, CO, NMVOC and CH_4 emissions to air*"[267] and includes a number of BATs, followed by Table 24 which sets "*BAT-associated emission levels (BAT-AELs) for NOx emissions to air from the combustion of natural gas in gas turbines*". Table 24 is not part of BAT 40. It is complex, not least as applying different standards to various subtypes of gas turbines. I set out excerpts below.[268]

261 This is a considerably simplified version of Table 23.
262 Defined in the CID.
263 MWth is a unit of specifically thermal power, as opposed to MWe which is a unit of specifically electrical power.
264 Generally what is in issue is 1500 hours on average per year over a five-year period but I can ignore that for present purposes.
265 D1 p117/118.
266 Day 3 p 162 & 167.
267 Respectively: the sum of nitrogen monoxide (NO) and nitrogen dioxide (NO2), expressed as NO2; Carbon Monoxide; non-methane volatile organic compounds; Methane.
268 This is a considerably simplified version of Table 24.

Type of combustion plant	**Combustion plant total rated thermal input (MW_{th})**	**BAT-AELs (mg/Nm^3)[269]**	
		Yearly average (3)	**Daily average or average over the sampling period**
Open-cycle gas turbines (OCGTs)(5)			
New OCGT	≥ 50	15–35	25–50
Existing OCGT ….. All but plants operated < 500 h/yr	≥ 50	15–50	25–55
Combined-cycle gas turbines (CCGTs)(5)			
New CCGT	≥ 50	10–30	15–40
(Omitted – Various types of Existing CCGTs)			
Open- and combined-cycle gas turbines			
(Omitted – Various types of Existing Gas turbines)			

Footnotes to Table 24

(3) These BAT-AELs do not apply to existing plants operated < 1500 h/yr.

Footnote (3) of Table 24, especially, seems to me consistent only with an expectation that at least some BAT-Compliant OCGTs will run for more than 1,500h/yr.

152. EPUKI complains that the EPA in its e-mail of 18 July 2022 misinterpreted §4.1.1, BAT 40 and Table 23 of the CID BAT Conclusions. It submits[270] that:

a. The CID must be read in the context of the technical possibilities in place at the time of its adoption. When that technical context is examined it is clear that BAT 12 and 40, read together, impose a limit of 1,500 h/yr on OCGTs.

b. Mr Denison explains that, in his view, those of the techniques listed in BAT 12 which are applicable to OCGTs would not achieve the necessary environmental outcomes.[271]

c. EPUKI refers to the First Table of BAT 40 as expressing *"combined cycle requirements*".

d. So, the First Table of BAT 40 is clear that "*when a turbine is operated at 1500 h/yr or more, it is required to be in combined cycle, such that an OCGT is not permitted to run 1,500 or more h/yr".* EPUKI puts it another way: *"pursuant to BAT 40 and BAT 12 read as a whole, the Best Available Technique for the operation of a gas turbine is to be in combined cycle or to be limited to less than 1,500 h/yr."*[272]

269 Nm^3 – Normal Cubic Metre - the quantity of gas which at 0o C and at an absolute pressure of 1.01325 bar and when free of water vapour occupies $1m^3$.
270 Submissions 21 December 2022 §51 et seq.
271 Second Report at §§4-6 [Tab 8 to Book of Combined Exhibits].
272 Emphases added.

e. If the CID is not read so as to require OCGTs to achieve the same efficiency as is required of CCGTs, then the "*general required technique*" that gas turbines which are run 1500 hours or more run in combined cycle is simply ignored.

153. The EPA replies, per Ms O'Connor[273] and Ms Martin[274]:

a. EPUKI's case is "*founded on the fundamental misconception that BAT 40 prescribes a binding approach to setting an*" ARHL for OCGTs.

b. There is no one correct regulatory approach to applying BAT Conclusions, provided BAT-AELs are complied with.

c. Table 23, in applying only to units operating more than 1,500 hours per year, and in setting BAT-AEELs for OCGTs, necessarily means that it is possible for BAT-compliant OCGTs to operate for more than 1,500 hours per year. Otherwise those BAT-AEELs for OCGTs would be redundant.

d. It follows that ARHLs may be imposed on OCGTs, but they are not mandatory. It is possible for OCGTs not to be restricted to 1,500 run hours per year. Whether the EPA will impose an ARHL on an OCGT is decided by its taking account of all the specific circumstances of a particular IEL licence application.

e. The meaning of §4.1.1 of the BAT Conclusions "*is not to restrict all OCGT plant, in all cases, to 1,500 running hours annually*". This observation is notable not just for what it says but for what it implies of the EPA's understanding of the case made by EPUKI.

154. As I have said, in reply to the assertion that EPUKI had at trial changed its case from that pleaded, Counsel for EPUKI argued[275] that its position is and always was that, specifically, as to gas turbine power plants, BAT 40 "*says that if it's going over 1,500 hours it <u>has to be</u> combined cycle*."[276] I pause to note that "combined cycle" is, for BAT Purposes, a "*technique*". Counsel said that it was possible to propose a different technique "*which is not in accordance with the BAT conclusion but which provides an equivalent level of protection*" but "*That's not to be found in the BAT. That is to be found in the CID*". He said that possibility was "*outside of just the BAT conclusion itself*".[277]

155. Though I do not, for reasons given, making a finding as to the proper interpretation of BAT 40, I consider I can reject that distinction by counsel as highly artificial and in breach of the principle that text must be interpreted in its context taking the document in which it is found as a whole. BAT 40 is part of the CID and must be interpreted as such. One cannot, in interpreting BAT 40,

273 Affidavit of Marie O'Connor #1 17 November 2022.
274 Affidavit of Maria Martin #1 25 November 2022. She is a Senior Manager in the Emissions Trading and Energy Regulation Team.
275 Day 3 p152 & 153.
276 Emphasis added.
277 Day 3 p162.

hermetically seal it off from its context and as the CID as a whole and of which it forms a part. This CID is clear, as all BAT-Conclusions are, and as the IED requires, and the CID on BATREFS generally requires,[278] techniques are not prescriptive or exhaustive. That is not an escape hatch or derogation from BAT – it is inherent in BAT. The permissible use of techniques not listed in a BAT is inherent in BAT. Their use does not take an installation outside BAT or require derogation from BAT. Such an installation is BAT-compliant because it achieves the required environmental outcomes. That is apparent from the scheme of the IED generally and in particular from the considerations that described techniques are not prescribed techniques.

156. EPUKI has argued and adduced expert evidence that, while BAT 40 also contemplates, as BAT to increase the energy efficiency of Gas Turbines, the techniques described in BAT 12, only some of those techniques described in BAT 12 can be applied to OCGTs and that when so applied they will not achieve the required environmental outcomes. That may or may not be so. But it seems to me to be precisely the type of judgement and decision which should be made by the relevant competent authority, in this case the EPA, and not by the courts. That point also illustrates the desirability of such issues being determined in specific licence applications and by reference to specific development proposals and specific proposals of techniques, as opposed to determining them in the abstract and by courts.

157. If nothing else, the welter of evidence and argument in this case as to the respective environmental and other respective merits and demerits, environmental advantages and disadvantages, and uses in power generation systems and generation portfolios of OCGTs, illustrate why Table 23 sets a BAT-AEEL for OCGTs lower than that required of CCGTs. Put simply, CCGTs are usually more energy-efficient than OCGTs and so can be held to a higher standard. But energy efficiency is not the only environmental criterion. It is common case that, for various purposes, OCGTs cannot achieve the efficiency of CCGTs – yet it is also common case that they have a place in power generation systems and generation portfolios. Indeed EPUKI strongly advocate their utility and seek Reliability Options accordingly. There is no reason why the CID should not recognise their utility and set a realistic BAT-AEEL accordingly.

158. The logic of EPUKI's position indeed, if generally applied, is that the CID should set BAT-AEELs for CCGTs no higher than those set for wind farms. EPUKI would correctly reply that to do so would be ridiculous given the different characteristics and functions of and advantages and disadvantages of CCGTs and wind farms: so too as between CCGTs and OCGTs.

278 Commission Implementing Decision of 10 February 2012 laying down rules concerning guidance on the collection of data and on the drawing up of BAT reference documents and on their quality assurance referred to in Directive 2010/75/EU Annex Ch3 §3.1.

IED & ARHL – CHRONOLOGY FROM THE 2017 CID

159. What follows here is the first of two considerably overlapping chronologies. They overlap both in point of time and in subject matter. The first concentrates on developments on foot of the IED. The second concentrates on developments in the regulation of the SEM. Very arguably, they should be combined, and it is impossible to separate them entirely, but I hope their separate consideration will be, on balance, marginally less confusing.

Draft English Guidance 2018 & 2019

160. Chronologically, and after the adoption of the 2017 CID, the next document of consequence on the evidence before me is an EA(E) "*working draft*" BAT Guidance[279] dated August 2018 for, inter alia, gas turbine electricity generating plants operating for less than 1,500 hours per year. Its present asserted significance lies in EPUKI's reliance on it as confirming that OCGTs will be subjected to ARHLs and as relied upon by the NIEA to that effect in imposing an ARHL on EPUKI's larger Ballylumford CCGT when operating in OCGT mode.

161. It seems it was neither published nor circulated, its legal status is unclear and its terms are opaque – if only to me. Perhaps primarily that may be because it is situate in, and is cross-referenced to, other documents (not to hand) situate in, a regulatory and guidance regime particular to England. Notably, this draft Guidance explicitly awaits review to ensure consistency with the 2017 CID and refers to the shortfall in supporting evidence for the guidance. It is also informed by a study as to additional BAT Considerations applying stricter requirements than ELVs set out in the IED or the CID where required by environmental quality standards.[280] It appears by its terms that it may be specifically confined to plants operating less than 1,500 hours per annum. In other words, and despite the use of the word "constraints" in Table 1, it is not entirely clear if the 1,500 hours constraint is a premise or a conclusion of the Draft Guidance.

162. It does clearly state, whether or not correctly, that

> *"Large combustion plants operating greater than 1500 hours per annum are required to meet IED Chapter III limits[281] and any BAT derived ELVs. New plant will also be required to meet Article 14 of the Energy Efficiency Directive."*
>
> *"Chapter III of the IED sets specific conditions …….. Plant operating for >1500 hrs/yr are subject to ELVs, which are minimum standards (i.e. BAT may be tighter). <1500 hrs/yr plant may apply for a derogation for higher ELVs …."*

279Tab 24 Exhibit "JM1" Affidavit of John Melvin 17 November 2022.
280 IED Art 18 – Art 3(6) provides that "environmental quality standard" means the set of requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Union law.
281 As stated above Chapter III of the IED consists of Special Provisions for Combustion Plants. In Chapter III, Article 30 and Annex V Part 2 impose specific ELVs for NOx and CO for gas turbines.

It is not clear whether this reference to *"Large combustion plants operating greater than 1500 hours …"* excludes OCGTs.

163. With some regret, as it clearly informed the view of the NIEA, I must confess that I am at something of a loss as to what to make of this draft guidance as relevant to present considerations. I am very wary indeed of attempting to reliably interpret it, much less regard it as an authoritative interpretation of the CID/BAT Conclusions. In the end it is working draft guidance only and I cannot see it as weighing heavily.

164. However a similar "*working draft*" EA document of January 2019[282] – again neither published nor circulated save to regulators - cites the "*LCP BREF[283] – V.3.2*", for which we may read "BAT" and "2017 CID". It somewhat easier to understand – at least in one respect. It is a list of ELVs for various categories of plant. The tables identify the "BREF" emission limit and the "*Expected permit limits*". Included are NOx and CO ELVs for "*Open Cycle Gas Turbine*", permitted after[284] publication of the BREF with "*Unlimited*" operating hours[285] and for the same save with Operating Hours "*less than 1,500 hours/year*".[286] I have failed to find any difference between the ELVs save as to less demanding monitoring for OCGTs of less than 100MW. Certainly, this "*working draft*" document, in specifically identifying BREF ELVs applicable to OCGTs operating "*Unlimited*" hours, suggests that such OCGTs can be BAT-compliant. EPUKI accepts that this is the tenor of that document.

165. Ms O'Connor asserts the irrelevance of UK Policy documents – by which I understand her to make the point that while (draft) UK Policy must be merely consistent with UK interpretation of its IED obligations and may properly influence the NIEA, that policy does not bind the EPA or bind me as to interpretation of the EPA's legal obligations or the interpretation of the IED. In any event, the policy of one Member State[287] within the discretion afforded it by EU legislation cannot bind another Member State to adopt the same policy. I broadly accept this view.

The Ballylumford Permit Review – Autumn 2021 & the Position of the NIEA & the New Kilroot OCGTs

166. EPUKI's larger Ballylumford CCGT, which can operate in OCGT mode, had not been subject to an ARHL until, in a PPC Permit variation review in 2021, the NIEA proposed to apply a 1,500-hour

282 Tab 6 to Exhibit 'MOC1' to Affidavit #1 Marie O'Connor 17 November 2022; Tab 27 Exhibit JM1 to Affidavit #1 John Melvin 17 November 2022.
283 BAT Reference Document.
284 Emphasis in original.
285 Table 2.1.1.
286 Table 2.2.1.
287 As was.

ARHL to the OCGT operation of that CCGT. The NIEA asserted that an ARHL was "*consistent*" with the EA(E) draft working guidance of August 2018.[288] It is not apparent that the EA(E) draft working guidance of January 2019 was discussed in that variation review.

167. EPUKI resisted, as late as August/September 2021 submitting to the NIEA that there should be no ARHL and citing the flexibility of OCGT mode in quickly responding to sudden demand in a system running on tight capacity margins and when renewables fail and that in both modes the plant efficiencies met the relevant BAT-AEELs and BAT-AELs.[289] The EPA, understandably, called for the exhibition of EPUKI's submissions to that effect. EPUKI obliged.[290] Those submissions are inconsistent with EPUKI's present position and consistent with the EPA's present position.[291] EPUKI is entitled now to have accepted that the NIEA was right (as it understands the NIEA's position) and that it was wrong at that time and argue accordingly now. However it is noteworthy that, while in September 2021 trying to persuade the NIEA that it would be lawful not to impose an ARHL, it had as recently as July 2021 made a confidential contrary argument to the SEMC to the effect that above 1,500 hours operation per year, only CCGTs could be BAT.[292]

168. During its dealings with EPUKI as to Ballylumford, the NIEA met the NIUR on 3 September 2021.[293] The NIEA's intention is apparent that any OCGT would be ARHL-limited to 1,500 hours. But so also is its willingness to reconsider and to liaise with other regulators on the issue, including "*counterparts in Ireland*" – i.e. the EPA. No evidence of such liaison between the NIEA and the EPA as to the interpretation of the 2017 CID (BAT 40) is before me. EPUKI relies on this note as demonstrating the knowledge of the NIUR – and by implication the SEMC, CRU and EPA – of the NIEA's interpretation of the 2017 CID (BAT 40) and its intention that any OCGTs would be ARHL-limited to 1,500 hours.

169. The NIEA by e-mail of 8 September 2021 sought more detailed submissions of EPUKI so NIEA could "*consider your case for amending that clause, specifically with regard to possibly reviewing the proposed run time limits*" .[294] It seeks detail of "*why you believe this clause should be relaxed*". In the context that even a relaxation would presumably take any ARHL above 1,500 hours, this seems, as the EPA suggests[295], to suggest a willingness on the part of the NIEA to consider submissions on specific merits - as opposed to taking a doctrinaire and rigid view. The EPA observes that the NIEA would only have invited EPUKI's submissions as to the ARHL if it were possible that a different appropriate decision could be made.

288 See e-mails, Nugent to Brownlees, 26 August 2021 18:25 & 01 September 2021 13:20 - Core Book 7 – pp125 & 123.
289 E-mails, Brownlees to Nugent, 1 September 2021 12.57 & 1 September 2021 13:51 - Core Book tab 9.
290 Crankshaw Affidavit #2 1 December 2022; Exhibit 2JC1 Tab 2.6.
291 See Affidavit #2 of Marie O'Connor 14 December 2022 §45.
292 JM1 p108 - Tab 2 Exhibit "JM2" Affidavit of John Melvin 15/12/22.
293 Formal minutes are not to hand but the NUIR notes are. Core Book 8.
294 See e-mail, Nugent to Brownlees, 8 September 2021 15:41 - Core Book 7 – p122.
295 Affidavit of Marie O'Connor #1 17 November 2022.

170. EPUKI responded[296] but the NIEA replied[297] on 28 October 2021 that it had

> *"… completed our engagement with SONI and UREG[298]… it is our collective view that condition 2.1.11 should remain in the permit as originally drafted. As previously stated, this is fully in line with UK Regulators Guidance and Best Available Techniques. As such, this will place an annual run time limit of 1,500 hours as a rolling five year average for plant of this type operating in open cycle mode, …"*

The NIEA served a Permit Variation Notice accordingly – including the ARHL.[299]

171. EPUKI conceded the ARHL point and the varied PPC Permit, with a 1,500-hour ARHL, issued accordingly in late October 2021.[300]

172. Mr Crankshaw states "*I understand that at no point during EPUKI´s engagement with NIEA relative to the variation of Ballylumford's PPC permit did the NIEA suggest that an ARHL in excess of 1,500 was possible. It was at all times communicated to EPUKI by NIEA that the ARHL was required in order to meet regulatory guidance on the correct application of BAT 40 and the IED*." [301] This passage does not assert personal knowledge and does not state his means of knowledge. I consider that I am entitled to prefer the contemporaneous documentary record.

173. The EPA observe that the NIEA's assertion that the ARHL being imposed is "*fully in line*" is an expression of consistency with UK Regulators Guidance and BAT - as opposed to the assertion and application of a rigid, automatic or inevitable requirement.[302] Nor, the EPA says, is there evidence before me that the NIEA has deemed 1,500 hour ARHLs mandatory for OCGTs in order to comply with the BAT Conclusions. The EPA say that all that can be deduced from the foregoing is that the NIEA, having considered all the relevant factors, determined that the ARHL should be applied. There may be reasons other than energy efficiency for restricting an OCGT's running hours. No general conclusions of proper interpretation of the BAT Conclusions can be drawn, the EPA say, from conditions attached to individual permits.

174. I have to disagree with the EPA in this respect - at least in some degree. It seems to me that the position of the NIEA that at least ordinarily it will impose ARHLs on OCGTs is reasonably

296 Core Book tab 9.
297 Tab 2.6 to Exhibit "2JC1" - Second Affidavit of James Crankshaw 2022/859 JR (EPA) – Core Book tab 9 p121.
298 NUIR.
299 Core Book p128 et seq. - §2.1.11 of the schedule of new conditions applied the 1,500-hour ARHL. It cites Appendix B: Protocol for IED ANNEX V 1500 limited hours derogation of the JEP IED Compliance Protocol for Utility Boilers and Gas Turbines (LCPBREF Update) which is exhibited at Tab 2.8 of the Exhibits to Second Affidavit of James Crankshaw affirmed 1 December 2022. It "covers plant specifically permitted as < 1500 h/yr plant." granted a permit before 27 November 2002 to which a "Limited Hours Derogation (LHD)" from ELVs allowed by Part 1(2) of Annex V of the Industrial Emissions Directive (IED) applies. It notes that UK regulators have discretion to apply BAT based ELVs which might be more stringent than the ELVs set out in the IED and have stated a wish to do so to minimise SO2 emissions.
300 Tab 2.6 to Exhibit "2JC1" - Second Affidavit of James Crankshaw 2022/859 JR (EPA) – Core Book 7.
301 Affidavit #2 of James Crankshaw 1 December 2022 - EPA Case.
302 Affidavit of Marie O'Connor #1 17 November 2022.

apparent from its dealings with EPUKI and the NUIR note of its meeting with DAERA on 3 September 2021. That the market and utilities regulators so interpret the NIEA position is also apparent from the CoNE report of October 2022.[303] However, while the general approach of the NIEA is discernible as matter of probability, I accept that it is not discernible that the NIEA has taken an entirely rigid view of the interpretation or application of the BAT Conclusions as to the imposition of ARHLs on OCGTs.

175. EPUKI plans two new large gas fired OCGTs due to be commissioned by 01 October 2023. It has a draft PPC Permit from the NIEA which includes a 1,500-hour ARHL. The final PPC Permit was expected in January 2023.[304]

The Corduff Road IEL – November 2021

176. On 10 November 2021 the EPA issued an IEL for an OCGT operated by the ESB at Corduff Road, Dublin.[305] It imposed no ARHL. This IEL, a public document, must have contrasted, on EPUKI's own case, with its experience in the Ballylumford PPC Permit review in which the varied PPC Permit, imposing an ARHL, had just issued. And it necessarily implies public knowledge that the EPA considered it at least possible that IELs of OCGTs need not include ARHLs. Indeed, EPUKI cite the Corduff Road IEL as evidence that *"The EPA in Ireland is applying the opposite interpretation of BAT 40 to that of the NIEA and is of the view that OCGTs can be operated in excess of the 1,500 ARHL."*[306] Again we see, early in the case, the argument for an absolute rule that OCGTs cannot be operated in excess of a 1,500 ARHL.

177. That observation apart, if it is evidence that the EPA was applying the opposite approach to that of the NIEA, it is evidence which was in the public domain from mid-November 2021, and available to be contrasted with the varied Ballylumford PPC Permit – even before SEMC published its Information Note of December 2021.[307] It is difficult to imagine that a presumptively alert and expert EPUKI was not relatively quickly aware of the Corduff Road IEL.

178. The EPA disputes EPUKI's characterisation of the Corduff Road IEL insofar as it is said by EPUKI to suggest that the EPA's general approach or immutable regulatory position is to allow OCGTs to operate in excess of 1,500 hours annually.[308] The EPA says that IEL and the absence of an ARHL therein reflect, rather than a general rule, the EPA's assessment of the particular circumstances of the application.

303 Considered below.
304 Affidavit #2 of James Crankshaw 1 December 2022 – CRU Action.
305 Tab 2 to Exhibit "JC1" - Affidavit of James Crankshaw 11 October 2022.
306 Affidavit of James Crankshaw 11 October 2022 §37.
307 See below.
308 Affidavit of Marie O'Connor #1 17 November 2022.

The 2021 CID & SEMC Information Note December 2021

179. On 30 November 2021 the 2021 CID replaced the 2017 CID – but the BAT Conclusions did not change in substance.

180. The SEMC issued a brief "*Information Note regarding the Application of Annual Run Hour Limits*" dated 7 December 2021 (the "Information Note").[309] In the context of the contrast between the then-recently revised Ballylumford PPC Permit and Corduff Road IEL, but in any event in its own terms, the observation in the SEMC Information Note that the EPA had confirmed to the SEMC that technologies other than CCGT can comply with the LCP BAT Conclusions without ARHLs of 1,500 hours and the recommendation that "*prospective developers contact the relevant Environmental Agency in the applicable jurisdiction for any further information"* amply sufficed to convey to a presumptively alert and expert EPUKI that it was in its interest to clarify in a timely manner the issue of the EPA's view of the application of ARHLs to OCGTs. That is especially so as the SEMC Information Note adverted to the EPA's position explicitly in the context of the SEMC's consideration of the possibility of ARHL De-Rating.

181. At hearing Counsel for EPUKI said that, on receipt of the Information Note and as to the possibility of what it calls a "*schism*" between the EPA and NIEA, EPUKI was "*unclear as to what exactly was the position*" and was aware at least of the possibility of a "*schism*".[310] Counsel clearly did not think that an admission, but I do. Counsel for EPUKI and I disagreed.[311] I said that in December 2021 the situation was *"at least flashing amber"* at EPUKI. He said *"at best it was flashing amber".* On reflection I think I may have understated the position somewhat. If EPUKI was unclear on what it says, and I accept, is an important matter, it ought to have urgently taken the explicit advice in the Note and contacted the EPA and the NIEA for clarification.

182. I will presently set out the EPA's view of the legal status (more accurately non-status) of pre-application consultations. It takes the same view of its sharing information with another public body, such as the SEMC, with a view to those views being conveyed[312] to potential applicants for IELs to assist them in planning their future projects. It says that such an action is not justiciable.[313] In any event its actions at that time are not impugned in these proceedings.

EPUKI's Pre-Application Consultation with EPA, the Impugned EPA e-mail of 18 July 2022 & Events to the Correspondence before Action

309 SEM-21-107 - Tab 3 to Exhibit "JC1" - Affidavit of James Crankshaw 11 October 2022. I consider this Note in more detail later.
310 Day 1 p43 & 44.
311 DAY 1 p134.
312 As occurred in the SEMC Information Note.
313 Affidavit #2 of Marie O'Connor 14 December 2022.

183. EPUKI had in mind to build an OCGT at Tynagh, County Galway, for which it would need an IEL. In late February 2022, AECOM, EPUKI's consulting engineers, asked the EPA for a pre-application consultation.[314] Perhaps oddly in light of the Ballylumford/Corduff contrast and the December 2021 Information Note, in identifying the issues it sought to discuss, AECOM did not list ARHLs, though it cited BAT 40. Of course, this may well have been tactical as, one would readily imagine that EPUKI did not want an ARHL limiting its return on investment in a new OCGT at Tynagh. What it knew from the December 2021 Information Note and the Corduff Road IEL of the EPA's position suggested that it might well be that no ARHL would be imposed. It would have been understandable if AECOM had decided not to draw attention to an issue which EPUKI might reasonably have hoped would never arise.

184. An EPUKI/EPA pre-application consultation ensued on 14 March 2022. Mr McClean of EPUKI attended. The EPA's interpretation of BAT was discussed[315] (though I am not told by whom the issue was raised or in what terms it was discussed). The EPA asked AECOM for a letter seeking its clarification on the issue. As far as the evidence reveals, this was the first time EPUKI had asked the EPA about the issue of ARHLs for OCGTs – over 3 months after the SEMC Information Note of 7 December 2021. Indeed, AECOM sent that letter 1½ months later again, on 2 May 2022, enclosing the SEMC's Information Note of December 2021 and seeking clarification of the EPA's interpretation of BAT as set out in the 2021 CID and of any likelihood that an ARHL would apply to the intended OCGT at Tynagh.[316] EPUKI let time pass in that way, in effect from December to May, and in the context of a system of regular Capacity Auctions held to tight timetables. Given those tight timetables their explanation that they deferred their request for clarification until they were ready for the Tynagh OCGT pre-application lacks force - given also that from requesting the Tynagh OCGT pre-application in February it took them to May to write the letter.

185. It is relevant to observe that in its submission of 22 June 2022[317], "*strongly*" opposing ARHL De-Rating, EPUKI complained to the SEMC of the statement of the position of the EPA set out in the SEMC Information Note of December 2021. EPUKI said that

- *"… we are not aware of any detail being provided to support this statement and we do not consider that it could be relied upon by an investor in new capacity."*

- *"The 1,500 hours ARHL is an EU-wide requirement and, as such, it is unclear how the EPA would be able to reach a different position on its application. Breaching this requirement would be a breach of EU law and it is our view that the requirements of the Capacity Market do not supersede the legal obligations of participants."…."*

314 Tab 1 to Book 'MOC1'.
315 Affidavit of Marie O'Connor 17 November 2022 §63 & Exhibit MOC1 Tab 2.
316 Tab 3 to Exhibit "MOC1" - Affidavit of Marie O'Connor 17 November 2022 – Core Book 11.
317 See below.

- *"We have written to the EPA seeking clarification as to whether they have published a report to support the SEMC position and, if so, what their logic is to circumvent the clear EU direction."* [318]

Notably, that assertion by EPUKI was made to the SEMC but not to the EPA. The AECOM letter to the EPA dated 2 May 2022 had certainly not raised the issue in the demanding and critical terms intimated to the SEMC on 22 June 2022. It did not interrogate the EPA's logic, did not inquire if the EPA had written a "report" on the issue and did not assert circumvention of a clear EU Direction. On the contrary, the inquiry was in entirely benign terms.[319]

THE IMPUGNED EPA E-MAIL OF 18 JULY 2022

186. The EPA replied to AECOM, by the Impugned E-Mail dated 18 July 2022[320] stating that

> *"….. the interpretation of BAT 40 of the LCP BAT Conclusions that the Agency will be applying to the assessment of IE Licence applications is that OCGT can be operated in excess of 1,500 hrs per annum provided the plant meets the relevant specified BAT AEEL of 36 — 41.5% net electrical efficiency."*

187. EPUKI and the EPA interpret this e-mail differently.

- EPUKI interprets it as saying that meeting the BAT AEEL is the only criterion for the grant of IELs without ARHLs and says this BAT-AEEL is very easy to meet and meant in effect that no IELs for OCGTs will include ARHLs.

- The EPA says it, in effect, means only that it will regard compliance with the BAT-AEEL as necessary, though not sufficient, to the omission of an ARHL – it does not mean that no IELS for OCGTs will include ARHLs. It says the e-mail in effect repeated its repeated its position as described in the SEMC Information Note of December 2021.

188. At this point it is important to note that the EPA's e-mail dated 18 July 2022 was clearly part of the non-statutory pre-application consultation process. Its assertion is not disputed that that process is non-statutory and that the EPA is not obliged by law to provide pre-application consultation.[321] Where requested, its usual practice is to provide such consultations to practically assist intending applicants for IELs. Indeed it encourages them, including by making pre-application

318 i.e. in AECOM's e-mail of 2 May 2022.
319 Insofar as relevant, AECOM's letter to the EPA, referring to the SEMC Information Note of 7 December 2021, said "We would be grateful if you could elaborate on this statement, advising which technologies are being referred to and if any are applicable to OCGTs? Additionally, should there be a need to impose an ARHL can you advise on if this would be applied as an annual rolling average; if so can you advise on the number of hours that would likely be set as a the ARHL, and the statistical basis of such a limit e.g. as a rolling average over 5 years, with an upper limit on operational hours in any single year e.g. 2,250 hours?"
320 Tab 4 to Exhibit "JC1" - Grounding Affidavits of James Crankshaw 11 October 2022 in both judicial reviews – Core Book Tab 14.
321 Affidavit #1 of Marie O'Connor 17 November 2022 §70 & 76 & Exhibit MOC1 Tab 1; Affidavit #2 of Marie O'Connor 14 December 2022 §7 – 15.

request forms available, as tending, self-evidently,[322] to improve the quality and efficient disposal of IEL applications. They generally occur online and last about 30 minutes. But pre-application consultation plays no formal role - in the EPA's subsequent consideration of IEL applications or in any other of its statutory functions. Pre-application consultations and things said therein have no legal effect and do not bind the EPA as to any decision as to the grant of na IEL or the conditions that should attach to an IEL. Nor are IEL applicants held in their applications to what they may have said in pre-application consultation and they are free to disagree with anything the EPA may have said. This position seems to me to be entirely in accordance with law – though it might minimise future disputes if its published pre-application request form drew attention to that position.

189. The EPA says its statutory role and decision-making powers are activated only on receipt of an IEL licensing application. It says it has it has no statutory power to make "decisions" as to matters of abstract legal interpretation, but only the power to make decisions on specific Licence applications. The EPA's net position, which is disputed, is that unless and until its view of BAT 40, that there is no mandatory limit on OCGT run hours, as expressed in its e-mail of 18 July 2022, is carried into effect in a binding decision of an IEL Application, it is of no legal effect.

Events from 18 July 2022 to the Correspondence before Action

190. I have referred above to the significance of EPUKI'S submission to the SEMC on 22 June 2022. In this context, if in no other, and on their own stated position, one would have expected EPUKI to have been alarmed that its fears had been confirmed by the EPA's e-mail of 18 July 2022 and would, at least now, have sought urgent engagement with the EPA, to correct its error.

191. Yet when the e-mail from the EPA on 18 July 2022, comes to hand in terms confirmatory of EPUKI's fears of illegality, as already asserted to the SEMC - fears informing its "*strong*" opposition to ARHL De-Rating - its next e-mail to the EPA, the regulator directly concerned, ignores the issue completely.

192. AECOM wrote to the EPA again on 25 July 2022[323] raising a query in the Tynagh OCGT pre-application. But it did not query or complain of the EPA's interpretation of BAT 40 as described in the e-mail of 18 July 2022 – much less assert its illegality. Certainly, it does not say to the EPA what it had already said to the SEMC on 22 June 2022 - that the EPA is wrong in its interpretation of BAT and, by necessary implication, that the EPA must, as a matter of legal necessity, impose an ARHL on EPUKI's intended Tynagh OCGT. (Incidentally, this cannot be explained by any delay in getting legal advice as such advice had already informed EPUKI's letter to the SEMC dated 22 June 2022.) Nor did AECOM's letter contrast with the EPA's interpretation EPUKI's understanding of the NIEA's

322 Ms O'Connor elaborates but I need not. Affidavit of Marie O'Connor #2 14 December 2022.
323 Tab 4 to Exhibit "MOC1" – Affidavit #1 of Marie O'Connor 17 November 2022 - Core Book 15.

interpretation of BAT 40 - of which EPUKI had had tangible experience as to its Ballylumford OCGT PPC Permit. All this was despite the content of EPUKI's letter of 26 June 2022 set out above.

193. That is unsurprising to the extent that it seems undeniably in EPUKI's interest, at least in terms of getting a return on a proposed investment in an OCGT at Tynagh, that the EPA had indicated at least a prospect that no ARHL would apply to it. However it is very surprising given the case EPUKI had made to the SEMC in its submission of 22 June 2022, which case it now makes again in these proceedings and given its knowledge of the NIEA view of BAT which it says it had first opposed, later accepted as to its Ballylumford OCGT PPC Permit and which it now positively advocates.

194. The same observations arise from the fact that on 18 August 2022 EPUKI and the EPA met again, in a second pre-application consultation meeting.[324] Mr McClean and Mr Crankshaw were present. Yet, again, EPUKI not did not query or complain of the EPA's interpretation of BAT 40 as described in the e-mail of 18 July 2022. Nor did it contrast EPUKI's understanding of the NIEA's interpretation of BAT 40. However, those observations have added force at this point in the sequence of events in that, between AECOM's e-mail to the EPA on 25 July 2022 and the second pre-application consultation meeting, EPUKI had had the SEMC Decision of 11 August 2022 to impose ARHL De-Rating[325] and the proposed Code Modification[326] to carry that decision into effect. Not only that, but only the day before that second pre-application consultation meeting on 18 August 2022, EPUKI had attended a Code Modification Workshop on the issue of ARHL De-Rating.

195. Nor was any complaint of discrimination as between OCGTs north and south of the border made in EPUKI's submission of 25 August 2022 to the SEMC in the Code Modification Consultation.[327] However short the consultation period, that was a simple point that could readily have been made (whether valid or not, or relevant or not, given the decision in principle had already been made). The consequences of the EPA's alleged misinterpretation of BAT and resultant discrimination of which EPUKI complains were, if not long-since, from 11 August 2022 in full view of EPUKI. Yet, it repeatedly failed to avail of obvious opportunities to further raise its concerns, or express its disagreement, with the EPA.

196. I reject as untenable in light of the objective facts as demonstrated by the documentary evidence, Mr Crankshaw's averments that the EPA's misinterpretation of the IED did not adversely impact EPUKI's business until the SEMC decision on 5 September 2022 which it characterises as a decision to apply ARHL De-Rating in the Capacity Auctions. It is not that I accept that there was an adverse impact but that it is quite clear that whatever EPUKI's fears as expressed in its submission to the SEMC of 22 June 2022 they had been realised by the e-mail of 18 July 2022. And further the real

324 Tab 5 to Book 'MOC1'.
325 Tab 12 to Exhibit "JM1" - Affidavit #1 of John Melvin 2022/860 JR (CRU) - Core Book 16.
326 Tab 14 Exhibit "JM1" Affidavit of John Melvin 17 November 2022; See also the SEMC E-mail to the market dated 12 August 2022 - Tab 16 Exhibit "JM1" Affidavit of John Melvin 17 November 2022.
327 See below.

prospect of any such impact must have been perfectly clearly apparent to EPUKI from the SEMC decision on 11 August 2022 to apply ARHL De-Rating. And that prospect had been clearly and expressly anticipated by EPUKI in its in its submission to the SEMC of 22 June 2022 which identifies its concern as having arisen from the alleged inadequacy of the SEMC Information Note which it had had since December 2021.

197. It bears repeating that, in that Information Note, the SEMC had adverted to the EPA's position explicitly in the context of its consideration of the question of ARHL De-Rating. To the extent that the Note, as EPUKI put it on 22 June 2022, suggested a "*breach of EU law*" and could not "*be relied upon by an investor in new capacity*", EPUKI can only have been very concerned from December 2021 – if not by the clarity of the statement of the EPA position then by the very lack of clarity of which EPUKI complains. Indeed, even on their own view, EPUKI seem to confuse a statement that cannot be relied upon with one that can safely be ignored – or at least interrogated only at a conspicuously leisurely pace despite its explicit advice to contact the IED regulators.

198. It does seem counterintuitive that EPUKI, for present purposes at least and also in its letter of 26 June 2022 to the SEMC, advocates ARHLs in OCGTs as legally necessary above and below the Border - including in its intended OCGT in Tynagh. Its solution to what it sees as a discriminatory effect on Northern OCGTs is to diminish return on investment in all OCGTs equally. It calls to mind the alleged inherent virtue of communism as the equal sharing of miseries. Counsel for EPUKI considered that a "*debating point and no more*"[328] but as tens of millions of euro manifestly turn on costs "*massively greater in the North compared to the South*"[329], I respectfully disagree. However EPUKI has a significant number of OCGTs in Northern Ireland and plans more and it must be the judge of where its interest lies. It may also be a view informed simply by a desire to face up now to its understanding of what the CID actually requires, rather than invest in further OCGTs on a false premise later to be upset by a proper application of ARHLs in IEL reviews south of the Border. Or to put it another way, as investors do, it wants certainty which is "*massively important*" to it[330]. However, its desire for certainty would be more convincing had EPUKI set about achieving it urgently from early December 2021 when, even on its view, the fog had descended.

199. EPUKI's engagement with the EPA on this issue was puzzlingly belated, tentative and not pressed after the EPA e-mail of 18 July 2022 - despite EPUKI's having already taken the view expressed in its letter of 26 June 2022 to the SEMC that the EPA's interpretation of the CID was wrong. Certainly, it was not pressed in AECOM's letter of 25 July 2022 despite the fact that the SEMC's decision on ARHL De-Rating was at that time awaited. Nor was it pressed at the second pre-application consultation meeting on 18 August 2022. It was not pressed again by EPUKI on the EPA until after the SEMC had adopted ARHL De-Rating by its decision of 11 August 2022 and the

328 D1 p60.
329 Counsel for EPUKI D1 p55.
330 Counsel for EPUKI D1 p59.

resultant Code Modification of 5 September 2022[331] and by way of its letter before action dated 29 September 2022.[332]

While EPUKI deposes that "*it is crucial to appreciate that this misinterpretation of the IED by the EPA did not adversely impact EPUKI's business until the SEMC decision on 5 September 2022 to apply a de-rating factor in the Capacity Auction"*[333], in reality both issues – ARHLs and ARHL De-Rating had long-since been flagged at very least as live prospects.

200. EPUKI's letter before action dated 29 September 2022, complaining of the decision asserted to have been constituted in the EPA's Impugned e-mail of 18 July 2022, disputed what it asserted to have been the EPA's interpretation of the CID BAT Conclusions in that e-mail and characterised it as a *"decision of the EPA … to not impose the 1,500 hours per annum limitation to OCGTs".* Despite the Ballylumford/Corduff Road contrast and the SEMC Information Note of December 2021, and, indeed the passage of over 2 months since the Impugned e-mail, this letter before action dated 29 September 2022 was the first occasion on which EPUKI asserted to the EPA that it had misinterpreted the CID and the alleged contradiction between the EPA's interpretation of the CID and that of the NIEA. I make this observation not so much as to time limits in judicial review but in the context of EPUKI's involvement in SEM processes which it knew to be attended by tight and important timelines in which context one would have expected it to seek early and urgent clarifications rather than seek them belatedly. If nothing else, one would have expected EPUKI to urgently suggest to the EPA that its interpretation of BAT 40 was incorrect.

201. Overall and as a probability, it seems fair to infer that, to the Autumn of 2022 EPUKI saw the EPA's alleged misinterpretation of BAT 40 not a problem in itself but as a potential stick with which to ward off ARHL De-Rating to which it was explicitly opposed – for reasons as to return on investment, perfectly sensible from its point of view and very easily understood from others'.

202. By letter dated 3 October 2022[334] the EPA responded to EPUKI's letter before action. It denied that its e-mail of 18 July 2022 was merely part of a pre-application consultation and was not a justiciable decision.[335] It repeats the view expressed on 18 July 2022 - that OCGTs can be operated at greater than 1,500 h/yr provided the plant meets the net electrical efficiency BAT AEELs – which it identifies as specified of OCGTs in Table 23 of BAT 40. It says that at least two other EU Member States that have adopted a similar approach.

203. The EPA emphasises that as yet, EPUKI has made no application to it for an IEL for an OCGT and that its impugned letter of 18 July 2022 was written in a pre-application consultation which has not lead to an application for an IEL. I will return in due course to the significance of this submission.

331 See further below.
332 Tab 5 to Exhibit "JC1" - Grounding Affidavits of James Crankshaw in both claims 11 October 2022 – Core Book Tab 20.
333 Grounding Affidavits of James Crankshaw in both claims 11 October 2022.
334 Tab 5 to Exhibit "JC1" - Grounding Affidavits of James Crankshaw in both claims 11 October 2022– Core Book Tab 21.
335 I return to this issue below.

The EPA's Inquiries of Environmental Regulators in other Member States

204. As a result of EPUKI's letter before action, the EPA set about canvassing opinion amongst its continental counterparts as to whether the 2021 CID forbade OCGTs running more than 1,500 hours per year.[336] EPA e-mailed that it was "*trying to understand*" the position – a phrase which EPUKI seeks to freight with an implication of lack of confidence on the part of the EPA which I do not consider it bears. Some of the correspondence seems a little opaque – at least to me – but that may be due to the fact that it is amongst a cognoscenti and to some "not first language" issues. Ms Martin, for the EPA, says[337] that none of the regulatory positions thus ascertained rules out the licensing of OCGTs to operate for more than 1,500 hours annually and, she observes, in any event the IED permits Member States to adopt stricter rules than the IED/BAT requires.[338]

- According to the EPA, in the UK - including Northern Ireland - all OCGTs are limited to 1,500-hour ARHLs.
- The Germans have adopted General Binding Rules[339] which appear to prohibit OCGTs running more than 1,500 hours per year unless use of CCGT or CHP is "*technically impossible or disproportionate*".[340]
- The view in Flanders, Denmark and Austria seems to be that OCGTs may run more than 1,500 hours per year if they meet the BAT-AEELs of Table 23. Austria states, notably, that BAT does not regulate operating hours.
- The Danes state that they don't have experience of licensing OCGTs but:

> *"As we interpret table 23 there are no upper limits for the number of operating hours pr year. (There are no reasons for limiting the upper number of operating hours.) Only limitation is that the AEELs are not relevant for plants with less than 1500 hours pr. year.*
> *……. table 23 applies to all plants using natural gas and thus all types of natural gas fired plants can be operated more the 1500 hours pr year."*

205. Mr Denison replied to Ms Martin as to her contacts with other regulators.[341] Inter alia, he points out that none of those other regulators have instanced OCGTs permitted to run more than 1,500 hours. He suggests that the German "*technically impossible or disproportionate*" criterion in reality affords little discretion. Mr Denison reports on his canvassing the experience of his firm's continental units and relevant national registers of IED Permits. In the 5 States canvassed[342] he

336 Exhibit MM1 to Affidavit #1 of Maria Martin sworn 26 November 2022.
337 Affidavit #1 of Maria Martin sworn 26 November 2022.
338 IED Art 14(4).
339 See IED Art 17.
340 Binding Rule §7(2) requires, inter alia as to natural gas turbines for electricity generation intended to be available for operation for 1 500 operating hours or more per year, the coupling of gas and steam turbines unless this is technically impossible or disproportionate. "the coupling of gas and steam turbines" refers to CCGT.
341 Affidavit #3 of Robert Denison 6 December 2022.
342 Italy, Germany, Poland, Romania, Sweden.

found no OCGTs permitted to run for more than 1,500 hours annually and identifies over 9[343] operating within 1,500-hour ARHLs.

206. Ms Martin in turn replied to Mr Denison.[344] Inter alia, she suggests that Mr Denison's point appears to be that, although an OCGT may possibly be licensed to operate for more than 1,500 hours per year in BAT-compliance, it is unlikely to happen very often in practice for want of a technical solution to allow it. (In fact, Mr Denison says there is no technical solution so it cannot happen). She disagrees but says their disagreement is irrelevant. Presumably her point is that the EPA's impugned e-mail says no more than that, as a matter of interpretation of BAT 40 (as a matter of law as opposed to a matter of engineering) an OCGT may possibly be licensed to operate for more than 1,500 hours per year in BAT-compliance. She also says that Mr Denison's research in other States is irrelevant as evidence only of decisions in individual cases made in light of their particular circumstances.

207. These views from continental sources are of some but limited help – not least in demonstrating the variation of view between expert environmental regulators with, I presume, access to highly-expert legal advice. That said, they are both informal and not determinative of, or even weighty as to, any issue of legal interpretation. I should say that they were explicitly proffered by the EPA on that basis and as merely demonstrating that Member States have taken different regulatory approaches within the discretion afforded them by the IED regime.

SEM, CAPACITY MARKET, CAPACITY AUCTIONS, QUALIFICATION & DE-RATING DECISION

208. While the account of the SEM and the Capacity Market given earlier in this judgment was explicitly crude, even the description I now set out is, no doubt, a very simplified and incomplete account of a highly complex and technical system. It will necessarily require some duplication of the information set out earlier.

209. As stated above, the Capacity Market is a particular sub-market of the SEM and is regulated by the Code, adopted and modified from time to time by the SEMC. A main objective of the Capacity Market[345] is to ensure security of power supply - the availability of sufficient power to meet demand. In other words, it seeks to ensure the availability of adequate capacity to generate power. Its success in that regard is appreciably dependent on the availability of power plants. To that end, the Capacity Market is intended, inter alia, to financially facilitate and incentivise Generators in planning and developing power plants.

343 The number is inexact as he refers to "a number of OCGT projects" in Italy.
344 Affidavit #2 of Maria Martin sworn 14 December 2022.
345 See §A.1.2.1(b) & (g) of the Code.

210. The Objectives of the Code[346] are as follows:

a. "*to facilitate the efficient discharge by EirGrid and SONI of the obligations imposed by their respective Transmission System Operator Licences in relation to the Capacity Market*;

b. *to facilitate the efficient, economic and coordinated operation, administration and development of the Capacity Market and the provision of adequate future capacity in a financially secure manner;*

c. *to facilitate the participation of undertakings including electricity undertakings engaged or seeking to be engaged in the provision of electricity capacity in the Capacity Market;*

d. *to promote competition in the provision of electricity capacity to the SEM;*

e. *to provide transparency in the operation of the SEM;*

f. *to ensure no undue discrimination between persons who are or may seek to become parties to the Capacity Market Code; and*

g. *through the development of the Capacity Market, to promote the short-term and long-term interests of consumers of electricity with respect to price, quality, reliability, and security of supply of electricity across the Island of Ireland."*

211. It will readily be seen that the foregoing objectives will not always fully coincide and will require the exercise of expert judgment in their reconciliation. To pick but one example: "*the provision of adequate future capacity in a financially secure manner"* requires recognition that generators need adequate return on their investments but too great a return is wasteful and inimical to consumers' interests as to price.

212. EirGrid and SONI operate the power transmission systems[347] and in their capacity as Transmission System Operator Licence holders ("TSO" or "System Operators") identified by the Code[348] - jointly administer the Code and, in so doing, periodically hold Capacity Auctions[349] under the Code. In advance of a Capacity Auction, the System Operators set out the Capacity Requirement[350] in MW for the Capacity Year[351] in respect of which it intends to award "Capacity Contracts" – also called "Reliability Options" - to generators who bid successfully in the Auction. The Capacity Requirement is the primary driver of the quantum of capacity to be purchased in the

346 §A.1.2.1.
347 These carry power from power plants to the more localised Distribution Systems operated by ESB/NIE Networks.
348 §B6.
349 The first was completed in December 2017.
350 Code §C.1.1.2(h) states: a capacity requirement reflects the quantity of de-rated capacity required to satisfy the SEM security standard and is determined by the Regulatory Authorities.
351 Each capacity year begins on 1 October.

auction. It is set having regard to de-rated capacity and the need to maintain the SEM Security Standard set under the Code.[352]

213. By those Capacity Contracts, Generators undertake to make electricity generation capacity available in that Capacity Year to enable the sale and purchase of power in the SEM. It is important to note that the Capacity Contracts merely relate to making capacity available in return for periodic "Capacity Payments". The sale of power generated by that capacity is contracted via separate auction procedures.[353] Though Capacity Contracts offered in Capacity Auctions are in respect of a "Capacity Year", as to plant yet to be built, Generators can bid for Capacity Contracts of longer duration. They often bid for, and are awarded, 10-year Capacity Contracts. I presume this is a function of the long-term nature of investment in new generating plants. The primary type of Capacity Auction is a "T-4" auction. These must be held roughly annually and call for capacity to be made available in a Capacity Year about 4 years thereafter.[354] As stated earlier, Generators can bid in such an auction on the basis of existing generation plant and also on the basis of generation plant they intend to build in time for the start of the Capacity Year.[355] As T-4 auctions necessarily make assumptions as to the future – for example as to electricity demand - which assumptions may require adjustment over time, the Code allows also for T-3, T-2 and T-1 Capacity Auctions to contract additional capacity for the Capacity Year in question. However, for present purposes it is the T-4 Auction for Capacity Year 2026/27 which primarily concerns us.

214. Before Qualification for each Capacity Auction, the Code[356] requires the SEMC to provisionally determine a number of auction parameters for inclusion in the applicable Initial Auction Information Pack ("IAIP"). Before doing so, the SEMC consults the market via a Parameters Consultation Paper, following which it makes a Parameters Decision. The parameters determined include De-Rating Factors, the Capacity Requirement and the Auction Price Cap.[357] The IAIP informs Qualification applications. After Qualification, a Final Auction Information Pack[358] ("FIAP") finally determines the auction parameters and on that basis bidding ensues.

215. A Generator bidding in a Capacity Auction bids a specific capacity by reference to a specific power plant[359] and a price at which it is willing to make that capacity available. Generators succeed in the auction and are awarded Capacity Contracts in ascending order of their bid prices until the

352 Code §C.1.1.2(e) states: the SEM security standard is a standard determined by the Regulatory Authorities which is based on hours of loss of load expectation per annum; The Code Glossary states: SEM Security Standard means the standard specified from time to time by the Regulatory Authorities for the annual loss of load expectation to be maintained in the SEM, that is the expected number of hours per year for which load curtailment may occur due to demand exceeding available capacity. The Ireland Capacity Outlook 2022-2031 - Glossary describes loss of load expectation as the mathematical expectation of the number of hours in the year during which the available generation plant will be inadequate to meet the instantaneous demand.
353 Known as day-ahead, intra-day, and balancing auctions.
354 §D.2.1.1.
355 Generation plant relied upon in bidding is include in the concept of "Candidate Units" used by the Code.
356 §D.3.
357 The Auction Price cap is the maximum Capacity Payment bid price allowed in a Capacity Auction. It is determined by the Regulatory Authorities under the Code and provided to the System Operators.
358 Code §F.5
359 Existing or to be built ("New")

total capacity required is met. But before it can bid, a Generator must qualify to do so.[360] Generally, qualification includes a consideration of a Generator's ability to make available the capacity for which it intends to bid and sets the maximum capacity for which it may bid. Such auctions have attracted in the order of 200 qualification applications. Significant time, effort and cost is required to compile a qualification application.[361] To state the obvious, in the first instance a Generator's ability to make available the capacity for which it intends to bid is limited by the capacity of its existing and intended power plants. And Qualification Applications are rejected unless the System Operators[362] consider that all Qualification Data required to be provided in the Qualification Application[363] is provided and is accurate.[364] But Qualification takes a particular form where the capacity to be bid is based on generation plant yet to be built ("New Capacity") and what accuracy means as to a qualification applicant's expression of an expectation as to future events is something I address below.

216. As to Capacity, the starting point is the Nameplate Capacity[365] - or "Rating" - of the plant. It is an engineering/technical concept which can be thought of as the maximum power output, in MW, asserted by the manufacturer or supplier of the plant. So the Generator's Qualification Application must state the plant's rating. As, ultimately, what will matter is actual energy output, capacity (rating) can be thought of as a proxy for energy output - to which it is directly proportional. However Nameplate Capacity would be a misleading proxy as, it is a theoretical figure in that, while such output may be reached at times, it will not be constantly reached in constant operation of the plant. For many and varied reasons, a plant will not be able to operate for the entire of a Capacity Year (for example while offline for breakdowns, repair and maintenance) and will not be able to operate constantly at full power (for example while starting up and shutting down and perhaps for technical reasons). Though such instances do not, in the strict sense, reduce the capacity of the plant[366], they will reduce its actual electricity output which, as I have said, is ultimately what matters. So bids in Capacity Auctions based on the Nameplate Capacity/Rating of the plant would in practice exaggerate, and thereby undermine, security of supply.

217. The solution adopted in the Code[367] is to adjust the Nameplate Capacity/Rating (Initial Capacity[368]) downwards – it is "De-Rated" by a "De-Rating Factor"[369] to reflect limitations on the unit's ability to deliver electricity. Remembering that capacity is proportional to, and can be thought of as a proxy for, energy output, such contingencies as those I have described can be mathematically

360 See generally the Code §E.
361 Affidavit #1 John Melvin 17 November 2022 §229.
362 i.e. EirGrid & SONI
363 Identified in Code Appendix D
364 Code §E.7.5.1
365 Not a phrase used in the Code but useful for simplifying the description and a phrase used on affidavit and by counsel for the CRU in describing qualification.
366 Which measures its maximum and instantaneous rate of power generation.
367 See generally Code §C - De-rating and Capacity Concepts.
368 Code §C.1.1.2(d) states: initial capacity is a measure of the capacity available from a Generator, Generator Unit or Interconnector (or a Capacity Market Unit that comprises those units) without applying any de-rating factor ….
369 Code §C.1.1.2(f) states: a de-rating factor is a factor between zero and one, which serves to lower the capacity available from a Generator, Generator Unit or Interconnector so that in aggregate all Generators, Generator Units and Interconnectors have enough capacity beyond their de-rated level to allow the SEM security standard to be achieved even allowing for some Generators, Generator Units or Interconnectors being unavailable.

represented by nominally "De-Rating" the plant: that is to say, by reducing the capacity attributed to it for purposes of bidding in a Capacity Auction. All plant is de-rated in this way - by way of Standard De-Rating Factors[370] - to produce a De-Rated Capacity to be identified in the Qualification Application. For example, Standard De-Rating would see an OCGT with a Nameplate Rating of 300MW de-rated to 259.5MW – the maximum capacity for which it could bid in a Capacity Auction.

218. However, and crucially for present purposes, the Standard De-Rating Factor does not reflect limitations on plant running hours imposed by ARHLs. So a plant (say, an OCGT) with a 1,500 hour ARHL in its IED Permit could, until now, bid for just as much capacity as, and on an equal footing with, a plant (say a CCGT) which had no ARHL. That not merely exaggerated its real capacity – it determined the quantum of its Capacity Payments. It resulted in Capacity Payments a multiple of the real capacity of an ARHL-limited plant. On one view, Capacity Payments thus calculated represent a windfall to Generators and a burden for consumers (who, ultimately, pay them) for which they did not receive consideration in the form of capacity actually made available. That is not to say that ARHL De-Rating is inevitable – there may be countervailing considerations such as the encouragement of investment. But it cannot be said that an SEMC judgment on balance in favour of ARHL De-Rating is in any way irrational. Nor, in fairness, has that been suggested.

219. However EPUKI is incorrect to say[371] that before the Impugned Decisions the Capacity Market was blind to any running hour constraints on generating plants and has been focused on delivery of MW (capacity) and not MWh (generation). That is true as to ARHLs but not as to other factors restricting operating time, as reflected in the Standard De-Rating Factor.

220. The Code provides mechanisms to ensure that New Capacity which has been awarded a Capacity Contract is built in time for the start of the Capacity Year in question.[372] Amongst these is the concept of "*Substantial Completion*" of the New Capacity in physical terms and in terms of its ability to generate electricity.

221. The Code provides mechanisms for its own modification – including urgent modifications.[373] They include obligations of public notice, prior consultation and workshops with the public and Code stakeholders.

ARHL DE-RATING – SEQUENCE OF EVENTS & THE T4-2026/2027 CAPACITY AUCTION.

370 See for example Affidavit #2 of James Crankshaw 1 December 2022 - EPA Case §50. The Standard De-Rating Factor varies as between different plant technologies/types by reference to issues such as their reliability (and hence offline time likely to be required for repair and maintenance) and start-up and shut-down times.
371 Affidavit #1 of James Crankshaw 11 October 2022 §50.
372 §J – "Delivery of Awarded New Capacity".
373 Code §B12

From March 2017

222. As stated above, ARHLs can limit OCGTs in particular to operating for as little as 1,500 hours per annum – 17% of the year. That is a radical reduction in the practical capacity of a power plant to which an ARHL is applied. It will be obvious that qualifying the operator of an OCGT subject to such an ARHL to bid in a Capacity Auction without de-rating its capacity to reflect the ARHL raises a risk that, for much of the Capacity Year of a resulting Capacity Contract and when called upon to do so, the OCGT may be unable to meet its capacity commitments by way of actual production of electricity. Whether that risk is obvious or not, the SEMC as an expert regulator has discerned it. Accordingly, such Capacity Contracts would tend to exaggerate true capacity and, hence, the security of supply which is a main objective of the SEM, the Capacity Market and the Code. Whether that is a practical problem as to plant, such as "peaking plant", which may be typically required to operate only intermittently – whether an ARHL will in practice stop it operating when otherwise it would have been operated – seems to me to be a matter for the SEMC and the Regulatory Authorities to assess. It is certainly not for the court.

223. While ARHL De-Rating was mooted over time since 2017 and for various reasons, has been controversial and resisted by at least some Generators, including EPUKI and while genuinely differing, and nuanced, views can legitimately be held on the issue, it cannot be said and has not been said in these proceedings by EPUKI, that it has been unreasonable of the RAs and the SEMC to take the view that ARHL De-Rating is, at least in a general sense, an appropriate and desirable response to the imposition of ARHLs in IELs and PPC Permits. EPUKI does not in these proceedings challenge the principle of ARHL De-Rating. It says that its *"present challenge simply to the application of De-Rating in the discriminatory context in which a different approach to the same environmental standards is taken in Northern Ireland and Ireland."*[374] EPUKI repeatedly emphasises that its challenge is based essentially on and is confined to the introduction of ARHLs in the specific context of the allegedly different ID Permitting approaches north and south of the Border. However it appears to me that EPUKI's present acceptance of that principle has more than a whiff of the Augustinian Prayer to it.[375]

224. A brief account of the history of ARHL De-Rating is necessary – both generally and having regard to a specific allegation of lack of consultation. The issue is not new. For the reasons indicated above, the prospect of the application to OCGTs, in IELs and PPC Permits, of 1,500-hour ARHLs arose from the Commission's BAT Conclusions of July 2017. Eirgrid/SONI in a consultation paper[376] circulated to market participants in March 2017, raised the prospect that IED Permits would impose ARHLs[377] with "*potentially significant*" impact on system adequacy.[378] It canvassed the possibility of ARHL De-Rating – "*how a limitation to run hours should impact on the calculation of a unit's de-*

374 Affidavit #2 of James Crankshaw 1 December 2022 – CRU action.
375 Lord grant me chastity, but not yet.
376 Tab 2 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022
377 Though that precise phrase was not used.
378 The reference here is to the electricity generation system.

rating factor" and posed questions accordingly to market participants.[379] Notably that Eirgrid/SONI consultation paper in 2017 had recognised the possibility of variation in ARHLs as between Ireland and Northern Ireland: *"The impact of* [IED] *limitations will depend on the unit's emissions abatement technology, operating license <u>and jurisdiction</u>."*

225. Following proposals and consultations, the SEMC decided[380] in June 2018, as to "*Run-Hour Limited Capacity*" that it would apply a voluntary "DECTOL" instead of ARHL De-Rating:

> *"3.4.20 From a capacity perspective, the SEM Committee consider it prudent to have de-rating factors which take account of the capacity contribution from capacity with run-hour limitations such as emission limitations.*
> *3.4.21 ………… The SEM Committee therefore consider it pertinent to introduce a voluntary downward adjustment, through the application of a DECTOL in the I-SEM Capacity Market. This downward adjustment would reflect an estimation of how emissions limits could reduce the unit's contribution to security of supply.*
> *3.4.22 A voluntary DECTOL would allow a unit to make an estimate of its expected run-hours in a particular year, accounting for any emissions restrictions, and adjust their exposure in the capacity market accordingly. Since run-hours are linked to a unit's bidding behaviour in the market, the unit owner will be best placed to estimate them.*
> *3.5.9 A voluntary decreasing tolerance (DECTOL) is to apply to generation with emission limitations or run-hour limitations (other than DSU and storage which have separate arrangements) and therefore the Capacity Market Code should be modified as soon as possible to bring this decision into effect."*

226. Significant here is the recitation, from Mid-2018, of the basic and constant logic underlying ARHL De-Rating – that ARHLs limit plant capacity such that allowing a Generator to bid for capacity while ignoring an ARHL tends to overstate real capacity. DECTOL was, in effect, a voluntary ARHL De-Rating Factor. It seems the SEMC hoped Generators would be incentivised to apply DECTOL in practice by their awareness that, in any event and by reason of other provisions of Capacity Contracts, if they proved unable to supply the capacity which they had contracted to supply, they would be subject to financial penalties. In practice, that proved to be a chance Generators were willing to take and they did not in fact use DECTOLs. As a result, Capacity Contracts were awarded to units which, it emerged, would be subject to 1,500-hour ARHLs – thereby tending to imperil their contracted contribution to security of supply.[381]

227. Notably in the context of allegations of a rushed decision and lack of consultation, it is undeniable that from June 2018 at latest and, in reality from mid-2017, market participants were aware of the potential de-rating issue thrown up by ARHLs and the SEMC were consulting them on

379 See generally §5.1 & §6 – Question F read: Do participants consider that a unit's run-hour limitations (due to emission restrictions or otherwise) should be reflected in the Capacity Market Auction? If so, what mechanisms should be applied. If not, please provide rationale.
380 SEMC Decision Paper (SEM-18-030) - Capacity Remuneration Mechanism (CRM) 2019/20 T-1 Capacity Auction Parameters and Enduring De-rating Methodology Decision Paper SEM-18-030 01 June 2018 - Tab 3 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
381 Affidavit #1 of John Melvin 17 November 2022.

the issue. EPUKI entered the market in 2019 and must have been similarly aware from that time at least.

June 2021 – the Possibility of ARHL De-Rating Revisited

228. In introducing DECTOL in 2018, the SEMC had indicated that it would keep the issue of ARHL De-Rating under review. The SEMC in April 2021 advised the market of a review of the issue and in June 2021 circulated a Consultation Paper.[382] It recorded that various legislation, including the IED, had *"the impact of potentially limiting the annual run-hours of a significant proportion of both existing and new fossil-fuelled capacity."* The SEMC noted its 2018 decision *"not to impose mandatory additional derating for emissions limited plant, but to allow market participants with emissions-limited plant, to voluntarily reduce the level of capacity they offer into the capacity auction to reflect the limitation on its run hours (applying .. DECTOL) …. However, this provision has rarely, if ever, been used." "New factors*" now prompted the SEMC to revisit the issue - primarily "*new evidence*" from the TSOs that a large proportion of the New Capacity, likely to bid for 10-Year Capacity Contracts to replace retiring older fossil-fuelled plant, is likely to be subject to 1,500-hour ARHLs in their IED Permits. So the SEMC reconsidered whether a purely voluntary DECTOL-based approach remained appropriate.

229. The SEMC was concerned that, failing "*immediate*" application of ARHL De-Rating, a security of supply risk could result. (Indeed, ARHL-limited OCGTs in Northern Ireland have already been awarded Capacity Contracts though not ARHL De-Rated, so the foreseen risk has eventuated.[383]) Accordingly, the TSOs wanted ARHL De-Rating. The SEMC considered that the objective of ARHL De-Rating should be to incentivise investment in technology not subject to ARHLs.

230. However the SEMC appreciated that time may have been too short to permit of such a change in then-forthcoming auctions and canvassed also applying a simpler "interim" ARHL derating factor to those auctions "*via an urgent modification*" even though it "*may not perfectly reflect a Capacity Market Unit's contribution to meeting demand during a scarcity event*". Clearly it's contemplation of such an imperfect interim solution speaks to the SEMC's view that the matter was even at that stage, in at least considerable degree, pressing – even urgent.

From July 2021 – including EPUKI Submission

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382 Information Note on the T-1 2022/23 Capacity Auction Volumes and Initial Auction Information Pack SEM-21-025 - Tab 4 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022; Capacity Remuneration Mechanism Annual Run Hours Limitation Deratings Factor Consultation Paper SEM-21-054 25 June 2021 - Tab 5 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
383 Affidavit #2 of John Melvin 15 December 2022 §39.

231. Notably in the context of allegations of a rushed decision and lack of consultation as to the Impugned De-Rating Decision made the following year, EPUKI in July 2021 responded to the June 2021 Consultation Paper on a confidential basis.[384] It opposed ARHL De-Rating in the short term but thought it might be possible to introduce it in the T-4 2025/26 auction. Indeed, EPUKI said in very general terms and subject to various concerns raised and observations made *"The proposed approach seems reasonable."* EPUKI considered that the 2017 BAT Conclusions had the effect,

> *"… that the operation of an OCGT … for greater than 1,500 hours per year would not represent BAT due to lower energy efficiency of such a unit compared to the operation of a ..CCGT .. This has been applied by the Environment Agency in the UK as a basis that all peaking plant[385] should not operate for more than 1,500 hours annually."*

Of some note given the present controversy, EPUKI was alive to the jurisdictional issue and thought it necessary to express its

> *"… understanding and expectation that the same permit condition would be applied in Northern Ireland and the Republic of Ireland."*

EPUKI went on to suggest that only CCGTs would avoid the imposition of ARHLs and if ARHL De-Rating was introduced for the T-4 2025/26 auction, it alone might not deliver new plant with unrestricted running hours (i.e. CCGTs). Robust analysis and further consultation would be needed on other changes to the Code to make it easier for investors to recover the higher costs of a CCGT and to deliver CCGT capacity. EPUKI stated:

> *"We do believe that with the appropriate incentives and design, and more timely consultation, it may be possible to successfully introduce this for the T-4 2025/26 auction."*

232. This document was clearly a considered and confidential response by EPUKI in July 2021 to the ARHL De-Rating issue. It clearly expressed the views that the operation of an OCGT for greater than 1,500 hours per year would not represent BAT and only CCGTs would avoid the imposition of ARHLs. That being so, it is striking that in either August or September 2021 it expressed the contrary view to NIEA in the Ballylumford PPC Permit review process.

233. While I will not record in detail all other responses to that June 2021 Consultation Paper, a very brief account of some will assist – not least in light of EPUKI's assertion of SEMC's failure to set out detail of "*industry concerns*" and its general allegations of inadequate consultation.[386]

- EirGrid/SONI shared the SEMC's concerns as to the "*serious impact*" of ARHLs on the SEM and advocated ARHL De-Rating.[387] They considered that if plants subject to ARHLs got Capacity

384 Tab 6 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
385 Including OCGTs.
386 They are at Tab 2 Exhibit "JM2" Affidavit #2 of John Melvin 15 December 2022.
387 The content here described was in their non-confidential response. EirGrid/SONI also submitted a confidential response which is exhibited but was not in the public domain in mid-2021. It is fair to say that it elaborated on the themes of the open response.

Contracts in the absence of ARHL De-Rating, the reliability of contracted capacity would be overstated. That would have broader implications for system security and undermine Capacity Market function. They also recognised the need to ensure continued investment in generation plants. But they suggested that the detail (including the degree of de-rating) required careful consideration and consultation, pending which it should be deferred.

- Energia[388] considered that proliferation of ARHL plant would be a serious concern for various identified reasons. It supported ARHL De-Rating as "essential" as conducing to security of supply and creating a level playing field as between generation plants as reflecting their respective real capacities. It considered the issues especially important as to Capacity Contracts "locked in" for 10 years. It too considered that clarification of important issues remained outstanding.

- Bord Gáis[389] replied to the SEMC suggesting immediate ARHL De-Rating to signal seriousness as to moving to low-emission technologies.

- ESBGT considered that the BAT Conclusions did not require ARHLs and so opposed both ARHLs and ARHL De-Rating. It advocated DECTOL on the basis that generators would be accountable for commercial risk.[390] In any event, it suggested deferral of ARHL De-Rating pending further careful and detailed consideration and consultation. It sought SEMC clarification on the BAT origins of the 1,500-hour ARHL and observed that the implementation by the EPA of the 2017 BAT Conclusions in IELs is "not yet known". It advocated SEMC[391] review of BAT requirements with the EPA pursuant to the CRU/EPA "MoU".[392]

- Bord na Mona[393] replied to the SEMC in generally similar terms – including complaining of lack of clarity as to BAT requirements.

- SSE[394] was less clearly opposed in principle to ARHL De-Rating but considered that much greater detail was required.

234. Generally, these responses:

- queried the application of ARHLs by the EPA.
- asserted deficiencies in belated and truncated consultation and in evidence and analysis justifying ARHL De-Rating.
- feared ARHL De-Rating would undermine prospects of investment in generation plant.

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388 A Generator. However generators are not an homogenous group. Notably, their interests will differ according to their particular portfolios of generating capacity. For example, a wind farm operator will have different interests than will a CCGT operator.
389 A Generator.
390 i.e. that they would be penalised for failure to meet capacity obligations.
391 The reference was in fact to the CRU.
392 The EPUKI and EPA submissions refer to a Memorandum of Understanding between the EPA and the CRU. I have not seen this document. I am told a link to it can be found in the Exhibit "JM2" Affidavit #2 of John Melvin 15 December 2022 but I have failed to find it. In any event it is not exhibited. The EPA records that the MoU is explicitly non-binding. I accept that it cannot create justiciable public law duties. I need consider it no further.
393 A Generator.
394 A Generator.

The SEMC says that similar queries arose at general bilateral meetings with potential investors.[395]

235. In August 2021, the SEMC

- decided against ARHL De-Rating pending further consideration and consultation with a view to a *"solution to this problem in time for the T-4 25/26 Auction."* [396]
- issued a consultation paper on the T-4 2025/26 Capacity Auction Parameters (SEM-21-059).[397]

236. Two months later, in October 2021, the SEMC issued a 2021 Parameters Decision[398] as to that T-4 2025/26 Auction in which it responded and decided on matters raised in both the June 2021 consultation paper[399] - to which EPUKI had replied[400] - and the August 2021 Parameters consultation paper.[401] The 2021 Parameters Decision recorded both the responses on the ARHL De-Rating issue and its decision against introducing them for the T-4 2025/26 Auction. The SEMC later identified its position in October 2021 as having decided against applying ARHL De-Rating at that time – *"preferring to allow investors to judge the risk of over-promising a run-hour commitment themselves, noting the higher exposure to difference payments[402] that might flow from imposition of limits to annual run hours".*[403]

237. In light of the history to this point I cannot but accept the SEMC's submission that when it came in 2022 ARHL De-Rating came as absolutely no surprise. It had long-since been on the cards and the basic rationale for it had long-since been well-understood by all concerned.

238. As recorded above, the NIUR and NIEA[404] met on 3 September 2021.[405] The NIUR noted the prospect that considerable new ARHL-limited capacity[406] would seek to participate in forthcoming Capacity Auctions. The SEMC's options in responding to that prospect could add large costs to consumers or deter new capacity from entering the market, exacerbating an expected capacity shortfall.

395 These were meetings with a broad agenda and were not minuted. No doubt has been cast on this assertion.
396 This decision issued in a matter in which it had issued a consultation paper in February 2021 but it cited the more recent consultation as to ARHL De-Rating described above - Capacity Remuneration Mechanism 2024/25 T-3 Capacity Auction Parameters Decision Paper SEM-21-058 03 August 2021. Tab 7 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
397 Cited in Decision SEM-21-079 of 1 October 2021, described below.
398 Capacity Remuneration Mechanism, 2025/26 T-4 Capacity Auction Parameters & Annual Run Hour Limited Plants Decision Paper SEM-21-079, 01 October 2021 - Tab 8 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
399 Capacity Remuneration Mechanism Annual Run Hours Limitation Deratings Factor Consultation Paper SEM-21-054 25 June 2021 - Tab 5 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
400 Tab 6 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
401 SEM-21-059.
402 Where the wholesale market price for electricity received by a Capacity Contractor exceeds a "strike price" set monthly pursuant to its Capacity Contact, the generator must repay the excess – the "difference" – by way of "difference charges" in accordance with the Trading and Settlement Code which governs such matters. The increased exposure cited here arises as where, say by reason of an ARHL, a Capacity Contractor is unable to meet its capacity commitments at a specific time, it may have to pay "non-performance difference charges". Though those non-performance difference charges for such a period will be much less than the Capacity Payments for that period and so, predictably, investors were not deterred from over-promising capacity.– See Day 3 p82 et seq.& p91, 92
403 Capacity Remuneration Mechanism T-4 2026/27 Capacity Auction Parameters Consultation Paper SEM-22-015 10 May 2022 - Tab 9 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
404 Sub nom DAERA - Department of Agriculture, Environment and Rural Affairs. The NIEA is an executive agency within DAERA.
405 Formal minutes are not to hand but the NUIR notes are. Core Book 8.
406 2 Gigawatts.

- The NIEA said it was operating under GB[407] guidance on the 2017 CID which had responded to GB issues with OCGTs being built in preference to more efficient capacity. The NIEA intended to encourage only the most electrically efficient plant - so any open cycle plant would be ARHL-limited to 1,500 hours.
- The NUIR said the SEM, as compared to GB, was a small market with limited interconnectivity.[408] ARHLs could inhibit growth in intermittent renewable generation due to loss of flexibility. Also, GB guidance would not apply in Ireland - there could be "*jurisdictional differences in the treatment of open cycle capacity*".
- The NIEA agreed to consider this further and suggested its interpretation[409] could be reviewed in light of growing concern on the part of SONI, NIUR and others. The NIEA and NUIR agreed the high importance of ongoing engagement in collaboration with counterparts in Ireland.[410] (This implies liaison with, at least, the EPA).

As recorded above, EPUKI relies on this note as demonstrating – and I accept it does so - the knowledge of the NUIR – and by implication the SEMC, CRU and EPA – of

- the NIEA's interpretation of the 2017 CID (BAT 40) (or at least the GB Guidance) and its intention that all OCGTs would be ARHL-limited to 1,500 hours.
- the possibility of jurisdictional differences, as between the EPA and NIEA, in the treatment of OCGTs and the importance of liaison with the EPA in that regard.

<u>SEMC Information Note of 7 December 2021 & Comment Thereon</u>

239. Significantly, and as recorded above, the SEMC issued a brief "*Information Note regarding the Application of Annual Run Hour Limits*" dated 7 December 2021 ("the SEMC Information Note").[411] It was explicitly prompted by SEMC concerns that investors' uncertainty as to how ARHLs would be applied in Ireland might deter participation in Capacity Auctions.

240. The Note briefly recites the history of the SEMC's consideration of ARHL De-Rating in terms going back to April 2021, which recitation market participants such as EPUKI can only have recognised as referring to the history I have recounted above. The SEMC recites that throughout that process and given its concerns it[412] had engaged with the EPA and NIEA and would continue to do so.[413] It continues:

> *"In the context of upcoming capacity auctions, which will seek to secure significant volumes of new capacity, <u>in particular in Ireland</u>, this note seeks to clarify an issue relating to the*

407 Great Britain.
408 i.e. to off-island supply.
409 i.e. of 2017 CID requirements.
410 There was also reference to the Ballylumford licence review then current and to possibilities of units exceeding ARHLs in exceptional circumstances.
411 SEM-21-107 - Tab 3 to Exhibit "JC1" - Affidavit of James Crankshaw Affirmed 11 October 2022.
412 Correctly, the Regulatory Authorities, CRU & NIUR, but it amounts to the SEMC.
413 See also Affidavit #1 of John Melvin §121 et seq.

> *interpretation of the efficiency requirements for large combustion plant (LCP) as set out in the … (BAT) Conclusions …"*

241. I observe that the words "*in particular in Ireland*", following the reference to liaison with the EPA and the NEA, clearly suggest to the alert and expert market participant such as EPUKI that the position specifically of the EPA was engaged. There follows a brief description of BAT 12 and BAT 40 as to energy efficiency and then the following appears:

> *"The SEM Committee wish to clarify that the EPA have confirmed that with regards to licencing processes in Ireland, technologies other than a Combined Cycle Gas Turbine (CCGT) can be compliant with the BAT Conclusions for LCP without being subject to an ARHL of 1,500 hours.*
>
> *The RAs will continue to engage with the EPA and NIEA, however, it is recommended that prospective developers contact the relevant Environmental Agency in the applicable jurisdiction for any further information in relation to this matter."*

The Information Note states clearly not merely that the EPA is understood to consider it possible to permit an OCGT to exceed 1,500 hours but that it considers that such a position can be BAT-compliant – that it may be that no derogation from BAT or ELVs is required.

242. EPUKI criticises this Information Note as failing to disclose the EPA's intentions as to the application of ARHLs to OCGTs and that they differed from those of the NIEA. It alleges[414] against the SEMC a *"failure to be transparent as to the known 'jurisdictional differences'"*. I cannot accept EPUKI's criticism – which approached an assertion of non-disclosure by SEMC. I do not accept that criticism either in terms of the information the Information Note conveyed to EPUKI or in terms of that conveyed to the market generally.

- First, the SEM is not a consumer market but is one composed of highly sophisticated, well-resourced and expert participants well-able to understand what they are being told and to do so with ready access to highly expert advice in multiple disciplines and against a very considerable background of consultation on, consideration of and disagreement as to, ARHLs and ARHL De-Rating stretching back to 2017. EPUKI is such a participant.

- Second, the explicit purpose of the SEMC was to draw attention to the issues of ARHLs and ARHL De-Rating and the prospect of both being imposed on plants other than CCGTs. That must have been understood as at least including OCGTs.

- Third, and as stated, the words *"in particular in Ireland,"* conveyed that an issue specific to Ireland, and so at least possibly contrasting with that in Northern Ireland, had arisen.

414 EPUKI Submissions 21 December 2022

- Fourth, market participants are explicitly "*recommended*" to consult both the EPA and the NIEA as to "*any further information*". This conveys that there may well be further and significant information to be had and that market participants are advised to go and get it. Indeed, EPUKI's criticisms of the Note as unclear tend to confirm the point.

- Fifth, as to the issue of transparency, there is no evidence that the SEMC knew anything of substance more of the EPA's position than its Information Note states. It is simply not open to me to find, or even to EPUKI to assert that it did know more. And, while my conclusion does not depend on it, it seems reasonable to infer that the SEMC may well, and prudently, have considered that, rather than proffering a more detailed, but necessarily second-hand, account of its understanding of the EPA's position, it would be safer to have market participants get that position direct from the horse's mouth.

- Sixth, in considering what would have been understood, by the market generally and by EPUKI specifically, of the significance of the SEMC Information Note, and remembering that IELs and PPC Permits are public documents and are no doubt monitored by market participants, it bears recollection that by August 2021 EPUKI had had and was responding to a draft PPC Permit which envisaged an ARHL for its Ballylumford CCGT when operating in OCGT mode and that ARHL took effect in October 2021. By that time EPUKI says it had accepted that OCGTs would be subject to ARHLs.[415] In alleged contrast, in October 2021 the EPA had decided to issue and in November 2021 had issued an IEL to the ESB for an OCGT in Corduff Road, Dublin without applying any ARHL.[416] On EPUKI's case, that IEL can only have illuminated what it says is the difference in approach as between the NIEA and the EPA and the SEMC Information Note of December 2021 must have been understood in that context.

- Seventh, leaving aside the Corduff Road IEL, EPUKI was perfectly well-placed to draw the contrast between its Ballylumford PPC Permit and the knowledge it had derived from that process of the view taken by the NIEA on the one hand and, on the other hand, the position of the EPA as described in the SEMC Information Note of 7 December 2021. That contrast easily sufficed to inform adequately inform EPUKI of at least the significant possibility of difference in approach as between the NIEA and the EPA.

  If they did not advert to it, they should have. In this respect I agree with the SEMC. Relief in judicial review is ultimately discretionary. I would not quash its Impugned Decision on grounds of inadequate consultation by reference to the alleged absence of information about the position in Northern Ireland at the instance of a party which knew exactly what the position in Northern Ireland was.

- Eighth and to the extent that EPUKI considered the SEMC's Information Note as "unclear" as to the EPA's position on a manifestly important issue, while it did make a fairly non-expeditious attempt to ascertain the position from the EPA, it took no steps whatsoever to ask the SEMC to

415 Tab 2.6 to Exhibit "2JC1" - Second Affidavit of James Crankshaw 2022/859 JR (EPA) – Core Book 7.
416 Tab 2 to Exhibit "JC1" - Grounding Affidavits of James Crankshaw in both claims 11 October 2022.

itself clarify the matter or to get the EPA to clarify the matter or even to point out the lack of clarity to the SEMC, until its submission of 22 June 2022 – 6 months later.

- Ninth, and regardless whether any divergence of approach between the EPA and NIEA was relevant to any relevant SEMC Decision – especially by way of discrimination between OCGTs north and south - if EPUKI thought it relevant it had ample opportunity from December 2021, which it failed to take, to make its views known to the SEMC - including in the two written submissions it made and the workgroup it attended - all prior to the Impugned Code Modification Decision.

243. Pleadings apart, I see no basis in substance for EPUKI's criticism of this SEMC Information Note of December 2021 or any assertion that it represented some form of inadequate disclosure to or consultation with the market or lack of transparency as to the prospect of difference of approach as between the EPA and the NIEA regarding the imposition of ARHLs on OCGTs. In my view the SEMC Information Note, was perfectly adequate to its explicit purposes of alerting expert market participants to

- the general view of the EPA of its possible bearing on ARHL De-Rating,
- that it was "*particular to Ireland"* and
- that market participants should investigate further with the EPA and the NIEA.

I frankly see EPUKI's criticism of the Information Note as contrived.

244. I also see as justified the observation by counsel for the CRU that it is remarkable that it was at the trial that EPUKI, though still complaining of lack of detail, for the first time actually agreed that the EPA' position, as described in the Information Note of 7 December 2021, is correct: that technologies other than CCGT can comply with the CID BAT Conclusions without having ARHLs of 1,500 hours.

245. Counsel is also correct in saying that EPUKI got no leave to complain of deficient consultation by way of the Information Note of 7 December 2021. Given my substantive view as just expressed, I need not rule on that. I will say that I would have been disposed in EPUKI's favour on that point given the SEMC's invocation of the history of the matter in response to the Consultation Ground and given Mr Crankshaw's first, Grounding, affidavit cited AECOM's seeking clarity as to the Information Note of 7 December 2021.

246. There followed AECOM's consultation with the EPA which I have described above as culminating in the EPA's Impugned E-Mail of 17 July 2022[417] advising that it would apply to IEL applications an interpretation of BAT 40 as allowing that OCGTs can be operated for more than 1,500 hours per year if they meet the BAT AEEL of 36 – 41.5% Net Electrical Efficiency. I have already

417 Tab 4 to Exhibit "JC1" - Grounding Affidavits of James Crankshaw in both claims 11 October 2022- Core Book 14.

described the failure of EPUKI to follow up their enquiries in that regard in a timely manner or to suggest to the EPA that its interpretation was incorrect.

<u>From May 2022 - Decision to Impose ARHL Derating – 2 Decisions & Code Modification</u>

SEMC Parameters Consultation Paper & EirGrid/SONI Information Paper – May 2022

247. On 10 May 2022 the SEMC issued a Parameters Consultation Paper with a view to the T-4 2026/27 Capacity Auction.[418] It included "*New Proposals regarding Annual Run-Hour Limited Plant*" - citing the background of its earlier decisions not to impose ARHL De-Rating. It refers to, but does not give detail of, liaison in depth since then with, inter alia, the EPA and the NIEA. It refers to its consideration of the decisions and bidding behaviours of owners of ARHL-affected plant in capacity auctions to date. The SEMC considered that there was now an increased likelihood of ARHLs impacting on security of supply[419] and a need to ensure that that the value such plants bring to the system, as compared to 'all-year' units, is more directly reflected in auctions. The SEMC proposed that Generators, in Qualification applications, must declare the Applicant's expectation as to ARHLs[420] and such declarations would result in the application of an ARHL De-Rating Factor ("ARHLdf") limiting the capacity for which the Generator could bid.[421] The SEMC proposed that the System Operator[422] would check the accuracy of those declarations – but at "Substantial Completion" stage (i.e. shortly before the start of the relevant Capacity Year and after the New Capacity had been built). At that point, and if the declarations proved to have been incorrect, the Capacity Contract might be terminated. For 1,500-hour ARHLs the proposed ARHLdf was 0.43. Feedback was sought.

248. In the example given earlier of an OCGT rated at 300MW, de-rated by the Standard De-Rating factor to 259.5MW, the proposed ARHLdf would further de-rate the OCGT to around 111.6MW.[423] On that basis its owner could bid only for that 111.6MW and recover Capacity Payments of 57% of those recoverable absent the ARHLdf.

249. As part of that consultation, on 16 May 2022 EirGrid/SONI – the TSOs - circulated an Information Paper in the market.[424] It expressed concern that capacity might not come forward in upcoming Capacity Auctions sufficient to address the short- to medium-term Capacity shortfall which had been identified. This was, in part, as some plant may "*now or in the future*" be subject to

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418 Capacity Remuneration Mechanism T-4 2026/27 Capacity Auction Parameters Consultation Paper SEM-22-015 10 May 2022 Tab 9 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022. Core Book 12.
419 Not put exactly that way but clearly the meaning.
420 The word "warrant" is used in the consultation paper but has caused some unnecessary confusion and I will not use it.
421 On that proposal, the de-rated capacity of a plant for the purposes of the Auction would be: Nameplate Capacity x Standard De-Rating Factor x ARHL De-Rating Factor.
422 EirGrid/SONI.
423 259.5 x 0.43.
424 Interim Solution for Capacity Market marginal de-rating Factors Information paper to SEMC 16 May 2022 - Tab 10 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022. It was addressed to SEMC but its circulation was confirmed by the parties at trial. D3 p91.

ARHLs. Such units *"cannot contribute in the same way to capacity adequacy as units that can run continuously throughout the year, especially when there are significant volumes of such units on the system".* It suggested that, in a market the size of the SEM, there is a relatively low *"saturation point*" for units with ARHLs. It essentially repeats many of the concerns described above.[425] It cites:

- the BAT Conclusions - to the effect that if new gas turbines can't meet its minimum efficiency targets and emission limits they will be subject to 1,500-hour ARHLs.
- the December 2021 Information Note - as having highlighted the position of the EPA that technologies in addition to CCGTs can comply with BAT requirements without ARHLs.[426]
- expert advice[427] that only 6 existing OCGTs could comply with BAT and then only in limited circumstances.[428]
- licensing experience had already shown, of gas turbines which had been awarded Capacity Contracts, that the ability to comply with BAT did not necessarily imply that ARHLs would not apply. Some existing gas turbines already had ARHLs "*based on planning and BAT issues*".

250. While EPUKI assert that, in this Information Paper of 16 May 2022, EirGrid/SONI deduced more from the SEMC Information Paper of December 2022 as to the EPA's position than EPUKI had deduced, and leaving aside what EPUKI ought to have deduced from that and other information available to it at any point in time, it is quite clear that from mid-May 2022 and before it made its submission of 22 June 2022, EPUKI was aware that at least EirGrid/SONI – the System Operators – had deduced the EPA's position as being that technologies in addition to CCGTs can be BAT-compliant without ARHLs and that OCGTs would be in difficulties in that regard.

251. EirGrid /SONI advocate ARHL De-Rating - concluding that:

> *"Without a change in the respective incentives and (with[429]) the continued use of the same de-rating factors irrespective of run hour limitations, there are two possible scenarios:*
> *• either we risk capacity adequacy issues as some units are not permitted to operate due to the emissions limits; or*
> *• we procure large volumes of run hour restricted units, at a significant cost to consumers, which is an inefficient way for delivering security of supply."*

It proposed, in effect, the same ARHLdf, for new OCGTs only, as that which the SEMC had suggested in its Parameters Consultation Paper and supplied a detailed and quantified justification of them.[430]

EPUKI Response in Parameters Consultation - 22 June 2022.

425 And adds some.
426 See Annex A of the SEMC Information Note for this and following information.
427 Jacobs, engineering consultants.
428 Only at higher generation levels (approximately 70% load and above).
429 Word not used but clearly intended.
430 Which I do not pretend, or need, to understand. But see also the Affidavit #1 of John Melvin 17 November 2022 §64 et seq.

252. Significantly, EPUKI made a confidential submission dated 22 June 2022 to SEMC in that consultation.[431] I have referred to this document in certain respects already. In some contrast to its position in these proceedings, EPUKI was, as recently as that time, "*strongly opposed to the proposals to apply*" any ARHL de-rating – inter alia as "*representing a distortion in the market in favour of particular technologies, especially CCGTs*". ARHLs would "*result in a significant revenue reduction for OCGTs thus creating an uneven playing field between OCGTs and CCGTs*". These and other changes would "*hurt investment confidence in the SEM*" and signal OCGT operators to exit the Capacity Market to the detriment of availability of flexible peaking plant to *"'fill the gaps' when the 'sun doesn't shine and the wind doesn't blow'".* Failing very large Auction Price Cap increases - inversely proportional to ARHLdfs – it was *"unclear whether new (OCGTs) will bid into the CRM, given they will be unable to recover their costs."* This would in turn be to the detriment of security of supply, of which there is already a shortfall. EPUKI considered that security of supply would be better addressed by securing new peaking units[432] in the long-term - an approach *"significantly more flexible than the development of new CCGTs".* That asserted flexibility compared to CCGTs and its advantages in facilitating renewable generation is set out in some detail. EPUKI also complains that use of ARHL De-Rating to encourage particular market outcomes envisaged in the consultation paper, rather than to reflect technical performance, would distort the market. The submission then addresses other changes to the Capacity Auction parameters which, it says, would be needed if it were decided to proceed with ARHL De-Rating despite its objections.

253. The SEMC suggests[433] that at that point EPUKI opposed what it saw as disincentivisation of OCGTs by ARHLs and ARHLdfs - whereas now it purports to advocate them: suggesting now that the absence of ARHLs and ARHLdfs will have the unsatisfactory and contradictory outcomes of

- incentivising developers to build low-efficiency OCGTs to operate for long durations in preference to more efficient CCGTs and to the detriment of the environment.
- rendering redundant the decision to implement additional ARHL De-Rating - as it is unclear to what technology it will apply in Ireland.

254. I can say at this point that the redundancy argument is clearly misconceived. First and rhetorically, if ARHL De-Rating is redundant why is EPUKI bothering to complain of it? Second, ARHL De-Rating clearly applies, even on EPUKI's own argument, to plants in Northern Ireland to PPC Permits of which ARHLs will be applied – whether or not ARHLs are applied in IELs granted to plants in Ireland. Third, it is clear that ARHL De-Rating will apply to any plant in Ireland, if any, in the IEL of which an ARHL is applied.

255. I have left out of the above account, in order to describe it discretely, EPUKI's submission of 22 June 2022 as to the position of the EPA. EPUKI complains in its submission of a lack of detail to support the statement in the December 2021 Information Note of the EPA's position – which could

431 Tab 11 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022 P203.
432 i.e. OCGTs.
433 Affidavit #1 of Robert Crankshaw §53 and the first Denison Report. See Affidavit #1 of John Melvin 17 November 2022 §70

not be "*relied upon by an investor in new capacity*". In its submission of 22 June 2022 it set out its position as follows:

> *"The 1,500 hours ARHL is an EU-wide requirement and, as such, it is unclear how the EPA would be able to reach a different position on its application. Breaching this requirement would be a breach of EU law …."*

and states:

> *"We have written to the EPA seeking clarification as to whether they have published a report to support the SEMC position and, if so, what their logic is to circumvent the clear EU direction."*

As I have pointed out earlier, this overstated what AECOM had in fact done.

Interestingly, EPUKI also asserts planning permission impediments to operating new OCGTs more than 1,500 hours a year.

256. I agree with counsel for the SEMC[434] that EPUKI's submission of 22 June 2022

- must be seen against the background of what it knew,
- did allege discrimination between OCGTS and CCGTS,
- but makes no complaint on the point at the heart of this judicial review - alleged discrimination between OCGTs in Ireland and Northern Ireland.

257. At least in general terms and to this point, EPUKI had had, and had availed of, legally adequate consultation opportunity both to investigate the EPA's position as to ARHLs and to make its own views known to the SEMC as to the prospect of ARHL De-Rating. If nothing else (and in my view, and for reasons given elsewhere in this judgment, there had been quite a bit else) the EirGrid/SONI Information Note of 16 May 2022 had flagged that issue. EPUKI also had had notice of both the ARHLdf of 0.43 proposed to be applied to OCGTs with 1,500-hour ARHLs and the reasoning behind it. And, in making its views known to the SEMC, EPUKI had clearly identified and objected to the prospect of differences in licensing application of ARHLs north and south of the Border. It had identified the prospect of what it considered illegal misapplication of BAT south of the Border by the EPA such as to fail to apply 1,500-hour ARHLs to OCGTs. Yet, in its response to the latter prospect in its submission of 22 June 2022, EPUKI did not include any assertion of the resultant anti-competitive market distortion or discrimination, as between Ireland and Northern Ireland, of the inevitability of which it now complains.

Parameters Decision of 11 August 2022 & Code Modification Proposal

434 Day 3 p93

258. The SEMC published a Parameters Decision of 11 August 2022[435] ("2022 Parameters Decision"), the express purposes of which included setting out the decision both:

- for the T-4 CY2026/27 Capacity Auction parameters[436] and
- for the enduring ARHL De-Dating methodology applicable to capacity auctions after the T-4 CY2026/27 auction,.

The SEMC clearly decided, inter alia:

- to apply ARHL De-Rating.
  - in the T-4 2026/27 Capacity Auction then scheduled for February 2023[437] (now scheduled for March 2023[438]) and
  - in auctions thereafter.
- that an ARHLdf of 0.43 would be applied to New Capacity OCGTs with 1,500-hour ARHLs.
- in principle, to modify the Code accordingly.

The SEMC had considered the responses in consultation,[439] rejected the view that regulation was uncalled-for and explains its decision[440], inter alia:

- stating that it found it difficult to justify continuing DECTOL self-assessment given that since its introduction around 1200MW of New Capacity had been awarded that may be ARHL-limited.
- citing the implications of potentially locking in to 10-year contracts for New Capacity with ARHLs.

259. EPUKI says that the expectation of ARHLs, expressed in the May 2022 Consultation paper, the Eirgrid/SONI Information paper and in the ensuing parameters decision of 11 August 2022, contrasts with the SEMC's expectation that the EPA would not impose ARHLs on OCGTs - with no reasons given for what EPUKI considers a discrepancy. But no reasons challenge has been mounted in these proceedings. In any event the expectation is consistent with what EPUKI itself says is the position of the NIEA as to imposing ARHLs on OCGTs. So I see no discrepancy. Certainly, there is no discrepancy sufficient to invalidate the parameters decision of 11 August 2022, had it been challenged (which it has not) or had its reasons been formally impugned (which they have not been).

260. On foot of that 2022 Parameters Decision, the RAs on 12 August 2022 issued an urgent Modification Proposal proposing textual amendments of the Code, explaining and justifying it in terms essentially echoing the 2022 Parameters Decision[441] to implement ARHL De-Rating and in terms of the need to comply with and implement that Parameters Decision. The standard

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435 Single Electricity Market (SEM) Capacity Remuneration Mechanism 2026/27 T-4 Capacity Auction Parameters & Annual Run Hour Limited Plant De-Rating Factor Decision Paper SEM-22-044, 11 August 2022 - Tab 12 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022. Core Book Tab 16, See generally §1. Executive Summary and §6.6. It recites the responses to the consultation but omits EPUKI's response as it was confidential.

436 Decisions pursuant to Code §D.3.1.3 – for purposes of informing the content of the IAIP.

437 See generally p3-5. §77(b) of the Affidavit #1 of John Melvin 17 November 2022 could be read as suggesting that the application of ARHL De-Rating was again deferred but the Parameters Decision of 11 August 2022 clearly reveals that is not the case. Nor is such a proposition consistent with events thereafter, the ensuing Modification Decision SEM-22-051 and the urgency upon the basis of which this case was afforded an early trial. Though imprecisely expressed, §77(b) of the Affidavit refers to the SEMC decision to defer changing the method of calculating de-Rating Factors. In this regard see p6 of the Parameters Decision of 11 August 2022.

438 Affidavit #1 of John Melvin 17 November 2022 §103.

439 §5 Summary of Responses. Also Affidavit #1 of John Melvin 17 November 2022 §76.

440 §6.6.

441 Recited in the modification proposal as "10 August 2022" but no one has suggested anything turns on that difference.

Modification Proposal Form requires identification of the "*Implication of not implementing the Modification Proposal*". Non-compliance with the 2022 Parameters Decision was the first implication identified.

261. On 15 August 2022 the SEMC exercised its power under the Code[442] to deem the modification proposal urgent as proposed to deal with a matter of which it could reasonably be anticipated that it would imminently and unduly interfere with, disrupt, or threaten the proper operation of the Capacity Market. The SEMC adopted a fast track procedural timetable accordingly.[443]

262. A workshop[444] on the Modification Proposal ensued on 17 August 2022. It was attended by the CRU and the NUIR, by EirGrid and SONI and by 20 industry representatives. Notably, EPUKI attended.

263. On 18 August 2022, a short SEMC Code Modification Consultation Paper issued.[445] The SEMC correctly characterise it as consultation paper on the implementation of the De-Rating decision already taken and limited to the textual modifications of the Code required accordingly.

264. The Code Modification Consultation Paper recounted the discussion at the workshop[446] and some resultant textual changes to the draft Code Modification Proposal. It stated the SEMC's "*Minded to position*" as being *"to approve this revised proposal for implementation, subject to consideration of responses to this consultation"*[447] and welcomed further comment, allowing a 7-day consultation period to 25 August 2022 and envisaging a decision the following day. It stated:

> *"2.1.6 In order to comply with the SEM Committee decision of 11 August 2022, this proposal would need to be implemented for the forthcoming T-4 CY2026/27 Capacity Auction, and given the impacts on the calculation of de-rating curves, the Qualification process and the process to determine Substantial (or Minimum) Completion will be affected, would need to be implemented ahead of the publication of the Initial Auction Information Pack (IAIP).*
>
> *2.1.7 Failure to implement this proposal could lead to either the market incurring capacity adequacy issues, as some units are not permitted to operate due to the emissions limits; or the market procures large volumes of run hour restricted units to deliver the required "effective"*

442 §B.12.9.
443 SEM-22-051: Capacity Market Code Urgent Modification – CMC_11_22 Timetable - Tab 16 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022. §1.2.2 et seq & 1.2.12.
See also Capacity Market Code Urgent Working Group Modification Consultation Paper CMC_11_22 – De-rating for Annual Run Hour Limits SEM-22-055 18 August 2022 - Tab 17 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022. §1.2.2 et seq & 1.2.12.
Code §B.12.9 prescribes the procedure for Urgent Modifications.
444 Required by the Code.
445 Capacity Market Code Urgent Working Group Modification Consultation Paper CMC_11_22 – De-rating for Annual Run Hour Limits SEM-22-055 18 August 2022 - Tab 17 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
446 §2.1.9.
447 §2.1.30.

de-rated capacity, at a significant cost to consumers, which is an inefficient way for delivering security of supply."

265. 12 parties responded to that consultation – some in some detail. EPUKI responded by confidential letter dated 25 August 2022.[448] It objected to the classification of the Modification as urgent in the absence of an unexpected event or an emergency. It considered the need for the Modification for purposes of the T-4 2026/2027 Capacity Auction unexplained - as was why consultation could not have begun earlier. It objected to what it described as the resulting inadequate time for, and lack of meaningful opportunity for, consideration and consultation. The intention to decide a day after consultation closed suggested intent not to properly consider submissions in consultation. Failing extension of consultation time, it threatened legal recourse. EPUKI repeated its view that any ARHL De-Rating should be counterbalanced by an inversely proportional Auction Price Cap rise.

It did not complain that the introduction of ARHL De-Rating would cause unfair discrimination between OCGTs north and south – now its central complaint. Given all EPUKI had known and known for some time and given its present complaint, I do not understand why it did not make that complaint at that point and I do not accept that the shortness of the consultation period inhibited its doing so. A brief sentence or two would have made the point.

Impugned Code Modification Decision of 5 September 2022

266. In fact the resultant and impugned Code Modification Decision[449] was not made on the day after consultation ended but on 5 September 2022, 11 days afterwards. The SEMC avers[450], and is not contradicted and was not cross-examined on the point, that the delay was to give the SEMC more time to consider the responses in consultation and that it did consider them. Indeed the Modification decision records that consideration. I must hold that the SEMC did consider the responses in consultation such that even if, which I reject, it had evidenced an intention not to consider them, no prejudice resulted and the challenge in this aspect must be rejected: if needs be on discretionary grounds.

267. The Code Modification Decision:

a. recites the history of the matter, including the RAs' view that ARHL De-Rating was important to provide New Capacity with appropriate economic incentives to deliver capacity for the whole Capacity Year - to incentivise unrestricted run hour unit configurations.

448 Tab 9 Exhibit "JC1" Affidavit #1 of Robert Crankshaw 11 October 2022 - Tab 18 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
449 "Capacity Market Code Urgent Working Group Modification Decision Paper. WG26b CMC 11 22 — De-rating for Annual Run Hour Limits, SEM-22-063 5 September 2022" - Tab 7 to Exhibit "JC1" - Grounding Affidavits of James Crankshaw 11 October 2022 in both judicial reviews – Core Book Tab 19.
450 Affidavit #1 of John Melvin 17 November 2022 §89.

b. explained the purpose and the urgency of the matter – that the SEMC decision to implement ARHL De-Rating for New Capacity "*requires modification*" to the Code in time for the T-4 2026/27 Capacity Auction (to be held in Spring 2023), and hence before the issuing of IAIPs for that auction, rendered the Modification necessary to "*comply with the SEM Committee decision of 11 August 2022*".

c. records that failure to implement the decision of 11 August 2022 by this proposal could lead to either the market risking capacity adequacy issues, or the market procuring large volumes of run hour restricted units to deliver the required "effective" de-rated capacity, at a significant cost to consumers, which is an inefficient way for delivering security of supply.

d. records the varying views of 11 of the 12 consultees who responded (it did not record the content of EPUKI's confidential submission). Some supported the proposal; others not. It's fair to say that, at least in appreciable degree, these responses[451] revisited issues as to the principle of ARHL De-Rating as well as the technicalities of drafting the Code Modification. Complaints of inadequate consultation and failure to justify urgency are recorded.

e. responded to submissions[452] (including as to the urgency issue), made some drafting changes to the Modification[453] and noted that:

> *".. this Modification is designed to implement the existing Parameters Decision relating to annual run hour limits (SEM-22-044) for the CY2026/27 T-4 Auction and <u>changes to that decision are not within the scope of the Modification or this Decision</u>."*[454]
>
> *"… the Parameters Decision (SEM-22-044) on which the Modification is based is only attempting to manage the annual limits arising from the Industrial Emission Directive (and related legislation) …"*[455]

f. records that the RAs considered that imposing ARHL De-Rating on Existing Capacity at that time was not appropriate as it could lead to early exit of capacity at a time of capacity shortage given the current level of the Auction Price Cap.[456]

268. The obvious and net result of the foregoing, as here relevant, is that by ARHL De-Rating and for purposes of Capacity Auctions, the capacity of new OCGTs[457], if expected to be subject to ARHLs, is significantly decreased such that the capacity for which its operator may bid is significantly decreased.

451 Tab 20, Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
452 See generally §2.3.
453 See Affidavit #1 of John Melvin 17 November 2022 §91.
454 §2.3.2 – emphasis added.
455 §2.3.3.
456 The RAs anticipated ARHL De-Rating would apply to all combustion plant in the longer term.
457 i.e. not yet built.

269. The Code Modification, revised accordingly, was appended to the Code Modification Decision of 5 September 2022.[458] It suffices to note that the Code Modification[459] defines the ARHL of a power plant in terms of the "*expectation*" of the plant's ARHL "*given the applicable emissions legislation*"[460] as stated by the applicant for qualification for a Capacity Auction in its Qualification Data.[461] That datum consists not of an ARHL but of the applicant's expectation of any ARHL expected by it to be set in its IEL/PPC Permit.

The Code Modification & Rejection of Qualification Applications

270. All this inevitably requires an attempt in a Qualification Application to predict the future and to state an expectation as to ARHLs which may or may not be realised.[462] The EPA has a margin of appreciation and discretion and insists, correctly, that it takes individual decisions on specific IEL applications such that the terms of the resultant IELS may differ accordingly.

271. As noted earlier, Qualification Applications are rejected unless the System Operators[463] consider that Qualification Data provided is accurate.[464] Though the issue was not teased out in argument, it seems necessary that I take a view of this power of rejection as applicable to the ARHL issue. That is because – remembering the significant and legitimate interests at stake, from all perspectives, in the acceptance or rejection of a qualification application - it engages the issue of the degree of certitude required of Qualification Applicants and of the System Operators at this early stage of the Capacity Auction process and necessarily before an IED Permit will have issued as to new capacity, as to the prospect of any ARHL. It seems to me that that, as the Datum to be provided consists of an expectation, it should not be considered inaccurate unless the System Operators[465] consider that the expectation stated is not in truth the Applicant's expectation. That would not seem to justify rejection merely on the basis that the System Operators' do not share that expectation. It would seem at least very arguable that a qualification application should not be rejected on this account unless the System Operators reasonably took the view that mala fides or irrationality underlay the Applicant's statement of its expectation as to ARHLs.

272. EPUKI points out[466] that it must certify the accuracy of its Qualification Application[467] but as relevant here, what it is certifying is not that an ARHL will or will or not apply but its expectation in

458 The Code Modification thus revised and approved was not exhibited – earlier drafts were. A copy of the revised and approved Code Modification was submitted to me by agreement.
459 Adding §C.3.8 to the Code
460 §C.3.8.1 & C.3.8.4 - That is not the wording of the Modification but accurately describes its effect for present purposes.
461 Modification to Code Appendix D, 4(m).
462 As Niels Bohr, Yogi Berra, and doubtless others, are said to have said: "Prediction is very difficult, especially if it's about the future."
463 i.e. EirGrid & SONI
464 Code §E.7.5.1
465 i.e. EirGrid & SONI
466 Day 3 p142
467 Code Appendix D §6

that regard “*having made all due and careful enquiry and to the best of the knowledge, information and belief*”. Its certification of its expectation could be interrogated in view of its obligation also to certify its “*good-faith intention to offer the capacity to be Qualified into the relevant Capacity Auction*”. But, if anything, that avails EPUKI in demonstrating that what is required of it is only a good faith expression of its expectation “*having made all due and careful enquiry and to the best of the knowledge, information and belief*”. It can hardly complain of such a requirement. It can certify its expectation based on what it bona fide foresees, as a matter of fact, that the EPA and/or NIEA will do as to the imposition of ARHLs on OCGTs. Which may be different, it can certify its expectation based on its view of the law, no doubt based on expert advice in that regard, and judicially review what it considers any non-complaint IED Permit. It seems very unlikely that certification on either such basis could be perilous to EPUJI or its officers as to the validity of such certification.

273. To a greater or lesser degree, reliance on intending bidders’ expectations of ARHLs not yet known[468] necessarily implies risk that events will not, in due course, bear out that expectation. The SEMC considers that capacity providers, not consumers, should bear that risk. Whether that risk allocation is a realistic approach or right on its merits is not for the court to decide. Whether and with what effect it is likely to discourage Generators from investing in energy plants and from bidding in Capacity Auctions is not for the Court to decide. These are matters for the expert judgment of the SEMC. It’s judgments may prove counter-productive or they may not. EPUKI’s dislike of that risk allocation, as allegedly discouraging investors, seems to me to underlie, at least in part, its case against the SEMC. That risk allocation does not strike me as in any degree irrational or otherwise illegal.

SEMC Commentary

274. I have already described EPUKI’s essential criticisms of the SEMC’s impugned Code Modification decision. It will assist to summarise here the SEMC response. The SEMC asserts[469], of the sequence of events from May 2022, that:

a. EPUKI has chosen to impugn the Code Modification Decision of 5 September 2022. It has not impugned the 2022 Parameters Decision which was the substantive decision to impose ARHL De-Rating.

b. The primary reason for introducing ARHL De-Rating was real concerns about capacity adequacy and security of supply. It aimed to reduce the risk that an excessive level of new Capacity would be awarded to ARHL-limited units constrained in their ability to support capacity adequacy and security of supply.[470] The validity of that reasoning is not in issue given EPUKI accepts the principle of ARHL De-Rating.

468 i.e. as to plants not yet built and not yet awarded an IEL/PPC Permit.
469 Affidavit #1 of John Melvin 17 November 2022 §92 et seq.
470 See also Affidavit #1 of John Melvin 17 November 2022 §119.

c. There was an adequate evidential and reasoned basis for the introduction of ARHL De-Rating. I accept that was so. So does EPUKI. [471]

d. The SEMC did not in the 2022 Parameters Decision or the Impugned Code Modification Decision of 5 September 2022 adopt or endorse any particular interpretation of BAT 12 or BAT 40. Its Information Note of 7 December 2021 stated its understanding of the EPA's position in that regard – not a position of its own.[472] I accept that is so.

e. The SEMC did not, as EPUKI alleges and Mr Melvin disputes[473], by its Information Note of December 2021, acknowledge that it adopted (or would adopt) ARHL De-Rating "*on the basis of the EPA's approach to OCGTS*". I accept the SEMC's position. The SEMC Information Note says nothing to that effect. Indeed, the EPUKI position is entirely illogical. The EPA's position of not imposing ARHLs, if as EPUKI depicts it and on the logic of ARHL De-Rating, did not even remotely suggest ARHL De-Rating. It would render ARHL De-Rating a non-issue at least as to the Irish plants for the IED Permitting of which the EPA is responsible. As EPUKI depicts it and on the logic of ARHL De-Rating, it was the NIEA's position of imposing ARHLs which rendered ARHL De-Rating desirable.

f. Whatever the correct view of BAT 12 or BAT 40 may be, there is no reason to infer that the SEMC would have reached a different decision regarding the introduction of ARHL De-Rating.[474] I understand this to mean that it is the mere fact of ARHL, whatever the unit it applies to, that imperils security of supply and justifies ARHL De-Rating.

g. The 2022 Parameters Decision and the Impugned Code Modification Decision of 5 September 2022 apply without discrimination to all units subjected by the respective environmental regulators to ARHLs. Though the point is not made in precisely those terms, it clearly is that, as I have said, the SEMC is an "ARHL-Taker" and applies ARHL De-Rating without discrimination to all New Capacity subject to ARHLs, irrespective of how or why or where those ARHLs arise.[475] In particular, ARHL De-Rating applies uniformly north and south of the Border - it makes no distinction between units in Ireland and in Northern Ireland on the basis that they lie, respectively, in Ireland and in Northern Ireland.

h. The SEMC emphasises[476] and I accept that after the 2022 Parameters Decision to implement ARHL De-Rating and adopting the ARHLdf of 0.43%, the purpose of the further consultation and decision to effect the necessary urgent Code Modifications was merely to give formal

471 As recorded above - Affidavit #2 of James Crankshaw 1 December 2022 – CRU Case §23. Affidavit #2 of James Melvin 15 December 2022 §5 et seq – CRU Case. EPUKI does not dispute (as he says it is irrelevant) that
"there is a benefit in adopting ARHL De-Rating".
"there was sufficient material before the SEMC to support the introduction of ARHL De-Rating" and "good reasons to introduce de-rating".
"in general, ARHL De-Rating is considered to promote the CRU's objectives".
472 Affidavit #1 of John Melvin 17 November 2022 §124 et seq.
473 Affidavit #1 of John Melvin 17 November 2022 §126 et seq.
474 Affidavit #1 of John Melvin 17 November 2022 §120.
475 See also Affidavit #1 of John Melvin 17 November 2022 §114 et seq.
476 Affidavit #1 of John Melvin 17 November 2022 §84.

documentary effect to the Parameters Decision with a view to issuing the T-4 2026/27 IAIP within three to four weeks.[477]

i. Accordingly, the Modification Consultation was not to consider whether ARHL De-Rating should be applied - nor even the ARHLdf of 0.43%. Those decisions had already been taken on 11 August 2022 after legally adequate consultation not challenged in these proceedings. The Modification Consultation was merely to consider how precisely ARHL De-Rating should be applied in textual amendment of the Code.[478] Essentially, it was a drafting question, though no doubt important drafting issues could arise.

j. The short consultation period allowed as to the Modification Proposal was adequate - both given that the substantive decision had already been made taken on 11 August 2022 after adequate consultation and given the essentially technical/drafting content of the subsequent Code Modification Decision.

k. Quashing the Impugned Code Modification Decision of 5 September 2022 would leave un<u>a</u>ffected the 2022 Parameters Decision whereby the SEMC decided to apply ARHL De-Rating in the T-4 2026/27 Capacity Auction. That may be technically true - but as the Modification Decision itself states, it would leave the Parameters Decision un<u>e</u>ffected.

l. The SEMC did not in the ARHL De-Rating Decisions,[479] fail in its duty under S.9BC(2) ERA 1999 to carry out its functions in the manner which it considers is best calculated to further the principal objective, set by S.9BC(1) ERA 1999, to protect the interests of electricity consumers in Ireland and Northern Ireland "*by promoting effective competition*" in the sale or purchase of electricity through the SEM having regard to considerations listed in S.9BC(2).[480] The SEMC say ARHL De-Rating promotes effective competition by ensuring that auction parameters better reflect participants' real contributions to capacity adequacy.

In my view, the phrase "*in the manner which it considers is best calculated to further the principal objective*" invokes the judgment and discretion of the SEMC as to what serves to promote such competition. Many may disagree with its decision but it is illegal only if irrational as "*fundamentally at variance with reason and common sense*" - see **Keegan**[481] - and I see no basis for such a finding.

477 §1. Executive Summary.
478 Affidavit #1 of John Melvin 17 November 2022 §84.
479 i.e. the 2022 Parameters Decision and the Code Modification Decision.
480 (a) the need to secure that all reasonable demands for electricity in the State and Northern Ireland are met,
(b) the need to secure that authorised persons are able to finance the activities which are the subject of conditions or obligations imposed by or under this Act or the Internal Market Regulations or any corresponding provision of the law of Northern Ireland,
(c) the need to secure that the functions of the Minister, the Commission, the Authority, and the Department in relation to the Single Electricity Market are exercised in a co-ordinated manner,
(d) the need to ensure transparent pricing in the Single Electricity Market, and
(e) the need to avoid unfair discrimination between consumers in the State and consumers in Northern Ireland.
481 The State (Keegan) v Stardust Compensation Tribunal [1986] I.R. 642.

275. EPUKI reject the allegation that it has failed to challenge the decision to which it in truth objects. It says[482] that for ARHL De-Rating to apply in the Capacity Auction, the Capacity Market Code had to be modified. It says that absent Modification of the Code, De-Rating would not apply in the auction and so it was the Modification Decision of 5 September 2022 that affected EPUKI and has been challenged.

T-4 2026/27 Capacity Auction & EPUKI Qualification

276. EirGrid/SONI issued the IAIP[483] and Timetable[484] for the 2026/2027 T-4 Capacity Auction on 8 September 2022. This started the 2026/2027 T-4 Capacity Auction process and it was based, inter alia, on ARHL De-Rating. The IAIP, in accordance with the then-recent SEMC decisions, set an ARHLdf of 0.43 for new gas turbines (in effect OCGTs) with ARHLs of *"> 500 ≤ 1500 hours*".[485] The closing date for qualification applications was 6 October 2022. These applications will have been informed, in greater or lesser degree, by the prospect of ARHL De-Rating.

277. EPUKI made qualification applications for the 2026/2027 T-4 Capacity Auction without prejudice to its position, which it articulated in some detail in its qualification application, as to the invalidity of the decisions impugned in these proceedings.[486] It submitted two units in Ireland as "CCGT or OCGT" and one CCGT in Northern Ireland. It assumed no ARHL De-Rating of any of them. The assumed absence of ARHL De-Rating in Ireland enabled[487] it to defer its choice as between CCGT and OCGT in Ireland. Because of assumed ARHL De-Rating of OCGTs but not CCGTs in Northern Ireland, and the consequent need to estimate ARHLdfs, it had to decide as between OCGTs and CCGTs in Northern Ireland and had to do so before having sight of the FAIP[488] which may change relevant Auction terms – for example the Auction Price Cap. It submitted two OCGTs at Kilroot in Northern Ireland and assumed 1,500-hour ARHLdf of 0.43 for each. EPUKI complains that this position disadvantages qualification submissions for Northern Irish projects as compared to projects in Ireland.

278. Notably EPUKI sought qualification on the basis that it would seek 10-year Capacity Contracts and takes the position[489] that on foot of such an application it may insist that any contract be for 10 years.

482 Affidavit #2 James Crankshaw 1 December 2022 – CRU Action.
483 Tab 5.1 Exhibits to Affidavit #2 James Crankshaw 1 December 2022.
484 Exhibit AR1 to the Affidavit of Alan Roberts affirmed 18 October 2022; Tab 5.1 Exhibits to Second Affidavit of James Crankshaw Affirmed 1 December 2022 - 2026/2027 T-4 Capacity Auction: Initial Auction Information Pack Page 18.
485 The relevant text at §2.1 reads: The Annual Run-Hour Limit (ARHL) De-Rating Factors approved by the Regulatory Authorities in accordance with Section D.3.1.3 (a) of the Capacity Market Code are set out in Table 6, in accordance with SEM-22- 063 and SEM-22-044.
486 Tab 11 Exhibit to First Affidavit of James Crankshaw 11 November 2022; Second Affidavit of James Crankshaw Affirmed 1 December 2022 Table 7.
487 Within the auction rules.
488 Final Auction Information Pack.
489 Day 3 p192 & 193 - Whether correctly or not I do not know.

279. The EPA observes that this inability to defer its choice as between CCGT and OCGT in Northern Ireland is caused by the NIEA's imposition of ARHLs – not by any action of the EPA. The SEMC says that while applicants for qualification were required to declare the ARHL they expected to apply to the plants they submitted the Code imposes no special requirement on Northern Irish plant to 'lock in' technology type. In effect they say it is for the Applicants for qualification to decide for itself with what type of plant they wish to bid – inter alia in light of what they expect as to ARHLs.

280. None of EPUKI's Qualification applications succeeded in the announcement of Provisional Qualification Results and those failures are at present in a review process. On 14 February 2023 the System Operators (EirGrid/SONI) are to submit Final Qualification Results to the Regulatory Authorities (CRU and NIUR) for approval and publication on 1 March 2023 to Applicants for Qualification.

281. Leave to seek judicial review was sought on 17 October 2022 – by which time 9 weeks had passed since the 2022 Parameters Decision to implement ARHL De-Rating. Meanwhile the deadline for submitting qualification applications for the 2026/2027 T-4 Capacity Auction had expired on 6 October 2022. The SEMC complains of delay by EPUKI.[490]

<u>Ireland Capacity Outlook 2022-2031 - October 2022</u>

282. EirGrid/SONI annually publish a 10-year capacity outlook. It is signals future capacity needs to policy makers, regulators, system operators and the market and is a significant source of information for SEM Capacity Auctions. It is important to say that it does not assume additional measures to meet demand beyond those already envisaged and so, prudently, represents a pessimistic "if we do nothing more than we are already doing" view. The 2022-2031 edition[491] is a lengthy and detailed document to which I cannot hope to do full justice here. It records that since 2016 EirGrid has warned of increasing tightness between supply and demand in Ireland. Most new predictable capacity[492] – including capacity awarded in earlier auctions which had been expected to come online over the coming years - has withdrawn. Demand will increase. ARHLs for OCGTs are a risk - in prospect but, in Ireland, uncertain. They must prudently be assumed.[493] In Northern Ireland "*new OCGTs will have ARHL of 1500 hours on average per annum*".[494] EirGrid/SONI's concerns that several new gas generating units will have ARHLs, based on their understanding of the 2021 CID (BAT Conclusions), are sufficiently serious to merit particular assessment.[495] The adequacy assessment of Ireland shows an initial deficit in all core scenarios and remains in deficit over the study horizon.[496] The outlook is challenging and serious and the assessment is "*stark*". The required

490 Affidavit #1 John Melvin 17 November 2022 §227 et seq.
491 Tab 29 Exhibit "JM1" Affidavit #1 of John Melvin 17 November 2022.
492 The word predictable excludes weather-dependant renewable supply.
493 Part B: All-Island Generation Capacity Statement 2022-2031 October 2022 p12.
494 Part B: All-Island Generation Capacity Statement 2022-2031 October 2022 p60.
495 Part B: All-Island Generation Capacity Statement 2022-2031 October 2022 p36 & p58 et seq.
496 Part B: All-Island Generation Capacity Statement 2022-2031 October 2022 p58.

balanced portfolio of new capacity includes gas-fired plant. The two new gas units in Northern Ireland are expected to be subject to ARHL once available in 2024 and "*new OCGTs will have ARHL of 1500 hours on average per annum*".[497] One of the new gas units in Ireland is expected to be subject to ARHL once available in 2026 – but it is not identified. Some units are subject to ARHLs by planning condition.[498] "*But ARHL is not modelled for OCGT which is normally used for replacement reserve to the system.*" [499] This last observation is puzzling in context. Perhaps it reflects a view that, given OCGT's role as replacement reserve, ARHLs may not in practice imperil operational, as opposed to reserve, capacity.

ADMISSIBILITY OF EXPERT REPORTS, DISPUTES ON TECHNICAL ISSUES & ENVIRONMENTAL ADVANTAGE & FINANCIAL MATTERS

283. Despite considerable broad agreement, the EPA differs from EPUKI as to certain, technical, functional, operational and environmental differences between OCGTs and CCGTs. The EPA says that these differences explain (if explanation is needed) the necessity to consider each IEL application on its individual merits and the terms of any resulting IEL accordingly.

284. Robert Denison swore his first of three affidavits for EPUKI on 28 October 2022. His expertise as a mechanical engineer is undisputed. Indeed, the expertise of no deponent in these cases was disputed and the technical expertise of all was impressive. It is also correct to say that the parties, in picking out Mr Denison and Ms Lyden[500] as experts, in considerable degree distracted from the reality in this arcane and complex area, that most if not all deponents deployed their respective expertises in greater and lesser degrees. It is also appropriate to observe that particular and commendable care was repeatedly taken by deponents to disclose and address any possible conflicts of interest and their understanding of their duties to the Court and in my view no issues arise in consequence.

285. Mr Denison exhibits his report of 28 October 2022 ("Denison #1"). It addresses two questions:

i. Whether the IED and the 2021 BAT Conclusions (BAT 40 and BAT 12) require a 1,500 hour ARHL in IED Permits for OCGTs;

497 Part B: All-Island Generation Capacity Statement 2022-2031 October 2022 p60.
498 Part B: All-Island Generation Capacity Statement 2022-2031 October 2022 p56.
499 Part B: All-Island Generation Capacity Statement 2022-2031 October 2022 p56
500 And Mr Ross.

ii. Why OCGTs are suited to peaking power supply and not mid-merit[501] or baseload[502] generation (and why other technologies – such as CCGT - are better suited to mid-merit or baseload generation).

286. The EPA objects that the interpretation of the IED and the BAT Conclusions is a matter of law as to which evidence, including expert evidence, is inadmissible. The EPA says that Mr Denison could provide an opinion on technical aspects of the BAT Conclusions but cannot opine on what the BAT Conclusions require a competent authority to do. The EPA's objections to the admissibility of Mr Denison's evidence were articulated on affidavit.[503] On a precautionary basis, against the possibility that its objection would fail, the EPA also tendered the replying evidence of Ria Lyden, engineer.[504] She exhibits her Technical Note dated 18 November 2022 ("Lyden #1").[505] It addresses the same two questions as did Mr Denison.

Admissibility on Question (i) - Interpretation of the CID BAT Conclusions

287. As ever, admissibility of evidence can only be considered in terms of its relevance to issues in the case and the specific purpose of proof for which it is tendered. A particular item of evidence may be admissible as to one issue or fact and inadmissible as to another issue or fact.[506]

288. I agree that the evidence of experts on the interpretation of the CID BAT Conclusions is inadmissible – save to explain technical terms and the like, insofar as not defined in the CID BAT Conclusions in ordinary language. Issues of interpretation are issues of law and do not normally require evidence.[507] "*In explaining an Act of Parliament it is impossible to contend that evidence should be admitted; for that would be to make it a question of fact, in place of a question of law."* and *"evidence is not admissible as to the meaning of ordinary English words in a public Act of Parliament"* but is admissible as to technical words - **Bissett**.[508] In **Ryan v AG**[509] the Supreme Court accepted an exception where the statute in question used "*scientific terminology, deals with a scientific procedure and requires scientific knowledge to comprehend the effect of its provisions. These are not matters which are presumed to be within the knowledge of the Court ….."* Where a phrase or term is a technical or scientific term outside of the normal scope of knowledge of a judge,

501 Mr Dennison says that mid merit generators are power plants adjust their power output to fluctuations in load demand. They also fill gaps between supply and demand caused by intermittent renewable power generation. Ms Lyden, (see below) says that mid-merit plant operates between peaking and baseload operation. For example, an older CCGT, less than efficient than newer plant and used less often.
502 Mr Denison says that Baseload generators typically operate for long periods of time, without shutting down, to provide a steady level of electricity. Ms Lyden, (see below) says Baseload operation by such plant as a high efficiency CCGT would be taken off load only for scheduled maintenance or due to breakdowns. Typically, it would operate in excess of 8,000 hours per year at varying levels of output.
503 Affidavit of Jonathan Moore 16 November 2022.
504 Affidavit of Ria Lyden 18 November 2022.
505 Co-written with David Ross and Sinead Whyte. David Ross later swore an affidavit verifying his contribution to that Technical Note. Affidavit of David Ross 19 December 2022. References in this judgment to Ms Lyden incorporate references to her co-authors.
506 For example, a letter may be admissible as proof that its contents were conveyed to a recipient but inadmissible as to the truth of those contents.
507 See generally Dodd on Statutory Interpretation §5.49 et seq.
508 Bissett v Thos. Heiton & Co [1930] IR 17. Sup Ct. citing Attorney-General v. The Cast-Plate Glass Company 1 Anst 39, at p 41; Camden (Marquis) v. Inland Revenue Commissioners [1914] 1 KB 641.
509 Ryan v The Attorney General [1965] IR 294 at 344 – the water fluoridation case.

a court may hear evidence as to its meaning. For example, in **Fleming**[510] Denham J construed the term '*directional light*' used in a planning permission as a technical one and construed it according to expert testimony.

289. I would admit and consider experts' views on interpretation of the CID BAT Conclusions only to the extent described in those cases. However I have not found it necessary.

Admissibility on Question (ii) – Advantages, Disadvantages and Uses of OCGTs & CCGTs

290. On a purist view there may be something in the objection of the EPA and CRU to the expert evidence on Question (ii). However, as I will dismiss the case against the EPA in any event I need not dwell on its objection. I cannot second-guess the CRU in its view as to how the electricity supply system ought to be structured and operated and of the virtues and uses of different types of generation plant, as long as that view is effected within the law. It is also clear that the technical and policy choices underlying the Impugned Decisions are for determination by the relevant expert decision-makers, not by me. Ant it seems that much is agreed on Question (ii), at least in general terms and helpfully so. Accordingly, and at least, the information Question (ii) is relevant and valuable in setting the context for and assisting in an understanding of the Impugned Decisions and I do not exclude it.

<u>Question (ii) – The Utility of OCGTs</u>

Denison & Lyden Affidavits

291. As to Question (ii), Mr Denison cites draft UK Policy of 2021[511] to the effect that peaking capacity, at scale, is essential for system reliability – it is "*designed to be used infrequently, but when it is required may need to produce large amounts of electricity for short periods".* Mr Denison identifies the key benefit of OCGT in quickly and reliably providing peaking capacity at short notice and he cites EA(E) Permit Glossaries as defining peaking capacity as 500-1,500 hours operation per year, above which lie mid-merit (1,500 - 4,000 hours) and baseload (>4,000 hours). He cites a paper[512] to the effect that OCGTs have much lower thermal efficiency than CCGTs and CCGTs as producing less emissions per unit of electricity produced, such that CCGT is better for mid-merit and baseload operation. As general propositions, other perhaps than the numerical prescription of hours of operation, it does not strike me that any of this is much in despite.

510 Fleming v Rathdown School Trust (6 April 1993, unreported) HC. Cited in Dodd §5.49. In Blankley v Godley [1952] 1 All ER 436, cited by Bennion on Statutory Interpretation, evidence was admitted as to when a plane ceased "taxiing" and started "taking off".
511 Draft Overarching National Policy Statement for Energy (EN-1) Department for Business, Energy & Industrial Strategy September 2021
512 Developing Best Available Techniques for Combustion Plants Operating in the Balancing Market, Department of Energy and Climate Change, Amec Foster Wheeler June 2016. It was not exhibited and its precise status is unclear to me.

292. Ms Lyden differs from Mr Denison on Question (ii) as to the suitability of OCGTs as peaking plant, but more in detail rather than general. Ms Lyden says Mr Dennison fails to address the changed role of peaking plant with the advent of renewables. She says peaking plant such as OCGT was traditionally required for peak demand - about two hours (less in summer), twice daily, 365 days per year - a maximum of 1,460 hours per year. In those circumstances, an ARHL of 1,500h/yr was not unreasonable for an OCGT - leaving up to 40 hours per year for emergency response to interruption to supply. However, she says the role of peaking plant has changed with the advent of less reliable renewable generation. It creates a greater need for rapid response peaking plant – which will be required to operate for an unpredictable number of hours per year. So, she says, to facilitate increased renewable generation, 1,500 hour ARHLs for peaking plant are inappropriate.

293. As to Question (ii) regarding the present role of OCGT as peaking plant and its bearing on ARHLs, I do not suggest he is wrong or Ms Lyden is right, or, for that matter, vice versa (nor could I so find absent cross-examination). But I confess to the strong impression that Mr Denison's second report in this regard serves primarily to emphasise a general point that such complex technical and policy issues are best resolved by experts, not judges.

294. This impression is reinforced by Ms Lyden's second affidavit and report. She[513] correctly describes the IED concept of "*Environmental Protection*"[514] as encompassing much more than emissions to air, fuel efficiency and electrical efficiency. She exemplifies site constraints, costs and environmental impacts such as constraints on size and/or material assets, such as the road network, water supply and effluent disposal. For example, a CCGT uses much more water than does an OCGT and produces effluent. She suggests that if a more expensive and inflexible CCGT cannot be justified, an OCGT rendered unavailable by having exhausted its 1500-hour ARHL, may impact population, human health, and air quality if power outages result. In power outages, use of emergency diesel generators cumulatively would generate more emissions to air than an OCGT. Those without emergency generators would be discommoded in various ways. All these are environmental considerations.

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513 Affidavit #2 of Ria Lyden 14 December 2022 and exhibited Report #2 of Ria Lyden 12 December 2022.

514 IED Recital 12 - The permit should include all the measures necessary to achieve a high level of protection of the environment as a whole …The permit should also include emission limit values for polluting substances, or equivalent parameters or technical measures, appropriate requirements to protect the soil and groundwater and monitoring requirements. Permit conditions should be set on the basis of best available techniques.

IED Recital 16 - …… no significant pollution should be caused and a high level of protection of the environment taken as a whole should be achieved.

IED Recital 27 refers to the protection of the right to live in an environment which is adequate for personal health and well-being. environment taken as a whole should be achieved..

IED Recital 34 cites the need to ensure a high level of environmental and human health protection

IED Recital 44 identifies the objectives of the Directive as "to ensure a high level of environmental protection and the improvement of environmental quality."

IES Article 1 states that the IED lays down rules on integrated prevention and control of pollution arising from industrial activities and rules designed to prevent or, where that is not practicable, to reduce emissions into air, water and land and to prevent the generation of waste, in order to achieve a high level of protection of the environment taken as a whole.

IES Article 3(10) defines "best" in BAT as meaning most effective in achieving a high general level of protection of the environment as a whole.

295. Indeed it seems to me notable more generally that Mr Denison's opinion that OCGT cannot be BAT-compliant is grounded in technical, engineering and environmental engineering considerations rather than legal considerations. Save for the question whether his choice of BAT-AEEL comparator is correct, it does strike me that it is to the EPA rather than to an inexpert court that his view should be addressed. Notably and as to comparing the Lyden and Denison views, Counsel for EPUKI said[515] "*There is agreement between them that you can operate beyond the 1,500 hours if you can show it's an equivalent level of protection. There is a debate between them as to whether as a practical matter you could do it, but that's an engineering debate for another day for an environmental authority to deal with, and we don't need to go there.*" And later: *"… there is further engineering debate about how feasible it is but that really is a matter for another day."*[516]

Crankshaw, O'Connor & Melvin Affidavits

296. As said, Mr Denison and Ms Lyden are not the only experts deployed. The main deponents for EPUKI and the EPA, Mr Crankshaw and Ms O'Connor, respectively deploy considerable personal expertise in making assertions as to the roles of OCGTs and their respective environmental advantages and disadvantages. Mr Melvin of the CRU also expresses his opinion. It is convenient to address some aspects of those views here.

297. Ms O'Connor[517] for the EPA says, inter alia:

a. The technical differences between OCGTs and CCGTs do not dictate that the use of CCGTs will lead to a better environmental outcome in all cases. For example, it may be inefficient and environmentally disadvantageous to have to run a CCGTs for a relatively long period to cover a relatively short period of loss of renewable generation capacity and doing so may require that renewable generation be constrained to avoid overproduction of electricity. So, Ms O'Connor says, reliance on CCGTs as peaking plant can cause pollutant and greenhouse gas emissions despite the availability of renewable generators. In contrast it may be, in a particular factual context, that an OCGT allows maximum use of other, less reliable, renewable energy sources and so produces a better environmental outcome than would a CCGT.

b. In similar vein, OCGTs are smaller than CCGTs and so their output is more likely to be in proportion with a sudden change in demand. In contrast, operating CCGTs at low loads damages them, so a CCGT responding to an increase in demand will generally operate at full load, possibly generating unneeded electricity and associated harmful emissions, including greenhouse gases. So an OCGT, despite producing more emissions per unit of electricity produced, may be able to meet sudden demand in way that creates lower emissions than a CCGT meeting the same demand.

515 Day 2 p58.
516 Day 2 p60.
517 Programme Manager in the Office of Environmental Sustainability – Environmental Licensing Programme at the EPA. Affidavit #1 17 November 2022.

c. Mr Crankshaw is incorrect in asserting that pollutant emissions are exactly the same as between OCGTs and CCGTs operating for the same number of hours. NOx emissions tend to be higher during start-up and CCGTs have longer start-up periods than OCGTs.

d. Mr Crankshaw's assertion that, as CCGTs are more efficient, greenhouse gas emissions per unit of electricity generated are about 30% less for CCGTs than OCGTs, ignores that efficiency depends also on load factors, that CCGTs are larger than OCGTs and, as Mr Crankshaw states, are much slower to start and shut down and must run for a longer minimum period once started. This means CCGTs are much more likely to generate more electricity than is needed, thus producing unnecessary emissions. As operating CCGTs at part-load can damage the plant, doing so is not a solution to the problem.

e. Mr Crankshaw's assertion that, "*the focus of regulation is to reduce the overall emissions of greenhouse gases significantly*" is correct as to regulation directed to curbing climate change.[518] But the greenhouse gas regulation of LCPs such as OCGTs and CCGTs is via the EU ETS[519] not by the IED and IED Permits. Article 9 of the IED[520], as transposed[521], allows the EPA to not impose energy efficiency requirements in licensing such plant. Accordingly, greenhouse gas emissions are irrelevant in these proceedings.

f. So, Ms O'Connor says[522], there is no straightforward and unwavering rule that CCGTs will always produce better environmental outcomes than OCGTs or that longer permitted running hours for OCGTs always lead to worse environmental outcomes. She says an ARHL on an OCGT could, in some circumstances, prevent the use of an OCGT even when a combination of it and renewable energy would yield a better environmental outcome than the use of a CCGT.

298. Ms O'Connor[523] says that factors such as those set out above illustrate that circumstances vary as between IEL application and that the EPA must consider all circumstances in deciding a specific IEL applications. And an ARHL on an OCGT could, in some circumstances prevent its use when such use would produce better environmental outcomes than would a CCGT. Where the environmental advantage lies can only be considered and decided by the EPA in an IEL application as to a specific proposed OCGT. The EPA rejects EPUKI's assertion, as it understands it, that it takes a universally applicable, as opposed to a site-specific approach to IEL applications.[524] It says that

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518 Ms O'Connor adds that the overall aim of the regulation of emissions is the reduction of all pollutant gases, including but not limited to greenhouse gasses.
519 EU Emissions Trading System - as set out in the ETS Directive 2003/87/EC.
520 Article 9 Emission of greenhouse gases
1. Where emissions of a greenhouse gas from an installation are specified in Annex I to Directive 2003/87/EC in relation to an activity carried out in that installation, the permit shall not include an emission limit value for direct emissions of that gas, unless necessary to ensure that no significant local pollution is caused.
2. For activities listed in Annex I to Directive 2003/87/EC, Member States may choose not to impose requirements relating to energy efficiency in respect of combustion units or other units emitting carbon dioxide on the site. …. 3. … 4. …
521 European Communities (Greenhouse Gas Emissions Trading) Regulations 2012 (SI 490/2012) – Art 33(2).
522 Affidavit #1 17 November 2022 §49
523 Affidavit #1 17 November 2022.
524 Affidavit #2 of Marie O'Connor 14 December 2022.

> *"Under the site-specific approach taken by the Agency, ensuring a BAT-equivalent level of environmental protection is fundamental and run hours can be restricted if such a restriction is needed to ensure compliance with environmental standards within the bounds of what is allowed for in the Commission Implementing Decision."*[525]

299. Mr Melvin's evidence[526] is essentially in similar vein as Ms O'Connor's. He emphasises that, in an SEM such as that in Ireland and Northern Ireland with a high dependency on renewable generation,[527] ready availability of OCGTs to quickly fill gaps in renewable generation is especially useful and facilitates higher use of renewables. An OCGT without an ARHL enhances capacity adequacy, and facilitates renewable generation, more than does an OCGT ARHL-restricted to 1,500 hours generation per year. From the point of view of the SEM, it is contribution to capacity adequacy that counts.

300. Mr Melvin considers that what he understands to be the EPA's approach – that OCGTs may or may not be subject to ARHLs depending on whether they meet BAT-AEELs in particular - will incentivise investment in more energy efficient OCGTs in Ireland. By contrast, the application of the same ARHL indiscriminately[528] to all OCGTs would weaken that incentive. Mr Melvin also explains why, in his view, and assuming EPUKI were to get all the reliefs it seeks in both proceedings, the result may well be a proliferation of less-efficient ARHL-limited OCGTs and disincentivisation of investment in more expensive CCGTs.[529]

301. Mr Melvin[530]

a. Agrees that OCGTs provide peaking capacity but says that it does not follow, and the draft UK Guidance of 2021[531] does not indicate, either that OCGT has no other role than provision of peaking capacity or that it must be subjected to ARHLs.

b. Reads the First Denison Report's graphs as showing that the least emitting OCGTs are less emitting than the most emitting CCGTs.

c. Cites EPUKI's submission to the NIEA in the Ballylumford review.[532] I consider that EPUKI cannot be criticised for later accepting, and now arguing for, an interpretation as a matter of law of BAT Conclusions which it considers has been adopted by the NIEA.

   Nonetheless, Mr Melvin notably points out that EPUKI made, more or less simultaneously, contradictory submissions in 2021 as to its understanding of the law. This requires a little

525 Affidavit #2 of Marie O'Connor 14 December 2022.
526 Affidavit #1 of John Melvin 17 November 2022 §138 et seq.
527 wind generation constituting almost 40% of all electricity generated in Ireland in 2020.
528 My word, not his but clearly his meaning.
529 Affidavit #1 of John Melvin 17 November 2022 §149 & 150.
530 Affidavit #1 of John Melvin 17 November 2022 §154 et seq.
531 Draft Overarching National Policy Statement for Energy (EN-1) Department for Business, Energy & Industrial Strategy September 2021.
532 Tab 25 Exhibit JM1 Affidavit #1 of John Melvin 17 November 2022 §149.

teasing out. EPUKI now relies in these proceedings on the NIEA decision, imposing an ARHL on its Ballylumford CCGT operating in OCGT mode, as illustrating the alleged view of the NIEA that ARHLs on all OCGTs are mandatory. As it was entitled to do, by submission of late August/mid-September 2012[533] EPUKI put to the NIEA that no ARHL should be applied to its Ballylumford CCGT operating in OCGT mode. That necessarily implies a submission that omission of such an ARHL would have been lawful. Yet EPUKI had already, by letter of 19 July 2021 in the ARHL Derating Consultation, confidentially submitted to the SEMC[534] that BAT-compliant OCGTs could not run more than 1,500 hours per year – only CCGTs could do so.

302. It's apparently contradictory views of the law in 2021 aside, it is striking that EPUKI made an argument to the NIEA, on substantive environmental grounds, identical to a significant argument now made by the EPA and the CRU and which significantly contradicts its own present arguments. In referring to the flexibility offered by OCGTs EPUKI said:

> *"EP firmly believes that this flexibility is and will be critical in facilitating more renewables on the system as we push to reach climate change targets of 70% renewable energy by 2030, and will help reduce consumer bills."*

And later in the same document:

> *"OC[535] mode can offer the system many benefits (lower min gen, faster start-up, faster ramping and provision of capacity during maintenance on Steam cycle plant) which EP believe will be critical in the future to facilitate the climate change target of 70% renewables by 2030."*

Remembering that EPUKI made these points in arguing against ARHLs [i.e. in arguing that OCGTs should be permitted to run in excess of 1,500 hours annually and that it was "critical" that they have the flexibility to do so], it seems that its "*firm belief*" has since dissipated.

303. Mr Crankshaw[536] disputes much of Ms O'Connor's affidavit – inter alia the assertion that operating CCGTs at low loads damages them. He says they often so operate. He casts doubt, by reference to alleged lack of evidence and alleged seasonal factors[537], on the assertion that OCGTs may facilitate greater use of renewables than CCGTs – though it's not clear that he actually disputes the proposition. Mr Crankshaw also observes that no IELs for OCGTs (he lists 4) have to date had ARHLs imposed which, he says, "*gives the lie*" to the EPA's assertion that it takes a site-specific approach to granting IELs.

533 It is unclear to which e-mail the submission as attached – Core Book Tab p pp121 & 126. EPUKI made the same argument by e-mail Sent: 01 September 2021 12:57 at Core Book p124.
534 Sub Nom UREGNI (NIUR). Market participants are allowed to make their submissions to the SEMC confidentially – a facility of which EPUKI generally availed.
535 Open Cycle.
536 Affidavit #2 of James Crankshaw 1 December 2022 - CRU Case.
537 In winter there may be an absence of wind and sunshine for extended periods in which CCGTs can supply the deficit – producing lower emissions per unit of electricity produced.

304. Mr Crankshaw also asserts[538] that

a. Mr Melvin over-simplifies EPUKI's position in asserting that EPUKI argues that operating OCGT plants more than 1,500 hours per year is harmful. EPUKI is not saying that OCGTs are necessarily "bad" or "good". It simply says that they have a particular use. In large part, the positions of the SEMC and EPUKI on this issue appear to be aligned.

b. While OCGTs are useful peaking plant to meet short term deficits in renewable supply, they are not the only technology which can support renewables. Given their lower emissions per unit of electricity produced CCGTs can and should be used to meet extended periods of renewable supply deficit - for example and typically in January and February, when wind and sunshine deficits of several consecutive days can occur.

305. Unsurprisingly, that last point is not controversial. Mr Melvin agrees[539] that CCGT can play a valuable role in supplementing renewable generation. He says that his point is that greater accommodation of renewables by OCGTs means that comparing the efficiency of OCGTs and CCGTs on a per MWh basis does not provide a complete picture of the impact of the two technologies on overall emissions. Beyond accepting, as I do, that there is no simple and universally correct answer to the question which of OCGTs and CCGTs can facilitate renewable generation it seems to me that the only conclusion I should draw is that it is for the expert regulators, not the courts, to decide what the proper balance of capacity and modes of use ought to be between the various possible types of power source.

306. Ms O'Connor clarifies[540] that her point was that operating CCGTs at below minimum loads damages them and so excess power generation, producing excess emissions, may occur. She rejects the proposition that the EPA bears an overriding regulatory obligation to discourage OCGTs or to make it harder, other than by reference to environmental considerations proper to the EPA, for OCGT to operate. Ms O'Connor observes[541] that the 4 IELs identified by Mr Crankshaw as issued by the EPA to OCGTs without ARHLs were all last revised before the 2017 CID issued[542] and so they cannot betoken an interpretation of the BAT Conclusions or even an EPA policy as to their application. This point seems to me as obvious as it is well-made and it is surprising that Mr Crankshaw did not volunteer it.

SEMC ASSUMPTION OF ARHL DIFFERENCES NORTH AND SOUTH & FINANCIAL IMPLICATIONS FOR EPUKI

538 Affidavit #2 of James Crankshaw 1 December 2022 - EPA Case.
539 Affidavit #2 of James Melvin 15 December 2022 – CRU Case.
540 Affidavit #2 of Marie O'Connor 14 December 2022.
541 Affidavit #2 of Marie O'Connor 14 December 2022.
542 Her affidavit says 3 of the 4 preceded the 2017 CID but a perusal of the dates she lists shows that all did.

307. Mr Crankshaw on 1 December 2022 swore his second affidavit for EPUKI in each of the EPA and the CRU proceedings. They address inter alia:

- His assertion that the SEMC understand the position as to ARHLs in OCGTs to the same effect as that alleged by EPUKI – i.e. the SEMC assumes the EPA will not impose them in Ireland and that the NIEA will impose them in Northern Ireland.
- What he says will be the financial consequences of the Impugned Decisions for EPUKI.

The content of the two affidavits overlaps in great degree and as to financial consequences they are identical.[543]

308. As to both these issues Mr Crankshaw cites a SEMC Best New Entrant Net Cost of New Entry (BNE-Net CoNE) Consultation Paper of October 2022[544] (the "CoNE Paper"). As will be apparent, this CoNE Paper postdates the SEMC decision on ARHL De-Rating.

SEMC Assumption of ARHL Differences North and South – the CoNE Paper

309. Mr Crankshaw cites the CoNE Paper as demonstrating that CEPA/Ramboll[545] and the SEMC, in calculating Cost of Entry to the market for developers of new OCGTs, assume that the 0.43 ARHLdf will apply to OCGTs in Northern Ireland but not in Ireland. In other words, he says that the SEMC shares EPUKI's understanding of the respective and differing positions of the EPA and the NIEA as to imposition of ARHLs on OCGTs.

310. Mr Crankshaw cites the CoNE Paper as describing itself as "*focusing on Ireland (where the ARHL derating is not applicable) ….*". Though he does not refer to it directly, this observation relates to Table 2, part of which I reproduce below and in which the effect on Gross CoNE of the assumption of ARHL De-Rating in Northern Ireland but not in Ireland, is apparent. As Table 2, the SEMC gives the same explanation as for Table 3.

Study	**Parameter**	**OCGT**	
		Ireland	**Northern Ireland**
CEPA/Ramboll	Capitalised cost €m (22/23, money)	108.1	106.1
	Nameplate capacity, MW	198.6	198.6
	Derated capacity MW	<u>175.4</u>	<u>75.4</u>
	Capitalised cost derated €/kW (22/23 money)	616.4	1407.6

Table 2[546] (extracts)

543 The paragraph numbers differ - §§31 – 67 in the EPA case; §§51 – 87 in the CRU case.
544 'Best New Entrant Net Cost of New Entry (BNE Net CoNE) Consultation Paper' SEM-22-076 19 October 2022 Tab 6.1 Exhibit 2jc1 to Affidavit #2 of James Crankshaw 1 December 2022 - EPA Case.
545 The SEMC engaged Cambridge Economic Policy Associates (CEPA) and Ramboll to assess in 2022 the fixed costs and Net CoNE of a BNE peaking plant.
546 Comparison of gross cones from Poyry (2018) and CEPA-Ramboll (2022).

Parameter	OCGT	
	Ireland	NI
Gross CoNE[547] € derated kW (22/23)	89.07	218.46
Inflation Adjustment	1.08	1.08
Gross CoNE € derated kW (26/27)	96.42	236.47

Table 3[548] (extracts)

Mr Crankshaw cites the SEMC explanation of this Table as follows: -

> *"… the significant difference in the estimated Gross CoNE for an OCGT in Ireland (€96.42/ derated kW/year) and in Northern Ireland (€236.47/ derated kW/ year) is predominantly a function of the assumption that the 0.43 ARHL derating factor applies in Northern Ireland."*

311. Mr Crankshaw asserts[549] that *"… what is most significant about Mr Melvin's Affidavit[550] is what remains unsaid, in particular, what the Respondent has been told about the position of the NIEA in relation to BAT 40 and when it was told that".* He repeats that point in various ways. On the face of his affidavit I am unclear what that significance is supposed to be but I see none. Other than merely asserting its significance and relevance, EPUKI takes the point nowhere beyond a vague invocation of its assertion of irrationality. EPUKI asserts that it is quite clear of the NIEA's position and knows all it needs to know about from its own dealings with it was to the Ballylumford PPC Permit review. It does not identify or even suggest any deficiency, either of substance or timing, in the SEMC's knowledge of that position.

312. The SEMC response in this regard is found in its most pithy form in Mr Melvin's second affidavit.[551] He points out that:

- the CRU does not see any material dispute about the NIEA's approach to licensing Northern Irish OCGTs.
- the CRU has never disputed that the NIEA's approach appears to differ from the EPA's.
- it is the EPA's approach, not the NIEA's that EPUKI impugns.

547 i.e. costs before income.
548 Gross cone derated inflation adjustments. Mr Crankshaw sets out a similar Table 6 for Net CoNE (i.e. costs after income) to similar effect.
549 Affidavit #2 of James Crankshaw 1 December 2022 - CRU Case.
550 For the CRU
551 Affidavit #2 of John Melvin 15 December 2022 - CRU Case.

Mr Melvin cites the note of the NIUR/NIEA[552] meeting on 3 September 2021[553] to which I have referred above, in summary to the effect that the NIEA intended to apply ARHLs to OCGTs. He says that the SEMC's understanding of NIEA's approach has not materially changed since that meeting.

313. Mr Crankshaw's repeated criticisms of the SEMC's evidence on this issue of its knowledge of the position of the NIEA seems to me to consist far more of heat than of light

314. As to the CoNE Report's assumption that an OCGT in Ireland would not be ARHL-limited, Mr Melvin clarifies, and is not contradicted, that this assumption must be understood as relating to a "Best New Entrant". I am not directed to and have failed to find in the papers any definition of, or even a useful description of, the concept of "Best New Entrant". However Mr Melvin says, and is not contradicted, that the concept, as applicable in the CoNE Paper, would include the assumption that it is possible to build an OCGT in Ireland that is not subject to an ARHL – from which it follows that the Best New Entrant OCGT in Ireland is one not subject to an ARHL. It is necessarily the comparator considered in the BNE-CoNE report as the premise of the CoNE report is that it considers the Best New Entrant. It follows that it presumes that an OCGT in Ireland not subject to an ARHL. However, Mr Melvin clarifies, that assumption for the purposes of that report does not imply an assumption that an ARHL and the 0.43 ARHL De-Rating Factor will never apply to any Irish OCGTs. Logically, it must be correct that the fact that the "best" OCGT in Ireland will not be subject to an ARHL cannot imply, per se, that all OCGTs in Ireland will not be subject to an ARHL. Not all OCGTs will be the "best".

315. In other words, according to Mr Melvin, the CoNE Report does not imply that the EPA is to be understood in the impugned e-mail of 18 July 2022 as asserting that no OCGTs In Ireland will be subject to an ARHL or that the SEMC has inferred, apart from the e-mail of 18 July 2022, that the EPA is to be so understood. I accept that proposition

Financial Consequences to EPUKI – EPUKI Position

316. Though somewhat out of sequence, as it is based on the CoNE Paper, it is convenient here to refer to Mr Crankshaw's account of what he says will be the difference in financial outcomes for EPUKI as between OCGTs which it may develop in Northern Ireland and Ireland respectively if ARHL De-Rating is applied in the context of the difference between the EPA and NIEA as to IED Permitting of OCGTS and the inclusion of exclusion of ARHLs.

552 Sub nom DAERA - Department of Agriculture, Environment and Rural Affairs. The NIEA is an executive agency within DAERA.
553 Core Book 8.

317. Before turning to the CoNE Paper I note that EPUKI says[554], and is not contradicted, that to date, only OCGTs have bid in the Capacity Market. Capacity Payments alone suffice as a return on investment on OCGTs, so there is no market risk to investment in them. Capacity Payments alone do not suffice as a return on the higher investment required in CCGTs. So, while income from actual power sales could result in a better overall return on a CCGT than on an OCGT, no generator has yet been willing to take that market risk.

318. BNE Net CoNE is necessarily an estimate and prediction. Various uncertainties are cited in the CoNE Paper. Nonetheless BNE Net CoNE is used to calibrate Capacity Auctions parameters – notably the Auction Price Cap. There is no criticism in this regard. Underlying its analysis, the CoNE Paper states that, with appropriate assumptions underpinning the estimate of Net CoNE, a BNE unit paid a Capacity Payment equal to Net CoNE will earn its cost of capital, i.e. an investible return.

319. In light of the CoNE Paper and on the assumption that 1,500-hour ARHLs, and hence ARHL De-Rating, will be applied to OCGTs in Northern Ireland but not in Ireland, Mr Crankshaw sets out at some length what he says will be the difference in financial outcomes. I do not need to set out the detail here. It suffices to record his view that an OCGT in Ireland not subject to an ARHL could receive 2.32 times the Capacity Payments of an "identical" OCGT in Northern Ireland subject to an ARHL. He says that over a 10-year Capacity Contract and as to each of its two intended 42MW Kilroot OCGT, that could amount to a difference in Capacity Payments of €32ml – a total of €64ml. As to a hypothetical "typical" 300MW OCGT, the difference could be €217ml. Indeed, Mr Crankshaw says the likely level of the Auction Price Cap will render a sufficient return on OCGTs in Northern Ireland impossible, such that EPUKI is unlikely to bid such projects in Capacity Auctions. All this, he says, discriminates against EPUKI plants in Northern Ireland and will cause significant financial loss to EPUKI.

320. These figures are all based on a variety of assumptions. No doubt all things are rarely equal. I assume that, for many reasons those figures could turn out much lower - but remain significant. I need not concern myself with the precise figures given or with their precision. Given capacity payments are proportional to derated capacity and given an ARHLdf for OCGTs of 0.43%, I accept as inevitable the general proposition that the difference between the Capacity Payments payable, as between an ARHL-de-rated OCGT and an OCGT of the same nameplate rating but not so de-rated, and over a 10-year contract, will very likely amount to a lot of money.

321. A significant part of the of the SEMC's explicit and unchallenged rationale for De-Rating is that the situation just described implies a lot of money paid, ultimately by consumers, to the owner of the non-derated OCGT for a consideration in the form of security of supply which may prove illusory to a greater or lesser degree. Whether that situation implies a loss to EPUKI by reason of the impugned decisions is a different matter.

554 Affidavit #1 of James Crankshaw 11 October 2022 §49 – EPA Case.

Financial Consequences to EPUKI – EPA and SEMC Response

322. I note the EPA's dissatisfaction with the proofs adduced and the losses posited by EPUKI as unreal, hypothetical and highly contingent.[555] The SEMC points out[556] that the two new OCGTs for which it assumed a 1,500-hour ARHLdf of 0.43 are each 42MW plants together representing 82MW (5%[557]) of the 1,582 MW EPUKI submitted for qualification. Lest this observation be thought of as a criticism of EPUKI's account of matters, I should add that this information was readily discernible from Mr Crankshaw's affidavit[558] and his figure of €32ml was specific to each of its two intended 42MW Kilroot OCGTs.

323. The EPA observes that EPUKI's argument, in reality, is that the combination of the NIEA's imposition of ARHLs on its OCGTs in Northern Ireland and the CRU's decision to apply ARHL De-Rating in Capacity Auctions have led to its alleged losses and that success in these proceedings, by forcing the application of ARHLs and ARHL De-Rating south of the Border, would merely add to those losses. It says that, as matters stand, and as EPUKI's own case is based on its assumption that the EPA will not impose ARHLs on OCGTs in Ireland, the EPA's supposed Impugned Decision, whether or not in error, will have no negative impact on EPUKI or its finances.

324. For the SEMC, Mr Melvin responds in detail to Mr Crankshaw's account of financial losses.[559] Putting it crudely he disputes the figures and calculations with a view to suggesting that even accepting Mr Crankshaw's premises the calculations are unreliable and the outcome would be far less dramatic than asserted.

325. Mr Melvin says that these alleged losses in the form of lesser revenues for Northern Ireland OCGTs than for OCGTs in Ireland *"would arise from the application of ARHL De-Rating "in and of itself', not from any difference in approach between regulatory authorities in Ireland and Northern Ireland. However, EPUKI has now made clear that it is not objecting to ARHL De-Rating "in and of itself'."*[560] Mr Melvin illustrates this by reference to the €64ml by which the revenue of its two intended 42MW Kilroot OCGTs will fall below the revenues of equivalent OCGTs in Ireland.

326. However, success in these proceedings for EPUKI takes the form of obliging the EPA to apply ARHLs south of the border just as does the NIEA to the north. In which case, EPUKI says, it agrees with ARHL De-Rating. So, success in these proceedings will not increase for EPUKI the revenues of its

555 Affidavit #2 of Marie O'Connor 14 December 2022 §58 et seq.
556 Affidavit #1 John Melvin 17 November 2022 §210 – 214.
557 My calculation.
558 Affidavit #2 James Crankshaw 1 December 2022.
559 See generally, affidavit #2 of John Melvin 15 December 2022.
560 See generally, affidavit #2 of John Melvin 15 December 2022.

two intended 42MW Kilroot OCGTs or recover the posited €62ml. So that sum cannot be lost by reason of the Impugned Decisions.

327. I do not see that the financial analysis EPUKI provides discloses any claim in damages even before one gets to the Francovich criteria.

EPA CASE – JUSTICIABILITY/PREMATURITY

Introduction

328. As EPUKI affects no principled objection to ARHL De-Rating and objects to it only on the basis of the alleged error of the EPA's position on the application of ARHLs to IELs of OCGTs as, it says, expressed in the impugned e-mail of 18 July 2022, it seems to me that that e-mail in a real sense, the fons et origo of the dispute at the heart of both proceedings. A fundamental, and logically the first, issue in these proceedings therefore, is whether that e-mail of 18 July 2022 is justiciable. That is to say, whether it is a "decision" susceptible to judicial review. The same question can also be analysed by asking whether the proceedings are premature.

329. I have set out above certain aspects of the case made by the EPA as to the non-justiciability of its e-mail of 18 July 2022 as having been written as part of a pre-application consultation process and not as part of any statutory process - much less being a statutory decision. It must be remembered that the EPA would have been within its legal rights (though clearly not its general policy) to refuse any pre-application consultation, to refuse to give any hint of its view of the meaning of BAT 40 and even to completely ignore AECOM's e-mail of 2 May 2022 instead of replying by way of the Impugned e-mail of 18 July 2022. Clearly it was desirable that it assist EPUKI in pre-application consultation but it was under no legal obligation to do so. The EPA says its statutory duties "bite" only on receipt of an application for an IEL for a specific installation, and not before.[561]

330. Ms O'Connor[562] asserts that a finding that such statements in pre-application consultations as the Impugned e-mail of 18 July 2022 were amenable to judicial review would create a significant chilling effect inhibiting the EPA's engagement in pre-application consultations and so tend to deprive applicants and the EPA of the benefit, or the full benefit, of such pre-application consultations as described above. The EPA says that its only statutory power of present relevance is that to receive, consider and decide a specific IEL application for a specific installation and industrial activity. As that is not really disputed I need not elaborate at this point the relevant provisions of the EPAA 992 in that regard. The EPA also says that the e-mail of 18 July 2022, in the absence of an IEL application and decision, is non-justiciable as lacking a factual context – that it is abstract and affects

561 E.g. Affidavit #1 of Marie O'Connor 17 November 2022 §42
562 Affidavit of Ms O'Connor #2 14 December 2022.

no rights or interest of EPUKI.[563] The EPA cites primarily **Sweeney v Fahy**[564], **Cintra**[565] and **Spencer Place**.[566] It also cites the recent **CETA** case.[567]

331. EPUKI cites **Mullally**[568], **MacPhartaláin**[569] and **Maguire**[570] in saying that the e-mail of 18 July 2022 is justiciable for essentially the following reasons:

- The e-mail of 18 July 2022 definitively states the EPA's interpretation of BAT 40 – specifically as that which it "will apply" in assessing IEL Licence Applications.

- The EPA's position is formalistic and ignores EPUKI's interest – even right – to know the EPA's position so it can make an informed qualification application in the Capacity Auction, in which it is obliged to describe to the SEMC the position as to the presence, absence and terms of any ARHL which will apply to its proposed New Capacity. So the e-mail of 18 July 2022 has a "concrete effect".

<u>Sweeney v Fahy, Cintra, Spencer Place & CETA</u>

332. In **Sweeney**, Clarke CJ described the *"overall role of the High Court in judicial review …. as concerned with whether a decision …which affects legal rights …. is lawful."* He states

> *"It is important, therefore, to emphasise that judicial review is fundamentally concerned with the lawfulness of decisions taken affecting legal rights whether by persons, bodies, or courts having statutory jurisdiction"*

333. **Cintra**, before contracting to sell shares, sought from the Revenue Commissioners an opinion that capital gains tax would not be payable on the sale proceeds. The Revenue refused to so confirm. Though its letters in fact post-dated the contract for sale, the Revenue was unaware of the contract when writing its first letter and, as far as it was concerned, was addressing a prospective transaction. Such opinions were not part of any statutory process but derived from a tax briefing document issued by Revenue which stipulated that while it would generally follow such an opinion, they were "*not binding on Revenue, and it is open to Revenue officials to review the position when a transaction has been completed and all the facts are known".* The letters were, in wording and tone, consistent with their being non-binding. They recorded not a determination or decision, but rather a "view" – albeit explicitly a strong view. The taxpayer remained entitled to a different view.

563 Affidavit of Ms O'Connor #2 14 December 2022.
564 [2014] IESC 50, §3.6.
565 Cintra Infraestructuras Internacional SLU v The Revenue Commissioners, Respondents [2016] 2 IR 314.
566 Spencer Place Development Company Ltd v Dublin City Council [2020] IECA 268 (Court of Appeal (civil), Costello J, 2 October 2020).
567 Costello v The Government of Ireland, Ireland and the Attorney General [2022] IESC 44
568 Mullally et al including The Psychiatric Nurses Association v The Labour Court [2016] 3 IR 245.
569 MacPharthalain v Commissioners of Public Works [1992] 1 IR 111; [1994] 3 IR 353.
570 Maguire v Ardagh [2002] 1 I.R. 385.

334. Cintra sought to quash the letters despite their non-binding nature – arguing that in certain circumstances legally sterile actions and actions that did not affect a legally enforceable right could be judicially reviewed if a probable or inevitable next step was that a legally enforceable right would be infringed and that it should be entitled to judicially review the opinion before tax was deducted. Cintra lost.

335. The court held that such a non-binding letter of opinion was not a decision imposing legal consequences so as to be justiciable. While a legally sterile action of a public body could be subject to judicial review in exceptional circumstances, the circumstances were not exceptional. Militating against finding exceptionality were the facts that such letters were a privilege of considerable benefit granted to certain taxpayers and that if their non-binding interpretation was replaced by a binding decision to the contrary, the applicant could appeal it. That prospect of appeal also meant that while the probable next step was a refusal by Revenue to refund withholding tax based on its interpretation of the tax legislation, Cintra's enforceable legal rights were not so close to being infringed by a public law decision such that the non-binding opinion was justiciable. The court expressed the view, obiter but as a matter with which it had a "considerable difficulty", that were such non-binding opinions justiciable, the Revenue could cease to issue such letters, which were designed to help taxpayers plan their transactions.

336. In my view the analogy between Cintra and the present case is obvious – not merely in the non-statutory nature of the opinion of Revenue and the desirability of such procedures but also as such opinions of Revenue are clearly both intended to state the Revenue's current understanding of a likely future statutory decision and as such opinions are clearly issued in the knowledge that they will provide the recipient with a degree of reassurance likely to inform its decision in making or not making a significant legal and financial commitment – in that case the purchase of shares, in this case bidding for a capacity contract.

337. Indeed, the Revenue Opinion in Cintra had the added force, as compared to the EPA's e-mail of 18 July 2022, that it was addressed to a specific envisaged transaction – yet the Revenue Opinion was still non-justiciable. A fortiori, at least in this specific aspect, the EPA's e-mail of 18 July 2022 should be non-justiciable.

338. In both Cintra and the present case the essential problem is the same: an economic actor needs to take in early course a decision with significant legal, commercial and/or financial consequences in anticipation of the subsequent exercise of statutory powers by way of a decision which, for one reason or another, cannot yet be made. The following seem to me to be inherent features of that problem:

- The statutory decision cannot yet be made – such that its outcome cannot be perfectly anticipated. A fortiori, and much as it might like to and much as it would be in its interest to, the

economic actor dependent on the decision has no right to know in advance and with certainty what that decision will be.

- The actor in making its present decision is at risk of the outcome of that future decision-making process.
- That risk can be mitigated by provisional procedures such as Revenue opinions or pre-application consultations. But it cannot be eliminated – or, to put it another way, a statutory decisionmaker cannot lawfully fetter its discretion in advance of making its decision. To reduce the point to absurdity: it cannot make the decision before making it.
- The economic actor is therefore inevitably faced with a decision whether or not to take that risk – a risk which can be more or less mitigated but is still a risk.

339. In other words, any decision in anticipation of the subsequent exercise of statutory powers inevitably involves risk and until it is made the real questions become ones of allocation of that risk and decision whether to take it. Generally as to the operation of the SEM, it is in law for the SEMC to allocate the risk in the Code and EPUKI is, of course, free to take or not take it. Whether the SEMC's risk-allocation decision is in substance commercially wise or environmentally wise or wise in its seeking to advance the security of electricity supply, is a matter for its expert judgment – not for the court. However these considerations illustrate that risk allocation decisions by the SEMC do not impose risk only on EPUKI and other Generators: the SEMC takes the risk that its decision will discourage investment desirable - even essential - to the attainment of its statutory objectives. Again, whether the SEMC's appetite for that risk and decision as to taking it is wise is a matter for its expert judgment – not for the court.

340. The taxpayer (in Cintra) and EPUKI in the present case remain at liberty to persuade the Revenue and the EPA respectively that the views they have expressed in advance of making their respective statutory decisions are erroneous. I am sure that those interacting with public bodies would in general be affronted by the assertion that they were bound by such provisional views and could not seek to dissuade decision-makers of them save by litigation. If they are not so bound, neither can be the statutory decision-maker.

341. A further feature of the present case suggests that if a Revenue Opinion is non-justiciable, a fortiori, the EPA's e-mail of 18 July 2022 should be non-justiciable. That feature is that opportunity for public participation and objection is mandatory in IEL licensing.[571] In addition issues of EIA[572] and AA[573] may arise in IEL licensing - as to which that opportunity for public participation and objection is mandatory. Indeed an oral hearing may be held.[574] As McKechnie J observed in **An Taisce**[575] - "*the underlying purpose of public participation in environmental matters is to facilitate good, fully*

571 See for example S.87(5) EPAA 1992.
572 Environmental Impact Assessment for purposes of the EIA Directives 2011/92/EU and 2014/52/EU on the assessment of the effects of certain public and private projects on the environment.
573 Appropriate Assessment for purposes of the Habitats Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
574 Ss.87 & 88 EPAA 1992.
575 An Taisce v An Bord Pleanála [2021] 1 IR 119 §130.

informed decision-making, it being acknowledged that the public as a whole is one of the greatest repositories of environmental information." Those other participants in the process must be free to make submissions as to, inter alia, the applicable law and cannot lawfully be told that any significant issue has already been decided against them in their absence in pre-application consultation. Public consultation must take place when all options are open. Indeed, that was part of the logic behind the decisions in **An Taisce** and **Callaghan**.[576]

342. I would add that we are not dealing here with a statutory prohibition on reliance in litigation on pre-application consultations in planning matters such as arose for consideration in ***O'Flynn***.[577] But the rationale is the same: Haughton J saw the intention as being *"to facilitate the widest possible discussion of planning matters at such consultations".* That view essentially pre-figures Cintra. While, correctly, it was not argued in this case, it may be useful to observe that the conclusion to be drawn from the statutory prohibition in planning matters is not that its absence in cases such as the present implies a contrary view – implies justiciability. It is, rather, that an explicit statutory prohibition was considered necessary to a statutory pre-application consultation procedure lest its statutory status be considered to set it apart from the general law of non-statutory pre-application consultation, exemplified in Cintra, such as imply justiciability.

343. In **Spencer Place,** the Chief Planner of Dublin City Council had issued a non-statutory briefing note to advise its elected members, in response to their general questions, that the mandatory SPPRs[578] in the Building Height Guidelines 2018[579] did not apply to approved statutory planning schemes providing for maximum building heights in Strategic Development Zones. The Applicants disagreed and proposed to seek planning permissions amending existing planning permissions for sites in the North Lotts SDZ Planning Scheme area by increasing the permitted building heights. Before doing so, it sought both to quash the briefing note and a declaration that it was in error, so as to ensure that the Council properly applied SPPR 3(A) to its intended planning applications. It argued that the Briefing Note affected its right to have the planning applications determined in accordance with the correct interpretation of the Building Height Guidelines.

344. As to justiciability Costello J[580] in Spencer Place cited **Ryanair**[581], **Cintra** and **Ballyedmond**.[582] In **Ryanair**, Kearns J had observed that "*the application fails both because there is "no decision" and secondly, even if there was, "no legal right of the applicant was thereby affected*"." He considered that:

[576] Callaghan v. An Bord Pleanála [2018] IESC 39 (Supreme Court, Clarke CJ, 31 July 2018)
577 O'Flynn Capital Partners v. Dun Laoghaire Rathdown County Council [2016] IEHC 480.
578 Special Planning Policy Requirements.
579 Adopted pursuant to s.28 of the Planning and Development Act 2000.
580 In a judgment concurring with the result and with Collins J who gave judgment on other issues.
581 Ryanair Limited v. Flynn [2000] 3 I.R. 240. Kearns J refused to quash, as non-justiciable, the report of an inquiry pursuant to the Industrial Relations Act 1990. It was not justiciable because there was no decision susceptible to being quashed and no legal rights of the applicant were being affected by a mere fact-finding report. It could not impose duties, penalties, liabilities or consequences of any sort.
582 Ballyedmond v. Commission for Energy and Regulations & Ors. [2006] IEHC 206.

"……. it must also be stated that there can be decisions with adverse implications for the person affected thereby which nonetheless fall short of infringing their legal rights."

345. In **Ballyedmond**, Clarke J, finding the statutory report of an inspector made under the Gas Act 1976 non-justiciable, had said

> *"The Inspector's report is not, therefore, a stand-alone report which is an end in itself. It is merely a step in a process. Either that process, taken as a whole, is sustainable, or it is not. It should also be added that it is a step in the process where the conclusions of the Inspector conducting that step have no formal effect on the process at all. It can thus be distinguished from schemes where, in order that someone might be adversely affected by the process, two separate decisions require to be made. …*
> *….. the report of an Inspector is not open to judicial review, notwithstanding (that it) may contain recommendations (which) are neither binding nor give rise to any formal consequences of the process as a whole."*[583]

346. Costello J cited the High Court decision in Spencer Place as follows:

> *"It would have been more satisfactory had the Developer allowed the two planning applications to be determined in the ordinary way, and to defer any judicial review proceedings pending the outcome of the planning process. In the event that planning permission were granted, then judicial review proceedings would be unnecessary. In the event that planning permission were refused, the fact that any judicial review proceedings would take place by reference to an actual decision, and by reference to the reports of Dublin City Council's planners, would give the case a less abstract air."*

347. Costello J in Spencer Place noted that the advices in the briefing note "*were not prepared, nor given, in the context of the planning applications. The advices are not part of the formal planning process and are entirely separate from the consideration of the planning applications*." She held that the Briefing Note expresses a point of view on a legal issue but in the abstract and had yet to be applied to an application for planning permission. The fact that the opinion so expressed would, if applied to an application for planning permission, almost inevitably result in the refusal of the developer's applications for planning permission, did not alter the status of the Briefing Note, in her opinion. She considered it even less amenable to review than was the inspector's report in Ballyedmond as it was generated outside of, and was not a necessary step in, the statutory process the process. It had no impact on the process. It had no legal consequences for, and did not affect a legally enforceable right of, the developer. The developer still had a legal right to have its future planning applications determined in accordance with law. Costello J said:

583 §§5.7 & 5.9

> *"In my judgment, the Briefing Note has the same status in law as both the opinion of Junior Counsel and the letter of Mr. Shakespeare: it expresses a point of view on a legal issue. That legal opinion was expressed in the abstract and had yet to be applied to an application for planning permission. The fact that the opinion so expressed would, if applied to an application for planning permission, almost inevitably result in the refusal of any such application, and in particular the developer's applications for planning permission, does not alter the status of the Briefing Note, in my opinion."*

348. It is instructive to explain the reference to Mr Shakespeare's letter. Spencer Place had written to the Council, as it was perfectly entitled to do, to persuade it of its interpretation of the law applicable to its intended planning applications. Mr. Shakespeare replied, enclosing an opinion of Junior Counsel and stating:-

> *"I must disagree with your argument regarding the application of SPPR3 of the [Building Height Guidelines]. Our advice on same is that consideration of any additional building height can only be considered following a review of the strategic development scheme."*

349. Significantly, Costello J observed that:

> *"It is probable that, as occurred[584], the planning permission would be refused on the basis that the Building Height Guidelines SPPR 3(A) did not apply to the North Lotts Planning Scheme. However, this is based upon Dublin City Council's interpretation of the Planning and Development Act 2000 (as amended) and the Building Heights Guidelines. It is an interpretation with which the developer disagreed but, as was pointed out by Twomey J. in Cintra, this does not amount to an infringement of its rights, nor an inevitable infringements of its rights. The fact that there are two possible interpretations of a statute or other legal instrument, and one is adopted by a decision maker with possible adverse outcomes for another party, does not amount to an infringement of the rights of a litigant, provided that the impugned interpretation is bona fide and reasonably held. There was no inevitable infringement of the rights of the developer when it commenced these proceedings. Its rights could only be said to have been infringed if a decision was taken which was subsequently found by a court to have been based on an error of law. This is relevant to the issue of prematurity but does not render justiciable that which is otherwise not susceptible to judicial review.*
>
> *It follows, inexorably, that what was sought was judicial review of an opinion and, in my view, Dublin City Council was correct in submitting that it was not open to review. In my judgment, the appeal should be refused on the basis that, in the circumstances of this case, the Briefing Note was not amenable to judicial review."*

584 By the time the matter came to her judgment.

350. In **CETA**[585] the Supreme Court held that the Constitution of Ireland precludes the Government and Dáil Éireann from ratifying the EU-Canada Comprehensive Economic and Trade Agreement ("CETA"). Inter alia, CETA provided for an arbitral process to resolve disputes. The Supreme Court's decision is highly complex. Inter alia, MacMenamin J dissented from the majority view that ratification of CETA would breach Article 34 of the Constitution because it would infringe Irish juridical sovereignty by permitting an international tribunal to make binding decisions enforceable in Irish law.[586] He did so not on substantive grounds but on the basis that the challenge in that regard was premature. Nonetheless he found the dispute justiciable[587]. He said[588], as to constitutional litigation but in terms which the EPA say apply more generally to the question of justiciability, that

- *"at the level of principle, courts operate upon an identified set of facts."*

- *"courts may decline to determine issues or deliver a judgment on a question which is premature, that is, one which, although it might raise a potential legal issue, is one where it is by no means certain that such issue will, in the event, actually arise, or is even likely to arise in the future. Such issues are defined as "contingencies", that is, events which may occur, but where it is unclear whether they will, or will not. When faced with prematurity, courts will, generally, refrain from expressing a conclusive view, especially on a hypothetical situation."*

- *"… through no fault of the parties there remains a distinct "lack of concreteness""* in the case.

- It is required that *"that the dispute or controversy*
  - *is to take place on the basis of known, fixed facts.*
  - Involve the identification, and final and enforceable determination, of the rights of parties, or the imposition of liabilities, or the infliction of a penalty

- For a declaration to be granted, "*the question before a court must be a real question, not one which is theoretical.*

McMenamin J cited US caselaw for the proposition, well-established in the common law world,

> *"that a court will not, generally, deliver a judgment in relation to a speculative future contingency, ……..What is generally needed is a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.."*

351. The EPA says that this case lacks a factual matrix - is abstractly founded by EPUKI on a hypothetical decision of the EPA on a hypothetical application for an IEL in respect of an

585 Costello v. The Government of Ireland, Ireland and the Attorney General [2022] IESC 44
586 See the Supreme Court summary of the decision.
587 §71 & §111
588 §71 et seq citing various cases: including McNally v. Ireland [2011] 4 I.R. 431; Blythe v. Attorney General (No. 2) [1936] I.R. 549 ;McDonald v. Bord na gCon [1965] I.R. 217; Zalewski v. Workplace Relations Commission [2021] IESC 24.

hypothetical OCGT in an hypothetical location in respect of all of which the detailed requirements of environmental protection are unknown and in place of "*known fixed facts*" the Court is invited to posit hypothetical "identical" OCGTs on either side of the Border. In granting an IEL to an OCGT the EPA may impose an ARHL. The EPA says that until EPUKI submits an application for an IEL for its proposed OCGT and the EPA has been able to consider such an application in full, it's not possible to know what conditions would attach to an IEL were it to be granted.[589] In my view there is much to be said for this submission. And it seems to me that the hypothetical aspects of the case are behind much of the cross-purposes of its argument and the difficulty we all had at trial (or at least I had) in getting to grips with exactly what was between the parties as to the interpretation of BAT 40.

EPA Cases on prematurity

352. The EPA cites cases specific to its prematurity point. **North East Pylon**[590] was a case in which leave to seek to prohibit a planning enquiry was refused. Humphreys J took the view that, though it was not an absolute rule, "*there are strong grounds in public policy for viewing as premature a challenge to an intermediate administrative decision until such time as it crystallises in a legally binding and normally final outcome*" and counter-instances were exceptional. The EPA also cites **Rowland**.[591] It is important to observe that Rowland was not a judicial review but a case in which a private law interlocutory injunction was sought to restrain a disciplinary process in an employment relationship. Accordingly the public law element was lacking and the public interests at play were different. Nonetheless, there are similarities and the view of Clarke J is striking to the effect that

> *".... the court must be satisfied that it is clear that the process has gone wrong, that there is nothing that can be done to rectify it and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law. In any case where the plaintiff cannot establish that the case meets that standard it will ordinarily be inappropriate for the court to intervene at that stage but rather the process should be allowed to continue to its natural conclusion at which stage it can, if any party wishes it, be reviewed."*

353. Of the present case it can certainly be said that, in any application by EPUKI for an IEL, neither it nor the EPA will be bound by the latter's view of the law as stated in the e-mail of 18 July 2022. EPUKI will be quite free to make in that application whatever submissions it wishes to make as to the correct interpretation and effect of BAT 40 and the EPA will be obliged to consider such submissions and in light thereof and or any other relevant matters equally free to take a view of the correct interpretation and effect of BAT 40. That view may prove to be or prove not to be the same as that stated in the e-mail of 18 July 2022.

589 Affidavit #1 Marie O'Connor 17 November 2022 §50.
590 North East Pylon Pressure Campaign v An Bord Pleanála [2016] IEHC 490, §13
591 Rowland v An Post [2017] 1 IR 355, 361

354. In **Spencer Place**, having held the briefing note non-justiciable, Costello J also concluded, citing inter alia, an earlier iteration of North East Pylon[592] that the proceedings had been brought prematurely where the developer had identified no exceptional circumstances for seeking judicial review prior to a decision on its planning application. The criterion of exceptional circumstances for departure from the "general rule" is notable.

355. In that iteration of **North East Pylon,** Humphreys J had observed that:

> *"From a public policy point of view, it seems to me that the need to avoid disruption to the processes of public administration is not only just as important as legal certainty in the abstract, but indeed significantly more important. …"*

Indeed it strikes me that this observation might serve as something as a leitmotif in these proceedings.

<u>Mullally, MacPhartaláin & Maguire</u>

356. Its rather laconic citation, shorn of context, of Hogan J in the Court of Appeal in **Mullally**[593] to the effect that the modern law on judicial review "*looks beyond the rather formalistic question of simply examining whether the legal rights of [the] individual have been affected*", does not avail EPUKI. First, it excludes the significant word "often" before "looks". Second, it excludes the observations immediately following, to the effect that *"In marked contrast"* to cases such as ***Maguire***[594] *"there is no attempt in the present case to adjudicate upon contentious and disputed facts in a way which might well adversely reflect upon the constitutional right to a good name of any of the parties."* Neither was there any such attempt by the EPA in the present case. Similarly, Noonan J in the High Court in Mullally, whose decision Hogan J upheld, said of cases such as ***Maguire*** that they *"concerned decisions or determinations that had a significant impact on the applicant's constitutionally protected right to his or her good name. Similar considerations do not arise in this case."*

357. Next, the judgment of Hogan J is notable for his observation that "The authorities bear out the submission of the Council that decision-making of a purely advisory or admonitory kind is generally regarded as non-justiciable in nature." For present purposes, it seems to me, Mullaly is most notable for the fact that the impugned recommendation was deemed non-justiciable – and was so deemed explicitly because the recommendation had no legal effect and despite the fact that it had issued following the compliance of the Labour Court with a statutory obligation to investigate a trade dispute and in the exercise by the Labour Court of a specific statutory function of issuing

592 North East Pylon Pressure Campaign Limited v. An Bord Pleanála (No. 1) [2016] IEHC 300.
593 Mullally, et al including The Psychiatric Nurses Association, v The Labour Court, [2016] 3 IR 245.
594 Maguire v Ardagh [2002] 1 IR 385 – see below.

recommendations on foot of such an investigation.[595] Not merely here does the EPA's impugned e-mail have no legal effect: it was not even sent in the exercise of a statutory function. And it clearly could not bind either an applicant for an IEL, objectors to an application for an IEL or the EPA in deciding an application for an IEL or prevent them from arguing or taking a different view as to the proper meaning of BAT 40.

358. EPUKI cites MacPhartaláin[596] as a landowners' challenge to the CPW's designation of its lands as areas of scientific interest and importance by the wildlife section of the CPW. Finlay C.J. rejected the contention that designation was not justiciable as it had not affected the lands – not least as it had resulted in the refusal of a planning permission. The case is unusual, or perhaps it is just that the times were simpler than this age of labyrinthine environmental legislation, in that the judgments do not identify a statutory basis for the designation. It seems that the designation was not statutory but was made on foot of an unidentified "decision" of government, in pursuance of a European Community "interest" in grading such areas. Finlay CJ said that:

> *"The function being carried out by the Commissioners on this occasion was a function, according to the evidence they adduced, in pursuance of a government decision and it is one of the functions which, as a matter of common experience, the courts find the Commissioners carry out on behalf of the government. It was not one of the functions which are specifically vested in government departments by the Wildlife Act, 1976, but was rather a function of a different kind."*

359. Possibly the decision in MacPhartaláin is to be viewed as made in the exercise of the executive power and justiciable as such.[597] But, if so, there can be no suggestion that the EPA's Impugned e-mail of 18 July 2018 was such a decision. In any event, the decision in MacPhartaláin differs from the EPA's Impugned e-mail in that the former applied a designation to specific property and thereby affected the owner's rights and interest in such property. To apply the word used by Costello J in Spencer place – it was not a decision in the abstract. That is quite different from an expression by the EPA of its understanding of the proper interpretation of a CID – which is far closer to the circumstances of Spencer Place.

360. EPUKI cites, without elaboration, **Maguire**[598] as an example of the justiciability "of the report of a Parliamentary Committee which had no jurisdiction to conduct a statutory inquiry and, strictly

595 The Headnote reads in part:
Section 20(1) of the Industrial Relations Act 1969 provides, inter alia, as follows:-
"Where the workers concerned in a trade dispute or their trade union or trade unions request or requests the [Labour] Court to investigate the dispute and undertake or undertakes before the investigation to accept the recommendation of the Court under section 68 of the [Industrial Relations Act 1946] in relation thereto then … the Court shall investigate the dispute and shall make a recommendation under the said section 68 in relation thereto."
Section 68(1) of the Industrial Relations Act 1946, as substituted by s 19 of the 1969 Act, provides as follows:-
"The Court, having investigated a trade dispute, may make a recommendation setting forth its opinion on the merits of the dispute and the terms on which it should be settled."
596 MacPharthalain, v Commissioners of Public Works, [1992] 1 IR 111; [1994] 3 IR 353.
597 See e.g. Burke v Minister for Education and Skills Supreme Court, 24 January 2022 [2022] 1 I.L.R.M. 73.
598 Maguire v Ardagh [2002] 1 I.R. 385.

speaking, no direct legal effect". In that case the Supreme Court declared that a sub-committee of a Joint Oireachtas Committee had no power to inquire into the fatal shooting at Abbeylara on the 20th April, 2000, in a manner capable of leading to adverse findings of fact and conclusions (including a finding of unlawful killing) as to the personal culpability of an individual member of An Garda Síochána[599] so as to impugn his or her good name. The constitutional right to a good name loomed large in the case and what the sub-committee had embarked upon was a form of public inquiry. Any findings would be "legally sterile" – but in the specific sense of being incapable of constituting a conviction or binding finding of guilt. But the results of the sub-committee's inquiry were clearly capable of affecting the applicants' good name and in a very fundamental and damaging way. Justiciability was partly conceded and non-justiciability was argued on the basis of the separation of powers and the immunity of the internal procedures of the Oireachtas to judicial review. Keane CJ rejected that argument on the authority of **In re Haughey**.[600] McGuinness J said of that immunity:

> *"Can this non-justiciability extend to actions of the Oireachtas, its committees and its members when those actions impinge on the rights of persons who are not members of either House, as contended for by counsel for the sub-committee and Deputy Shatter? More particularly, can non-justiciability extend to a situation where such persons are compelled to attend and give evidence before a committee of either House or a joint committee? Could such non-justiciability extend to a situation where, for instance, the members of a committee were in blatant breach of the standing orders of the House itself and that breach affected the rights of non-members? It seems to me that it could not.*
>
> *……..*
> *A person such as one of the applicants, therefore, who appears before an Oireachtas committee under a direction pursuant to the Act of 1997, is thus involved in a scenario where crucial decisions are to be made by the High Court, or by this court on appeal. He is at risk of being found to have committed an offence and of being fined or committed to prison. He is brought into this scenario as a result of resolutions, motions, amendments and other actions of the Oireachtas. It seems to me that actions of the Oireachtas which are the basis on which the ordinary citizen may be brought into such peril cannot be non-justiciable."*

361. In my view, **Maguire** is a case decided in very specific constitutional contexts not found here and it does not govern the present case.

<u>Conclusion on Justiciability & Prematurity</u>

362. I have expressed certain conclusions above in my analysis of the case law which inform the view I now take. I will not repeat them all. I do not doubt that it would be very much in EPUKI's interest to regard the EPA e-mail of 18 July 2022 as justiciable. However such an interest does not necessarily imply justiciability and does not in this case. As Kearns J said in Ryanair "*there can be*

599 not a member of the Oireachtas.
600 in In re Haughey [1971] I.R. 217.

decisions with adverse implications for the person affected thereby which nonetheless fall short of infringing their legal rights." – i.e. are not justiciable. In my view the EPA's reliance on Cintra and Spencer Place is well-founded and the analogies between those cases and the present case against the EPA are close and convincing. Inter alia, Spencer Place is analogous in that EPUKI too asserts an error of interpretation of law. Indeed, by the time Spencer Place came to appeal that alleged error in the impugned briefing note found non-justiciable had already informed the refusal of a planning application. In the general area of IED Permitting, Planning Applications and the like there is a keen public interest in pre-application consultations and a similar keen private interest of intending applications. It is a necessary feature of such consultations that utterances therein be generally non-justiciable. I do not rule out the possibility of exceptions[601] but they do not seem to me to arise here.

363. If the EPA applies, in any IEL decision on an IEL application by EPUKI, the view of the law expressed in its e-mail of 18 July 2022 so as not to apply an ARHL an OCGT planned by EPUKI, it will of course be open to EPUKI to seek by judicial review to quash such a licence with a view to a determination that the imposition of an ARHL in such a licence is mandatory. I confess to wondering whether EPUKI will take such a course. Only time and events will tell, but EUKI must be the judge of where its interest lies. However, and in the meantime, EPUKI is entirely free to bid in auction for a Capacity Contract for any OCGT in Ireland on the footing of its view that it must be subject to an ARHL and in any event on foot of its view that the EPA is wrong in the view of the law expressed in its e-mail of 18 July 2022.

364. My view is, it seems to me, bolstered by the correctness of the agreement of Counsel for the EPA, citing Spencer Place, that if in a specific IEL application submissions were made by anyone that the view of the law stated in the EPA's impugned e-mail of 18 July 2022 was incorrect, it would be obliged in law to consider that submission and if needs be, revise its view accordingly.[602]

365. **Mallon**[603] was introduced by EPUKI in reply. I understand it to recognise a discretionary jurisdiction to grant declaratory relief even absent the impugning of a justiciable decision. That must be the exception rather than the rule in judicial review, the norm of which is a requirement that the decision impugned be justiciable. I do not see that this is a case to depart from that norm. That this is so can be illustrated by the difficulty experienced in pinning down exactly what was between the parties as to the EPA's e-mail of 18 July 2022. But in any event I am concerned to maintain as a matter of good public administration the position that pre-application consultations are non-justiciable. EPUKI also introduced **Omega Leisure**[604] in reply. The circumstances of that case were very different to the present. As relevant here it seems to me notable for the view that declaratory relief is *"discretionary relief and involves a jurisdiction which must, therefore, be circumspectly exercised and in accordance with the circumstances of the case."* For the reason I have indicated in

601 A possibility canvassed in O'Flynn Capital Partners -v- Dún Laoghaire Rathdown County Council [2016] IEHC 480.
602 Day 2 p169 et seq
603 Mallon v. Minister for Justice [2022] IEHC 546 (High Court (Judicial Review), Phelan J, 5 October 2022)
604 Omega Leisure Ltd v. Superintendent Charles Barry [2012] IEHC 23 (High Court, Clarke J, 12 January 2012)

my view circumspection in the circumstances of this case indicates that I should not make an exception as to this non-justiciable e-mail.

366. I will therefore dismiss the action against the EPA on the basis that the impugned e-mail of 18 July 2022 is non-justiciable.

367. Viewing the matter through the lens of prematurity, I take the view that EPUKI has demonstrated no exceptional circumstances justifying departure from the general rule identified in North East Pylon and Spencer Place. My view is to some degree informed by the view taken in Rowland - though, as I have said, I am conscious that that case was not a judicial review.

368. In my view, as stated elsewhere in this judgment, the process of qualification for a capacity auction intrinsically and necessarily involves all parties, not just applicants for qualification, taking a view as to the prospect of future events of various kinds - including but by no means limited to, the grant or refusal of an IEL, the terms upon which it will be granted, and the question whether an ARHL will or will not be included. No doubt the parties will have to take a view on many financial, practical and other contingencies which may bear upon the question whether, and if so whether profitably, a generation plant will be commissioned and come into operation in due course. Such risks are inevitable and unavoidable and the practical questions are essentially of risk allocation. It is in my view not permissible to use the happenstance (which is what it was in a legal sense) of an e-mail in a voluntary, non-statutory and non-binding pre-application consultation as basis on which to seek from the courts an advisory opinion as to the law in advance of a Capacity Auction. The courts do not give advisory opinions. Much less do they do so in the abstract – as opposed to on foot of the outcome of a specific licensing process. While, in the instant, it might superficially seem that there is a practical attraction to giving such an opinion - in terms of facilitating the parties with a view of the law to enable them to better assess their future courses of action, there are good reasons why the courts do not give advisory opinions. Inter alia they tend to lack, as this case does, a factual matrix by which, in the method of the common law, a sound view of the law can be informed. And this is far from an unusual or exceptional situation. Parties assess, allocate and take risks, including legal risk, all the time. Myriad must be the circumstances in which parties entering into legal relations of many kinds or embarking upon commercial ventures would find it extremely useful and highly mitigatory of risk to have, in advance, an opinion of the law from the courts. But at that point they must take counsel – not go to court. There is nothing exceptional about such a situation. I am conscious that the rule is not absolute but I am of the view that no exceptional circumstances have been shown in this case.

369. In my view these proceedings against the EPA are premature and they will be dismissed on that account.

EPA CASE – RESIDUAL ISSUES

370. Often, against the possibility of being found in error on appeal, High Court judges state their views on grounds of judicial review other than that on which they have decided the case. In general, there is a lot to be said for that practice. Not least, it tends to reduce the frequency of remittals of overturned High Court decisions to be decided again by the High Court.

371. However the very bases, non-justiciability and prematurity - on which I will dismiss the action against the EPA seems to me to suggest that I should be cautious as to going on nonetheless to consider EPUKI's other grounds of attack on the e-mail of 18 July 2022. In part that is because the abstract character of that e-mail 18 July 2022, as compared to a controversy as to an IEL once issued, renders judgment on those other grounds of attack undesirable.

372. I must emphasise therefore that it follows from the basis on which I dismiss the action against the EPA that my account of the IED, BAT and IEL licensing set out above is obiter. But in deference to the arguments in this case, given the dearth of authority on these issues, given also the need to put the decision in the EPA case and the decision in the SEMC case in a comprehensible context, and in hope they may be of some assistance, I have thought it worthwhile to set out the account of the law and my views on it to the extent I have done so above. That said I will yield to the temptation to say a little more, obiter, of those matters in the hope that it may assist the parties.

What does the EPA's E-Mail dated 18 July 2022 mean?

373. To recapitulate: the e-mail 18 July 2022 said that the interpretation of BAT 40 of the LCP BAT Conclusions which it "*will apply*" in IEL Licensing applications and decisions is that OCGTs can be operated *".... in excess of 1,500 hrs per annum provided the plant meets the relevant specified BAT AEEL[605] of 36 — 41.5% net electrical efficiency".* Though the case against the EPA is to be dismissed, It will assist in addressing the case against the SEMC to know what the e-mail means

374. The words "*the relevant specified BAT-AEEL[606] of 36 — 41.5% net electrical efficiency*" are taken from the entry in Table 23 of BAT 40 as the BAT-AEEL specific to "*Open cycle gas turbine, ≥ 50 MW_{th}*"[607]

375. Counsel for EPUKI made clear the interpretation of the EPA e-mail on which EPUKI's case rests: he said it said that, the EPA was saying that to allow an OCGT exceed 1,500 hours per year *"the only condition we're going to impose is ..this AEEL figure"* – one could exceed 1,500 hours if one

605 See below - Best Available Techniques - Associated Energy Efficiency Levels.
606 See below - Best Available Techniques - Associated Energy Efficiency Levels.
607 See Table 23 extract above.

"*just*" met the AEEL.[608] I must say that, even before considering the EPA and SEMC arguments on that question, I do not see the word "*only*" in that e-mail and I do not see it as implicit in that e-mail. The same can be said of the word "*just*". Counsel says the e-mail means: *"All you've got to do is hit this non-onerous electricity efficiency level percentage figure and then off you go".* I confess that is not how I interpret the e-mail.

376. The EPA characterises[609] that e-mail as stating as its interpretation of BAT 40 that it is "*possible, and not inconsistent with*" BAT 40 for an OCGT to be granted an IEL without being restricted to 1,500 run hours per annum. But, it says, it has no immutable regulatory position or general approach to allow any or all OCGTs to operate in excess of 1,500 hours annually. Rather, it says, it decides the terms of an IEL only following a full consideration of the licence application, the BAT Conclusions as a whole and the environmental context of the particular site in respect of which the Licence was sought. Nor do the terms of other or earlier IELs bind the EPA in deciding the terms of any future IEL. It says the Corduff Road IEL is consistent with the EPA's stated interpretation of the BAT Conclusions but it does not follow that the EPA will never limit the run hours of an OCGT plant even where the BAT-AEEL is achieved. Equally, the imposition of a 1,500-hour ARHL in a specific IEL for an OCGT would not indicate a blanket regulatory policy either. The EPA says its mail of 18 July 2022 is "clear" only insofar as it rules out a blanket policy of refusing to license OCGT plant for more than 1,500 hours annually. It says EU Law does not require such a blanket policy and it has no such policy. In short, a new OCGT in Ireland may or may not have an ARHL placed in its IEL.[610] Its e-mail means merely that for an OCGT to receive an IEL without an ARHL it considers it necessary but not sufficient that it meet the BAT-AEEL.

377. For the SEMC's part, Mr Melvin does "*not understand the EPA's position in any way to mean that there will never be ARHLs applied to OCGT plant on the basis of the BAT CID*."[611] He says of the impugned e-mail of 18 July 2022 that "*it does not appear that the EPA has adopted any definitive or categorical position that no ARHLs will be imposed on OCGT plant in Ireland*". As explained above, he explains why the CoNE report does not imply anything to the contrary. In my view the SEMC has correctly understood the e-mail of 18 July 2022.

378. I accept the EPA's view of the proper interpretation of the e-mail as I have set it out above. Perhaps the e-mail could have been clearer – but, as I have said, it was an e-mail sent in a voluntary non-statutory pre-application process. It should not be interpreted as if a statute or a decision on an IEL application or, indeed an IEL. For all that, I think it tolerably clear. I do not accept the criticism levied by counsel for EPUKI of the EPA affidavits as involving *"a certain amount of reinterpreting of the e-mail of 18th July to say that they haven't really made up their mind, that they are trying to water it down a bit…"*[612]

608 Day 1 p37, p39, p45
609 Affidavit of Marie O'Connor #1 17 November 2022.
610 Affidavit of Marie O'Connor #2 14 December 2022.
611 Affidavit #2 of John Melvin 15 December 2015 §62.
612 Day 2 p61.

Interpretation of BAT Conclusions - Possibility of Difference Between EPA & NIEA

379. The EPA also says[613] that its interpretation of the BAT Conclusions is within its "*margin of discretion" "in interpreting BAT Conclusions"* and that the BAT Conclusions are "*not amenable to one correct interpretation, but rather set the parameters for a range of reasonable regulatory responses".* This point seems to me misconceived. Though perhaps the point is semantic as opposed to substantive, it seems to me worth addressing given the stress repeatedly laid by the EPA on decrying "*the idea that there is one and only one permissible interpretation of the BAT Conclusions*"[614] and EPUKI's response.[615]

380. Speaking of any document compendiously, there is only one lawful interpretation of a document creating legal obligations. That it may contain ambiguities does not alter that proposition – ambiguities are to be resolved. That it makes differing provisions for relevantly differing situations and circumstances does not alter that proposition either – it would be surprising if it did not. But it is quite a different, and correct, thing to say that, on its single proper interpretation and as a matter of that interpretation, a document may allow flexibility, discretion or margin of appreciation or of judgment in carrying into effect powers and obligations created by the document.

381. In summary, it is perfectly possible that BAT Conclusions, or indeed any similar document may *"set the parameters for a range of reasonable regulatory responses"* or, as Kingston et al put it, give a "*strong steer to the permitting process*". But it is not possible that they do so by being amenable to more than one correct interpretation. Ms Martin was correct in stating that "*there is not one correct regulatory approach to <u>applying</u> the BAT Conclusions*".[616] But it is not the case that there is not one correct interpretation of the BAT Conclusions.

382. It follows from the fact that "*there is not one correct regulatory approach to <u>applying</u> the BAT Conclusions*" and from the discretionary elements of the IEL decision-making process, that approaches may lawfully differ within the margin of discretion as between IED-Permitting competent authorities on either side of any of the many land borders within the EU. Inter alia, that is consistent with the EU Law principle of subsidiarity. That may well result in apparently or broadly similar IED Permit applications being decided differently in respect of very similar installations located near each other but on opposite sides of a border between Member States. That may advantage and disadvantage operators of such installations and in many and varying respects in many of the single markets – not just that in electricity and as to their capacity to compete in such markets.

613 Affidavit of Marie O'Connor #1 17 November 2022.
614 Affidavit of Marie O'Connor #1 17 November 2022.
615 E.g. Affidavit of Robert Crankshaw #2 1 December 2022.
616 My emphasis.

SEMC CASE - CONSULTATION

383. EPUKI asserts that[617] the alleged inconsistencies, discriminatory effects and lack of logic in the De-Rating Decision were not considered by the SEMC prior to making it - in part due to the absence of a proper prior consultation - only lasting 5 working days before the Code Modifications to were decided. Also, the Code Modification process timetable intimated that the decision would be made the day after the consultation closed, suggesting, it is alleged, pre-determined view "*that it was going to take the De-Rating Decision*" and intention to not properly take account of the responses made in the consultation.

384. In my view there is nothing in this complaint. I have already addressed the chronology in terms which will have rendered that view no surprise. I should add that I am conscious of other stakeholders' complaints of inadequate consultation. But my concern and jurisdiction are as to legal adequacy of consultation as opposed to a higher standard – **GRA & Bourke**[618] **-** and I accept that, as McCombe J in the Court of Appeal said in **Sumpter**:[619]

> *"… consultation has to be fair; it does not have to be perfect. With the benefit of hindsight, it will no doubt often be possible to show that a consultation could have been carried out rather better, but that will not necessarily mean that it was unfair."*

As the trial judge in Sumpter had said:

> *"… the test is not whether the consultation process could have been improved; it is whether it was unfair."*

385. Sumpter is also authority that the question of fairness is "*intensely case-sensitive*". It is also noteworthy that, as in the present case, the allegation in Sumpter was that the consultees had been inadequately informed to allow them to exercise their right of consultation. Certainly, "*sufficient information must be given to enable intelligent consideration and response*". But that sufficiency falls to be judged in the light that the consultees were "*sophisticated representative bodies*" to whom the relevant information was "*reasonably obvious*". In my view, EPUKI falls into a similar category of consultee.

386. I cannot see that, taken overall, as they must be, the consultation processes which resulted in the adoption of ARHL De-Rating were unfair or that SEMC failed to adequately inform EPUKI for purposes of that consultation. EPUKI, as an expert, expertly advised and sophisticated consultee, knew or ought to have known everything it needed to know to participate in the consultations and

617 Affidavit of James Crankshaw 11 October 2022 §54.
618 Garda Representative Association and Amy Bourke V Minister For Public Expenditure and Reform [2018] IESC 4; [2018] 4 ICLMD 71 §7.1.
619 Sumpter v Secretary of State for Work and Pensions, [2015] EWCA Civ 1033 at 50.

in at least appreciable degree failed to avail of its opportunities. However, at risk of some repetition, I will say a little more of these issues.

387. There is no doubt that the decision to adopt ARHL De-Rating was made on 11 August 2022. Leaving aside the question whether that means EPUKI challenged the wrong decision, EPUKI (correctly in my view) does not impugn the adequacy of the consultation process prior to that decision. Rather EPUKI now says that consultation process is irrelevant as it did not canvass the issue of difference as between the EPA and the NIEA in their approach to ARHLs – that the SEMC failed to raise that issue. For reasons which will have become apparent from my chronological accounts above, in my view EPUKI's position lacks any reality. For reasons I have already set out, EPUKI was, or ought to have been, adequately aware of the issue of difference as between the EPA and the NIEA from, at latest, December 2021 and any consequences of its own tardiness in taking the advice of the SEMC to further investigate the issue cannot be held against the SEMC.

388. In making its submission to the SEMC in June 2022 EPUKI clearly understood and expressed the view that there was at least an uncertainty whether the EPA intended to apply ARHLs to OCGTs. Indeed, it took the trouble to state that such a position would be illegal (in its view). It must be remembered that at this point EPUKI was long-since aware of the NIEA's position and so was necessarily aware of the risk (as it would see it) of the difference between the EPA and NIEA and of the illegality of the EPA's position and of the resultant alleged discriminatory effect, of which difference and effect it now complains. If it chose to address that issue only obliquely (as it seems to me it did) or not at all in its submission of June 2022, that cannot be said to have been because of an unfairness or want of opportunity of consultation afforded by the SEMC. It is no answer to say, as Mr Crankshaw does, that EPUKI's concern in that submission was to "strongly" oppose ARHL De-Rating as distorting the market in favour of CCGTs by reducing OCGT revenues. It was up to EPUKI to decide what points it wished to make in that consultation and that it sought to make one does not imply that it lacked opportunity to make another.

389. The SEMC points out[620] that as EPUKI does not complain of the text of the Code Modification as distinct from the prior decision to introduce ARHL De-Rating, it is not clear what prejudice it claims to have suffered by virtue of the alleged unfair brevity of the consultation prior to, specifically, the Code Modification. However, even accepting, which I do not but for the sake of argument, that

- the consultation period in the Code Modification process was unfairly brief,
- EPUKI lacked opportunity to raise in the consultation, prior to the actual ARHL De-Rating decision of 11 August 2022, the risk of the difference between the EPA and NIEA and of the illegality of the EPA's position and of the resultant alleged discriminatory effect between OCGTs north and south, of which difference and effect it now complains,
- it would have been relevant to raise those issues in the Code Modification consultation,

it does not follow that any substantive unfairness to EPUKI ensued.

620 Affidavit #1 of John Melvin 17 November 2022 §204.

390. Notwithstanding the complexity and length of the papers in this case and the no doubt excessive length of this judgment, the point EPUKI says it was prevented by inadequate opportunity from making is essentially a simple one – whether or not correct in law. EPUKI's point is that the EPA's interpretation of BAT 40 is in error, so that the EPA's position as to application of ARHLs to OCGTs is illegal and the difference between that position and the NIEA's would produce a discriminatory effect as between OCGTs north and south of the Border if ARHL De-Rating was to be applied. While, as this case shows, this is no doubt a point capable of being expanded upon at length, the essential point takes a short paragraph to express and I have no doubt would be easily understood by experts such as the SEMC (which is not to say they would have agreed with it).

391. It is clear that entering into the Code Modification consultation EPUKI was long-since "prepped" for its discrimination point based on alleged misinterpretation of the CID by the EPA - even if it had chosen to make it only obliquely in its submission of 22 June 2022. On any conceivable view, it had explicitly foreshadowed in that submission the EPA's alleged error. By the time of the Code Modification Consultation it had had its supposed fears confirmed by the EPA e-mail of 18 July 2018. No doubt it took advice immediately on its receipt and, perfectly properly, a strategy ensued in relatively short order to address the entirely apparent risk of discrimination (assuming there is one) of which it now complains. From the point of the start of the consultation process as far back as mid-May 2022, that a Code Modification process – and consultation - would ensue from any decision to apply ARHL De-Rating was entirely predictable, if not inevitably so. The weeks from 18 July 2022 to the ARHL De-Rating decision of 11 August 2022 were doubtless prudently and well spent by EPUKI in preparation for that decision and the potential Code Modification consultation.

392. Even though the Code Modification consultation period was very short, there is no reason to believe that the inclusion in EPUKI's submission in the Code Modification Consultation of the brief paragraph required to raise the issues now litigated was beyond EPUKI's capacity. I decline to infer that the shortness of that period, as a matter of probable fact, prevented or even inhibited EPUKI from raising these issues in either its submission of 25 August 2022 or, indeed at the workshop of 17 August 2022.

393. In my view it is not open to EPUKI to complain that SEMC never intended to consider a submission it could have made but in fact did not. Admittedly, the intention to decide the Code Modification the day after the closing date for submissions was at best optimistic from the SEMC's point of view – though perhaps informed at the date the timetable was set by the expectation that only a drafting exercise was involved in the Code Modification. In any event, as it is clear the period of consideration of submissions in the Code Modification process was extended to allow such consideration, there is nothing in this complaint.

394. I therefore reject the allegation of inadequacy of consultation.

395. It is therefore unnecessary for me to rule on the SEMC submission that there is no basis for the common law (which EPUKI invokes) to impose different, more onerous consultation duties than those expressly prescribed in the Code. Given the public law context, the SEMC's invocation of the contractual status of the Code is not necessarily entirely convincing and noting that the Code, perhaps understandably, does not set a baseline for adequacy of consultation in cases of urgency, I would not rule out the possibility that general duties of fair procedures might supplement the Code's provisions in, for example, a case of manifest inadequacy of consultation.

SEMC CASE – SEMC DERATING DECISION BASED ON EPA APPROACH TO ARHL

396. Essentially the EPUKI position is that "*As acknowledged in the SEMC's Information Note, the SEMC has adopted the De-Rating Decision on the basis of the EPA's approach to OCGTs*"[621]

397. First, there is no such "acknowledgment" in the Information Note of December 2021 of the basis of a De-Rating decision taken months later. In terms, the allegation is anachronistic.

398. However, leaving aside the Information Note, one may consider the question more generally. Is it true that "*the SEMC has adopted the De-Rating Decision on the basis of the EPA's approach to OCGTs"?* In my view it is not. I consider that the SEMC is correct when it says that it has no function in setting or in questioning ARHLs. That is for the EPA and NIEA. No more or less than anyone else, unless and until an IEL is quashed, the SEMC must presume it valid. As I have said, the SEMC is an "ARHL-taker". It merely responds to ARHLs as they bear, as it is agreed they bear[622], on the exercise of its statutory function is securing electricity capacity. The SEMC says, and I accept, that it has taken no position, and does not need for the exercise of its functions to take a position, on the correctness or otherwise of the EPA's interpretation of BAT 40. It will or will not impose ARHL De-Rating irrespective of the location of the plant in question and on the basis only of whether it is subject to an ARHL. The submission of counsel for EPUKI[623] that, by the Code and/or the Code Modification, the SEMC has "*set themselves up sort of a mini version of the EPA*" so as to oblige it to interrogate the correctness or otherwise of the EPA's interpretation of BAT 40 has only to be stated to be rejected.

621 Crankshaw #1 §60.
622 Given EPUKI's acceptance of the principle of ARHL De-Rating.
623 Day 3 p189

SEMC CASE – BREACH OF THE IED & CID

399. I have explained my view that the question of the SEMC interpreting the IED and the CID does not arise and my acceptance that the SEMC's imposition of ARHL De-Rating was not premised on the EPA's interpretation of the IED and the CID – or, for that matter, any interpretation of the IED and the CID.

400. However I should address some further issues. The argument is a little confusingly put in written submissions but I understand EPUKI to argue that, assuming OCGTs in Ireland are not subjected to ARHLs and as, under the Code, the SEMC will require Capacity Contractors to comply with their capacity market obligations, it will be doing so inconsistently with the "mandated ARHL" required by the CID. For the purpose only of addressing this argument I will assume that an ARHL is mandated in and would omitted by the EPA from an IEL.

401. The argument misstates the SEMC's obligation in law – which is to respect the terms of any presumptively valid IED Permit issued by a competent authority - the EPA and the NIEA. That they might issue differently conditioned IED Permits does not per se imply that they interpret their legal obligations differently: much less that either interprets them incorrectly. And, as has been seen, the Code itself also obliges all parties to respect IED Permits in priority even to the Code itself.[624] In any event, and as the SEMC Points out, the obligation on Capacity Contractors, under the Code, to make awarded capacity available "*dedicate and use its reasonable endeavours to make available the Awarded Capacity*".[625] That obligation cannot oblige Capacity Contractors to act contra legem – either in breach of IEP Permit terms or more generally by reference to provisions of the IED, implementing legislation or a CID. Nor does the Code entitle the SEMC to attempt to procure that they do so. That there may be financial or other contractual consequences of the Generator's not making awarded capacity available does not affect the point. Further, even EPUKI now accepts that it is legally possible for an OCGT to be BAT-compliant without an ARHL and that it is for the EPA, not the SEMC and much less the court, to assess whether that is technically possible.

402. I should add that I accept the EPA and SEMC submissions, that as it has been transposed into Irish law (principally by the EPAA 1992 as amended) and as that transposition is not impugned, the question whether articles of the IED are directly effective does not arise. And the national implementing measures impose no obligations on the SEMC/CRU. Even if they were directly effective in the Irish State generally, the IED and CID do not purport to impose any obligations on national energy regulators in designing auctions for electricity generation. As the SEMC and CRU have no function in granting IED Permits, the IED and CID impose no obligations on the SEMC and CRU as to the conditions proper to such Permits.

403. Accordingly I see no reason to find against the SEMC in these regards.

624 §B.4.1.1.
625 Code §I.1.2.1(b).

SEMC CASE - DISCRIMINATION, IDENTICALITY & IRRATIONALITY, DISTORTION OF COMPETITION & URGENCY

404. EPUKI's cases in irrationality, breach of statutory duty (by reference to the ERA 1999) and breach of the Recast Electricity Directive are all grounded in its allegation of discrimination as between OCGT operators in Northern Ireland and their counterparts in Ireland. So grounds DG1 & 2 and EU2 can all be dealt with together.

405. First, I reject the SEMC's complaint that that EPUKI's reliance on the EU Law principles of equal treatment and proportionality was not pleaded. In reality they are encompassed in the pleaded complaint of discrimination as "*the prohibition of discrimination … is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law"* and the requirement of objective justification of discrimination encompasses a criterion of proportionality. And on given facts, as here, the general EU Law principles of non-discrimination and of proportionality are "closely linked". In these regards, see generally **Partridge Farms** and cases cited therein.[626]

406. EPUKI asks what the SEMC is trying to achieve by its decision to apply ARHL De-Rating Decision as "*In practice, it has no effect in Ireland but significantly impacts on Northern Ireland. This perverse outcome makes it clear that the ARHL De-Rating Decision combined with the EPA's Unlimited Operation Decision view discriminates against plants in Northern Ireland because it is extremely unlikely to affect any plants in Ireland*." [627]

407. EPUKI cites the RED as to:

- Article 1, which records that the RED "*establishes common rules for the generation, transmission, distribution, energy storage and supply of electricity, together with consumer protection provisions, with a view to creating truly integrated competitive, consumer-centred, flexible, fair and transparent electricity markets in the Union".*
- Article 3(1), which provides that *"Member States shall ensure their national law does not unduly hamper cross-border trade in electricity, consumer participation, including through demand response, investments into, in particular, variable and flexible energy generation, energy storage, or the deployment of electromobility or new interconnectors between Member States, and shall ensure that electricity prices reflect actual demand and supply".*
- Article 3(4), which provides that *"Member States shall ensure a level playing field where electricity undertakings are subject to transparent, proportionate and non-discriminatory rules, fees and treatment, in particular with respect to balancing responsibility, access to wholesale markets, access to data, switching processes and billing regimes and, where applicable, licensing."*

626 R (Partridge Farms Ltd) v Secretary of State for Environment, Food and Rural Affairs - [2009] EWCA Civ 284 [2009] All ER (D) 03 (Apr) citing, inter alia, Joined Cases 201 and 202/85 Klensch v Secrétaire d'Etat [1986] ECR 3477 and Case C-535/03 Unitymark and North Sea Fishermen's Organisation [2006] ECR I-2689
627 Affidavit of James Crankshaw 11 October 2022 §55 et seq.

408. As to discrimination, EPUKI cites S.9BC(1) ERA 1999 for the SEMC's principal objective to *"protect the interests of consumers of electricity ………. wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with the sale or purchase of electricity through the [SEM]".* It cites S.9BC(2) for the SEMC's duty to perform its functions *"in the manner which it considers best calculated to further the principal objective, having regard to: (a) the need to secure that reasonable demands for electricity in the State and Northern Ireland are met; and (e) the need to avoid unfair discrimination between consumers in the State and consumers in Northern Ireland."*

409. EPUKI cites S.9BC(5) to the effect that the SEMC *"shall not discriminate unfairly as regards terms and conditions",* inter alia[628], between holders of licenses to generate electricity and between applicants for such licenses.[629] It cites S.9BD for the SEMC's duty to *"Be transparent, accountable, proportionate, consistent and targeted only at cases where action is needed."*

410. Notable in the foregoing is that S.9BC(1) identifies an objective – not a duty. And the promotion of effective competition is not, as the SEMC points out, an end in itself of S.9BC(1) – though the SEMC says, and I accept, that ARHL De-Rating "*does promote effective competition in the capacity market, by ensuring that auction parameters better reflect each participant's real contribution to capacity adequacy*".[630] Rather, by S.9BC(1), the promotion of effective competition is a means to the objective of protection of consumers' interests – which is an objective of the ARHL De-Rating decision. S.9BC(2) identifies the duty – though doubtless it must be interpreted as part of S.9BC as a whole and as furthering the objective. Notable also is that by S.9BC(2) the duty imposed on the SEMC is to perform its functions "*in the manner which it considers best calculated to further the principal objective*".

411. That duty is framed in terms leaving very considerable scope to the SEMC for the exercise of its expert judgment in a very complex field requiring multifactorial analysis and decision-making. Such exercise is entitled to significant curial deference (as Clarke J explained in **Viridian Power**[631]) and is reviewable only for irrationality. See also **ETI**[632] as to curial deference "*where the decisions in question require 'complex scientific or technical assessments and weighing up'.*" Indeed ***Fitzgibbon***[633], cited by the EPA, is apposite to the position of the SEMC. In that case the Supreme Court cited ***M. & J. Gleeson***[634] *to the effect* that:-

628 See S9BC(7) as to the definition of "Authorised person" and S.14 ERA 1999 as to licences.
629 EPUKI also cites S.9(1)(fb) as to the CRU's duty to "foster non-discriminatory operational arrangements in regard to supply undertakings" – though as by S.2, "supply", in relation to electricity, means supply through electric lines to final customers for consumption;" and EPUKI is not such an undertaking does not seem to me to add to their case.
630 Affidavit #1 of John Melvin 17 November 2022 §101.
631 Viridian Power v Commission for Energy Regulation [2011] IEHC 266, paras.5.1-5.13.
632*Environmental Trust Ireland v An Bord Pleanála* [2022] IEHC 540, §234
633 Fitzgibbon v Law Society [2014] IESC 48
634 M. & J. Gleeson & Co. v. Competition Authority [1999] 1 ILRM 401

> *"It seems to me clear that the concept of curial deference of necessity takes the court to this further position, namely that the greater the level of expertise and specialised knowledge which a particular tribunal has, the greater the reluctance there should be on the part of the court to substitute its own view for that of the authority."*

The Supreme Court also cited Keane C.J. in **Orange Communications**[635] to the effect that *"In arriving at a conclusion on [whether a decision is vitiated by a serious and significant error], the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the first defendant."*

412. I should say that I have not had evidence as to the particular expertise of the SEMC in terms of the qualifications, professions, and specific expertise of those who administer it. But I consider that I am entitled to draw the necessary inference from the sheer complexity and multifactorial nature of the statutory scheme, technical apparatus and single electricity market which it administers. It seems to me that the SEMC must be at very much the higher end of the spectrum of expertise and entitled to a high degree of curial deference accordingly.

413. As to the factors identified in S.9BC(2) – security of supply and non-discrimination between consumers – they and the other factors identified are factors to which the SEMC must "*have regard*". That statutory formula is as well understood, no-doubt, by the parliamentary draftsperson as by the Courts. As Humphreys J said in **Cork County Council v. Minister for Housing**[636] - "*No kind of compliance is required by a have-regard obligation, merely regard*." And even having had regard to these issues the SEMC is to act "*in the manner which it considers best calculated to further the principal objective".* S.9BC(2) clearly afford the SEMC very considerable freedom to act as it sees fit and I see no evidence that it has exceeded the legal scope of that freedom.

414. Discrimination can arise only between comparators and it is essential to any such comparison that like must be compared with like. Indeed, comparators need not be identical in an absolute sense – comparators rarely are, if ever. It is in that non-absolute, but nonetheless demanding, sense that I interpret EPUKI's repeated use of the word "identical". EPUKI cites **Peak Gen Top**[637] for the uncontroversial proposition, which I accept, that "*the EU principle of non-discrimination requires that comparable situations are not to be treated differently or different situations treated in the same way, without objective justification*."[638] That principle was established by McCracken J in **Maxwell**[639] as requiring *"that similar situations shall not be treated differently unless the differentiation is objectively justified."*

415. Peak Gen Top is also notable for:

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635 Orange Communications Ltd v. Director of Telecommunications Regulation [2000] 4 IR 136
636 Cork County Council v. Minister for Housing [2021] IEHC 683 (High Court (Judicial Review), Humphreys J, 5 November 2021).
637 R. (Peak Gen Top Co Ltd) v Gas and Electricity Markets Authority [2018] EWHC 1583 (Admin) [2018] A.C.D. 85
638R. (RWE Generation UK Plc) v Gas and Electricity Markets Authority [2015] EWHC 2164 (Admin); [2016] 1 C.M.L.R. 17
639 Maxwell v The Minister for Agriculture [1999] 2 IR 474

- noting that Ofgem's duty not to unfairly discriminate was uncontroversial – as it is in the present case.
- noting that Ofgem[640] is an expert body charged with making decisions on complex, technical issues. The Courts will be slow to interfere with the judgments of such a body on such issues.
- confirming in considering a discrimination allegation, whether one is comparing like with like is considered by looking in the round at the similarities and differences between the posited comparators.
- the observation that while the distinction between comparability and objective justification is a useful tool of analysis, it is not a rule of law and the question whether two situations are comparable will often overlap with the question whether the distinction is objectively justifiable. There is a single question: is there enough of a relevant difference between X and Y to justify different treatment?[641]

416. Peak Gen Top was an electricity market case but, as to the facts, there the similarity with the present case ends. Accordingly, that the discrimination case failed in Peak Gen Top is of no present relevance. The same can be said for the dismissal of the discrimination allegation in **RWE Generation**[642] cited in Peak Gen Top for the principle of non-discrimination in the terms set out above. But RWE Generation, which the SEMC cites, does usefully observe that there is no unfair discrimination where "*differential treatment is based on a material, relevant difference*" and that such treatment, so based, can contribute "*to a cost-effective system and promoting effective competition*".[643] And the undoubted fact that a conclusion of actual contribution to those desiderata would be highly fact-sensitive and a matter of expert judgment seems to me to suggest a considerable curial deference.

417. The SEMC cites the UK Supreme Court in **Rotherham MBC**[644] for the proposition that the nature of the question whether parties are comparably situated, or whether any differences in treatment are objectively justified, "*requires a particularly wide margin of judgment to be allowed to the decision-maker*". In **Partridge Farms**[645] the trial judge held and it was common ground in the appeal that *"Member States have a broad margin of appreciation in terms of objective justification."* Though I am inclined to agree, I am not prepared to take a clear view on this in the absence of more detailed argument. Nor do I find it necessary in this case to do so. Rotherham MBC was a 4/3 majority decision of the UKSC and does not bind here. And the remark in question seems to me to have related to what was very much a policy decision of the executive and to have been grounded in the particular EU regulation under consideration. None of this is to suggest anything less than the greatest respect for the judgments in that case. But I need not decide the issue for this jurisdiction. That said, **Rotherham MBC** does assist in its acknowledgment that the question whether there is

640 i.e. the Gas and Electricity Markets Authority – for present purposes the GB equivalent of the SEMC.
641 Citing R. (Rotherham MBC) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6; [2015] 3 C.M.L.R. 20.
642 R. (RWE Generation UK Plc) v Gas and Electricity Markets Authority [2015] EWHC 2164 (Admin); [2016] 1 C.M.L.R. 17.
643 §§45 & 51.
644 R (Rotherham Metropolitan Borough Council and Others) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6; [2015] 3 All ER 1, para.28.
645 R (Partridge Farms Ltd) v Secretary of State for Environment, Food and Rural Affairs -[2009] EWCA Civ 284; [2009] All ER (D) 03 (Apr) - Citing Joined Cases 17 and 20/61 Klockner v High Authority [1962] ECR 325.

"enough of a relevant difference …to justify any difference in their treatment" was ultimately one for the court.

418. Though it is not essential to my decision, it is of at least some weight that it was held in **Partridge Farms** that does not follow from the principle of non-discrimination that measures of general application "*must be tailored to meet every difference between the persons it affects*". It is *"impossible to take account of every difference which may exist in the organisation of economic units"* and the *"fact that one particular group is affected to a greater extent than another by a legislative measure does not necessarily mean that the measure is disproportionate or discriminatory inasmuch as it seeks a comprehensive solution to a problem of general public importance".* Within its sphere of operation I see ARHL De-Rating as a measure of general application which seeks a "*comprehensive solution to a problem of general public importance"* – that being the problem identified by the SEMC, in essence, of awarding to generation units, and paying Capacity Payments for, capacity beyond their true capacity, thereby tending to undermine security of supply and un-justifiably increase prices to consumers all in the context of seeking to address a national power supply capacity crisis.[646] Indeed that is a problem - and a solution - implicitly acknowledged by EPUKI in its acceptance of the principle of ARHL De-Rating.

419. Strictly and to state the obvious, "*discrimination*" per se is not a cause of complaint. The law and everyone discriminate constantly and perfectly properly. What can be illegal is unfair discrimination – that is, treating differently situations which the law requires to be treated the same by reason of the absence of legally relevant differences between them. At very least generally, objectivity of difference is essential to legal relevance of difference. That said, I will revert to the common usage of "discrimination" as meaning "unfair" or (which is the same thing) "invidious" discrimination.

420. At the heart of EPUKI's case is the proposition that ARHL De-Rating, in the specific context of application of ARHLs to OCGTs in Northern Ireland and their non-application in Ireland, will "*discriminate*" between "*identical*" OCGTs. Clearly EPUKI sees identicality as an essentially physical and financial criterion and as viewed only from the perspective of the investor in power plants - comparing only the costs of, the physical and technical nature of, and the power generation capacity of, OCGTs without reference to the terms of their IED Permits.

421. Mr Melvin[647], viewing the matter of identicality from the perspective of the SEMC's statutory objectives and responsibilities, inter alia to secure All-Island power supply, summarises pithily its concerns which prompted its adoption of ARHL De-Rating. He says: "*In simple terms, a unit that cannot run for more than 17% of the year does not make the same contribution to generating capacity and supply security as a unit that is not subject to any restrictions."* He says an ARHL results

646 Affidavit #1 of John Melvin 17 November 2022 §222 et seq.
647 Affidavit #1 of John Melvin 17 November 2022 §206 et seq; Affidavit #2 of John Melvin 15 December 2022 §10.

in a "*real difference in the contribution to capacity adequacy*".[648] He states and I accept that *"ARHL De-Rating is primarily intended to correctly value the contribution of annual run hour limited plant to capacity adequacy, so that the correct amount of capacity can be procured to ensure that the security standard for the electricity system is met."* As to EPUKI's assertion that, as a result of ARHL De-Rating, "*identical OGCTs in Northern Ireland and Ireland will be treated differently in the Capacity Market auction*", the SEMC, as to its statutory responsibilities, says that "*from a capacity adequacy perspective, a generator that cannot operate for more than 17% of the time is not "identical" to a unit with no restriction on run hours*." And, from the perspective of the SEM and as to Capacity Payments it follows that it "*is entirely reasonable that a run hour limited plant, whose contribution to capacity is severely restricted by the terms of its licence, .would receive lower levels of capacity payments than a plant with no run hour limits".*[649]

In other words, he says, two otherwise identical OCGTs, are not identical if one is subject to an ARHL and the other isn't.

422. Mr Melvin says[650]

- ARHL De-Rating is simply a response to the fact of anticipated application of ARHLs in IED Permits for New Capacity and will apply to any plant to which an ARHL is applied – not because it is or is not an OCGT nor because it is in Ireland or Northern Ireland, but simply because it is subject to an ARHL.

- due to their nature, OCGTs are more likely to be subject to such limits, but ARHL De-Rating does not target them.

- its Decisions of 11 August 2022 and 5 September 2022 apply the same de-rating approach to all new capacity subject to ARHLs, irrespective of how or why those ARHLs arise and that the derating factor applies in the same way whether a plant is OCGT or CCGT, and whether located in Ireland or Northern Ireland. It applies only if the plant is subject to an ARHL because an ARHL restricts its contribution to capacity adequacy.

- its power is merely to set parameters for Capacity Auctions requiring the prediction by generators whether, as a matter of fact and if so in what terms, ARHLs will feature in anticipated IED Permits yet to be issued to their proffered New Capacity and to require the application of ARHL De-Rating accordingly.

423. I accept the position of the SEMC as correct. That analysis is fatal to EPUKI's allegation of discrimination. EPUKI's error is to see the purpose of the SEM solely as to afford it investment opportunities and a return on them. Investment opportunities and a return on them are, of course,

648 Affidavit #1 of John Melvin 17 November 2022 §190 & 206.
649 Affidavit #2 of John Melvin 15 December 2022 §100.
650 See generally on these issues Affidavit #1 of John Melvin 17 November 2022 §187 et seq. &194; Affidavit #2 of John Melvin 15 December 2022 §§32, 98.

vitally necessary aspects of the SEM. Without investment in power plants the SEM will not exist and power supply will not be secure. And a secure power supply is a vital interest of the community. Such investments doubtless also bring many and valuable other benefits. But such investments are a means – they are not the end of the SEM. The end of the SEM is security of power supply to the island of Ireland on a sound economic and sustainable footing. Viewing the matter of identicality, and hence of discrimination, from the perspective of the community, of the public interest and of the SEMC in seeking to attain that end, it is simple and clear that the OCGTs posited by EPUKI as identical are not identical. They differ, as to ARHLs, in the vital matter of their ability to contribute to security of power supply. I accept the SEMC view that these are relevant and objective differences capable of justifying differential treatment – with the decision whether they in fact justify differential treatment being for the SEMC and reviewable only for irrationality . As to identicality – the lack of it, I consider the SEMC is correct. As to objectivity and adequacy of justification, it requires little curial deference to hold that irrationality has not been shown by EPUKI.

424. Viewing the matter, as I consider correct, from the perspective of the true end – purpose - of the SEM, I accept the SEMC's entitlement to the view that:

> *"It is entirely wrong to claim that "identical" plants in Northern Ireland and Ireland will be treated differently under the Code. A plant whose contribution to capacity is limited by ARHLs, and can only operate 17% of the time, is not "identical' to a plant whose contribution to capacity is not limited."*
>
> *"Under the Code, the same rules apply to units in Ireland and units in Northern Ireland. If a new unit— whether in Ireland or Northern Ireland — happens to be subject to annual run hours limits, that results in a real difference in the contribution to capacity adequacy of that unit. It is this real difference that is reflected in the capacity auction through ARHL De-Rating"*[651]

425. Paraphrasing slightly, I accept that the presence or absence of an ARHL is an objective – real - difference in a relevant characteristic producing objectively different effects on the respective contribution of the postulated respective OCGTs to electricity generation capacity.[652] Accordingly, the case based on discrimination must fail for failing to compare like with like. Alternatively, and if the OCGTs are to be regarded as identical discrimination between them is objectively justified by the presence or absence of an ARHL. That the problem can be analysed both ways perhaps illustrates the overlap between the issues of identification of comparators and objective justification and the good sense of the view of Lord Sumption in **Rotherham MBC** that these issues often ultimately elide into a single question: is there enough of a relevant difference between X and Y to justify different treatment? Indeed, in accepting the principle of ARHL De-Rating, EPUKI necessarily accepts that the presence or absence of an ARHL is an objective difference justifying differential treatment, at least if we leave aside the difference in the prospects of ARHLs on OCGTs north and south

651 Affidavit #2 of John Melvin 15 December 2022 §10.
652 Affidavit #2 of John Melvin 15 December 2022 §11.

426. I should note that EPUKI disagrees that the presence or absence of an ARHL bears on the identicality of OCGTS as "*That distinction, however, is one which obviously engages the very issue in this case rather than being a substantive difference between the stations which could justify their difference in treatment.*"[653] However that submission seem to me misconceived. From the perspective of the SEMC as an "ARHL-taker", the difference between such OCGTs, by reason of their having/not having ARHLs in their IEP Permits is both substantive and substantial. It limits one to running only 17% of the year when the other is unlimited in that regard. Yet without ARHL De-Rating the OCGT limited to 17% will receive the same Capacity Payments as the OCGT not so limited. The additional cost involved will, doubtless, be ultimately borne by the consumers – the protection of whose interests is the principal objective of the SEMC. All this occurs in the context of the SEMC's rational concern at the prospect of being locked into 10-year capacity contracts on the basis of that difference.[654] I therefore do not accept EPUKI's assertion that the imposition of ARHL De-Rating is disproportionate.

427. It also follows from this analysis that the complaint of irrationality and "lack of logic" fails. Viewing the SEMC as an "ARHL-taker" obliged to treat all IED Permits as valid, whether or not including ARHLs, and given that an ARHL "*results in a real difference in the contribution to capacity adequacy*" the imposition of ARHL De-Rating was entirely rational and logical. But I need not make such a finding I need merely be satisfied that it was not *fundamentally at variance with reason and common sense*".[655] In that context I agree with the SEMC that it is relevant that Mr Crankshaw for EPUKI accepts that, as set out above, "*there is a benefit in adopting ARHL De-Rating", "there was sufficient material before the SEMC to support the introduction of ARHL De-Rating," "there were good reasons to introduce de-rating"* and "*in general, ARHL De-Rating is considered to promote the CRU's objectives"*. On the issue of irrationality I have no hesitation in finding for the SEMC.

428. Indeed, though repeatedly averred, given that EPUKI accepted the principle of ARHL De-Rating there was, in truth, no irrationality point here. In confining its complaint to the particular circumstance of difference between the EPA and NIEA position on imposing ARHLs on OCGTs and in describing ARHL De-Rating as illogical and irrational in that context, EPUKI was merely expressing its discrimination point in another way. The alleged irrationality consisted in the alleged discrimination, and, as I hope I have shown, there is no unfair discrimination in this case.

429. EPUKI asserts[656] that the De-Rating Decision will distort competition in the SEM. As a consequence of this difference in approach between the EPA and the NIEA, Operators of OCGTs being developed in Ireland and being bid into the Capacity Auction without ARHLs will have a significant commercial advantage over operators in Northern Ireland, whose OCGTs are ARHL-restricted and so subject to ARHL De-Rating. EPUKI specifically submits that the discrimination of

653 EPUKI Submissions 21 December 2022.
654 SEMC 2026/27 T-4 Capacity Auction Parameters & Annual Run Hour Limited Plant De-Rating Factor Decision Paper SEM-22-044 11 August 2022 §6.6.
655 The State (Keegan) v Stardust Compensation Tribunal [1986] I.R. 642.
656 Affidavit of James Crankshaw 11 October 2022 §59.

which it complains is inconsistent with effective competition between OCGT operators north and south.

430. This submission is misconceived. As I have said, the SEMC is an "ARHL-Taker". The SEMC is concerned with security and quantum of power supply. From the perspective of SEM, two <u>otherwise</u> identical OCGTs are <u>not identical</u> if one has an ARHL in its IED Permit and the other does not. The SEMC is entitled to take the view that the effective capacity (in the sense of quantum of power it can contribute to the system in a given period of time) of an OCGT with an ARHL limiting its operation to 17% of the hours of a year is appreciably less than that of OCGT with no ARHL. Indeed, that is not even a proposition with which EPUKI disagrees, given it accepts the principle of ARHL De-Rating. ARHL De-Rating applies the logic of that view regardless which side of the border the OCGT is on. It is entirely reasonable and in no way unfair, much less anti-competitive, that an OCGT with no ARHL in its IED Permit should be permitted to bid for more capacity in a capacity auction than can an otherwise identical OCGT with an ARHL in its IED Permit. Assuming for the sake of argument, that one or other of the EPA and NIEA erred in the application or non-application of an ARHL to an OCGT, that is not a matter to be corrected by the SEMC.

431. I also accept the SEMC submission that EPUKI is incorrect when it argues that there was no need or urgency to introduce ARHL De-Rating *"prior to the present issues of distortion being considered and addressed"*. The SEMC was entitled to judge the urgency of the matter and I should defer to its expert view on that issue. I find the view taken by the SEMC to have been clearly rational for the reasons set out in the SEMC Parameters Consultation Paper of 16 May 2022 and the EirGrid/SONI Information Paper of 16 May 2022 as identifying a risk that, if ARHL De-Rating was not introduced, there was a risk the auctions would "*procure large volumes of run-hour-restricted units, at a significant cost to consumers, which is an inefficient way of delivering security of supply*"[657] and that the SEM would be "locked in" to that inefficiency and costs by 10-year Capacity Contracts. I also accept the SEMC submission that here is no *"distortion"*, and even if there was, the SEMC would have no power to *"address"* it.

<u>SEMC CASE – WITH WHOM IS EPUKI'S QUARREL? & RISK ALLOCATION</u>

432. I agree with the SEMC that it is notable that EPUKI now says it has no complaint of de-rating in and of itself and its complaint arises only in the context of its complaint against the EPA, such that any issue is with the EPA and not with the SEMC. I have in substance addressed this issue already. It suffices here to repeat my view that the SEMC is an "IEL-Taker" and is as bound as anyone else by the presumption of validity of an IEL. It has no function as to the interpretation or implementation of the IED or, perhaps more to the point, the EPAA 1992 which transposes the IED. It has no function as to the issuing of IELs – which competence the EPAA 1992 assigns to the EPA. As counsel for the SEMC said[658] – the SEMC is just looking at a factual position: is there or is there not an ARHL? Any

657 Affidavit #1 of John Melvin 17 November 2022 §61.
658 Day 3 p125.

issue as to interpretation or implementation of the IED must be raised against the EPA and in justiciable circumstances.

433. I also broadly accept the SEMC submission that it is not obliged to stop regulating the industry it is set up to regulate and defer all capacity auctions until it has somehow "sorted out" – perhaps even by suing the EPA and/or the NIEA – a possibility that one or other of the EPA and the NIEA have erred in their interpretation of their legal obligations as to IED Permitting. And this is in circumstances in which it's entirely conceivable that any differences between the NIEA and EPA may derive merely from differences in policy (including Guidance) and the exercise of judgment and discretion as opposed to a difference in understanding the law. The SEMC has no obligation to stop regulating the SEM pending an investigation by it of the true legal nature of any apparent difference between the EPA and NIEA and some further course of action to resolve that difference, any more than it must stop regulating – or can be stopped from regulating - the SEM pending an investigation by it of the true legal nature of any apparent difference between planning decisions in apparently similar circumstances (whatever that phrase may mean) in County Antrim and County Cork, or for that matter, County Cork and County Sligo, as they bear on EU Law issues as to EIA or AA.[659] I take that view as a matter of law and of the scope of the SEMC's legal competence and obligations.

434. I appreciate that this situation inevitably creates risk in a qualification and auction process as to New Capacity - which process will inevitably precede the outcome of any IEL application and require a prediction of that outcome which prediction may prove incorrect. But that is by no means the only such risk of prediction required in the qualification and auction process - as I have observed above. Such risks must be borne and managed by someone. So they must be allocated in whole or in part to one party or another. Legally, the SEMC is entitled to allocate that risk, inter alia by Code Modification. That risk allocation may occur merely, as may be the case here, as the result of its pursuit of other legitimate aims - such as security of capacity/supply. The SEMC is not, as counsel for EPUKI suggested as to the prospect of ARHLs being applied to OCGTs, "*trying to predict what's going to be the outcome under the applicable legislation*".[660] But somebody has to and that risk is properly allocated to Generators. Whether it is commercially or strategically wise of the SEMC to allocate that risk to Generators to the degree in which that has been done in the Modification Decision, or whether it will discourage (at all or excessively) investment in power plants or participation in the SEM, are matters for the SEMC's judgment. It is not for the courts to second-guess that decision on its merits. Certainly, in its risk allocation aspect, the decision is in no way irrational.

659 Analogy posited by Counsel for the SEMC – D3 p127.
660 Day 3 p189.

SEMC CASE - COLLATERAL ATTACK - HAS EPUKI CHALLENGED THE WRONG DECISION?

435. The SEMC asserts that EPUKI has impugned the wrong decision in that:

a. The 2022 Parameters Decision was the substantive decision to impose ARHL De-Rating and adopt the ARHLdf of 0.43%. The purpose and effect of the Code Modification Decision of 5 September 2022 was merely to give formal documentary effect to the Parameters Decision by way of textual amendment of the Code.

b. EPUKI has chosen to impugn only the Code Modification Decision of 5 September 2022. It has not impugned the 2022 Parameters Decision.

c. None of EPUKI's grounds of challenge impugn the specifics of the Modification Decision. They do not assert the Modification is textually flawed or fails to properly carry the 2022 Parameters Decision into effect. Rather, EPUKI's grounds of challenge are exclusively directed at impugning the policy adopted in the 2022 Parameters Decision. The SEMC allege that the challenge to the Modification Decision is a collateral attack on the Parameters Decision, which attack would now be time barred.

d. Quashing the Impugned Code Modification Decision would leave unaffected the validity of the 2022 Parameters Decision whereby the SEMC decided to apply ARHL De-Rating in the T-4 2026/27 Capacity Auction. Even were this technically correct,[661] as the Modification Decision itself records, it would leave the Parameters Decision uneffected.

436. The SEMC cites **An Taisce v An Bord Pleanála & McQuaid Quarries**.[662] I will not set its consideration of the issue out in full here, though I have considered it. Notably it states[663] of a two- or multi-stage procedure that:

- *"The proper approach is to look at the overall scheme and determine whether what is decided at each stage is intended to be truly separate and distinct from what is decided in the other, even if the requirements of both must be established before the entire process concludes."*

- *"The question is whether it is the overall intent of the scheme that the relevant issue should be definitively decided at the first or an earlier stage of the process, with no capacity to reopen that issue at any subsequent stage."*

- *"The analysis which may be required to decide on the proper characterisation of any particular scheme may not always be quite so easy. This may particularly be so where the scheme is not express in its terms as to whether particular issues are capable of being raised*

661 As to which see below.
662 [2020] IESC 39; [2021] 1 IR 119 §145 – 152.
663 citing Sweetman v An Bord Pleanála [2018] IESC 1, [2018] 2 IR 250.

at various stages in the process or alternatively are to be taken to be definitively determined at a particular point."

- *"The collateral attack jurisprudence should only be deployed to prevent a substantive case being heard in circumstances where it is clear, on a proper analysis of the relevant scheme, that an earlier decision in the process is intended to be final and definitive regarding the issue in question."*

437. EPUKI rejects the allegation that it has failed to challenge the decision to which it in truth objects. It says that for ARHL De-Rating to apply in the Capacity Auction, the Capacity Market Code had to be modified. It says that absent Modification of the Code, De-Rating would not apply in the auction and so it was the Modification Decision of 5 September 2022 that affected EPUKI and has been challenged.

438. Given my views on other matters, I need not decide this issue. That may be just as well as I have found it difficult. In the end, I would have decided it against the SEMC.

439. It is true that the only issues which arose for consideration in the Modification Decision, though important, were essentially clerical and all the grounds on which EPUKI relies in these proceedings address in substance the legality of the underlying decision of ARHL De-Rating decision of 11 August 2022. I am in no way critical of the two-step procedure adopted by the SEMC. Nor do I suggest it should not be adopted in the future. I can well see its advantages. However, the relevant "scheme" here is the Code. The Code does not seem to envisage such a two-step procedure. It envisages merely a "Modification" decision.[664] Not merely was the Modification Decision essential to effect ARHL de-Rating: it seems to have been the only decision essential to that purpose, though, as I say, from a governance and practical point of view I can readily see the worth of the two-step procedure. So, while the SEMC clearly intended the ARHL De-Rating decision of 11 August 2022 to be "*final and definitive"* as to the issues it decided, I am not *"clear, on a proper analysis of the relevant scheme,"* that the Code rendered it so.

440. In taking this view I have not lost sight of the fact that the decision of 11 August 2022, though I have called it the "ARHL De-Rating" decision, was a Parameters decision as to the 2026/27 T-4 Capacity Auction Parameters. That is a type of decision for which the Code does provide.[665] However it seems to me that the setting of parameters for an auction must be grounded in the Code. That is not to say that, in anticipating the modification of the Code to introduce ARHL De-Rating, the Parameters decision was in any sense invalid or legally objectionable. But it does seem to me that having regard to the Scheme of the Code, any decision as to auction parameters which is not grounded in the Code must be regarded as provisional pending the laying a basis for it in the Code.

664 Code §B12.
665 Code §D.3.1.3.

SEMC CASE - LOSS AND DAMAGE

441. I have addressed this issue above – though, as I said at trial, I am by no means clear it was being pursued.[666] In summary, EPUKI say that two of its Northern Irish OCGTs (subject to ARHLs) would, by reason of ARHL De-Rating, be €64 million worse off in Capacity Payments than they would have been had they been constructed in Ireland. Leaving aside the precise figure, the point may or may not prove correct in some degree, depending on how the EPA proceeds as to IELs of OCGTs. But even assuming it correct, the figure does not represent a loss to EPUKI any more than it represents a gain to its own future Tynagh OCGT. The supposed loss must be measured against what EPUKI says ought to be the position. EPUKI's prescription has two elements. First, it emphasises its acceptance of the principle of ARHL De-Rating. Second it accepts – indeed requires – ARHLs. In EPUKI's desired world, its Northern Irish OCGTs would be no better off. Indeed, the only change would be that, as compared to its assumption that the EPA at present will not impose an ARHL on its Tynagh OCGT, an ARHL would be imposed on it - at considerable loss in capacity payments to EPUKI. At least on its case and on the figures as presented, EPUKI suffers no loss by the present position and will lose by its prescribed position. Even prima facie I cannot see the financial and associated information provided by EPUKI as enabling an award of damages.

CONCLUSION

442. I dismiss both proceedings for the reasons set out above.

443. I am provisionally of the view that the CRU and the EPA, having succeeded, should have their costs.

DAVID HOLLAND
10/2/23

666 D2 p173.