

A photograph of an offshore wind farm with several turbines in the sea, viewed from a rocky coastline. The image has a greenish tint. The sky is overcast with some clouds. The water is a pale blue-green. The foreground is a rocky beach with some seaweed.

Marine Planning and Development Management Bill – the General Scheme

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MARINE PLANNING AND DEVELOPMENT MANAGEMENT BILL – THE GENERAL SCHEME

Introduction

The eagerly awaited General Scheme¹ of the Marine Planning and Development Management Bill (**MPDM**) was recently published by the Department of Housing, Planning & Local Government². The MPDM represents a significant change in how the marine planning system in Ireland will be managed and developed. It is part of an ambitious suite of reforms which will modernise and streamline the process for approving maritime infrastructure projects, including offshore renewable energy.

Background

It has long been recognised that the existing system for approving maritime infrastructure projects under the Foreshore Acts 1933-2011 is outdated and no longer fit for purpose. A 2012 Government report "Harnessing our Ocean's Wealth" identified the need for an overarching national marine spatial plan underpinned by an efficient planning and licensing system. A previous attempt was made to reform the law in this area under the proposed Maritime Area and Foreshore Amendment Bill (**MAFA**) which was introduced in 2013. However, a lack of political will, combined with legal concerns expressed by the Attorney General, meant that MAFA never got off the ground.

Much of the reform in this area is being driven by the European Maritime Spatial Planning Directive (Directive 2014/89/EU) which sets 31 March 2021 as the date by which member states must have in place a Marine Spatial Plan (**MSP**) for their territorial seas. The Department of Housing, Planning and Local Government has recently launched a whole-of government approach to the development of Ireland's first MSP, which will be known as the National Marine Planning Framework (**NMPF**) and which will set out the Government's long-term planning objectives and priorities for the management of our territorial seas over a 20-year time frame. In addition to the draft NMPF, the Government has put forward a series of proposed reforms in this area as set out in the:

- Climate Action Plan 2019
- Draft Marine Planning Policy Statement
- Draft MPDM Bill
- Proposed Maritime Jurisdiction Bill

This briefing note will focus on the draft MPDM Bill and in particular its relevance to offshore renewable energy projects.

Key Elements of the MPDM Bill

A planning system generally comprises three main elements:

1. **Forward planning** – the process by which statutory authorities set out high-level planning objectives over the medium to long term at national, regional or local level
2. **Development consent** – processing and making determinations in respect of applications for specific development
3. **Enforcement** – tackling unauthorised development or non-compliance with development consent decisions.

The draft MPDM Bill incorporates each of these three elements, together with a fourth key element which is unique to marine planning, namely:

4. **State consenting** – the process by which the State, as owner of the maritime area, regulates the occupation of that area by prospective users.

¹ The general scheme, or draft heads, of a Government Bill generally undergoes pre-legislative scrutiny by an Oireachtas Committee before the text of the Bill is finalised. At the end of the pre-legislative scrutiny, the Committee produces a report and lays it before the Houses of the Oireachtas. The report makes recommendations on the Bill based on the Committee's scrutiny. The Bill must then pass through five stages in both the Dáil and Seanad before it can be enacted into law and become an Act.

²https://www.housing.gov.ie/sites/default/files/legislations/marine_planning_and_development_management_bill_-_general_scheme.pdf

Looking in turn at each of the four main elements in the draft MPDM Bill:

1. Forward Planning

Part 3 of the MPDM provides for the restatement verbatim of Part 5 of the Planning and Development (Amendment) Act 2018, which forms the existing legal basis for marine spatial planning in Ireland. The Minister for Housing, Planning and Local Government is obliged under the MPDM to prepare and publish an MSP and ensure it is reviewed every six years.

This Part of the Bill also introduces additional provisions to designate Strategic Marine Activity Zones. These provisions allow for the designation of a part of the maritime area for the establishment of a zone to facilitate activities which are of economic, social or environmental importance eg offshore renewable energy. This is similar to the designation of Strategic Development Zones under Part IX of the Planning Acts. Provisions are also included for the preparation of a marine planning scheme in respect of all or part of a Strategic Marine Activity Zone.

2. State Consent

Part 4 of the MPDM provides for a new State consent regime to be managed by the relevant minister. This new regime will focus on the abilities of prospective developers to complete proposed projects and will regulate the occupation of the maritime area in accordance with the rights and obligations of the State under the United Nations Convention on the Law of the Sea. The relevant minister will not assess project level detail or undertake any environmental assessments, which will instead occur under the planning system. Contrast this with the current system whereby the relevant minister assesses both the State consent and the offshore development consent (including environmental assessments) under the Foreshore Acts.

The Minister for Communications, Climate Action and the Environment will be the relevant Minister for development types within his policy remit, namely offshore renewable energy. All other development types within the scope of the MPDM will be the responsibility of the Minister for Housing, Planning and Local Government.

The MPDM introduces two new forms of State consent:

- a) Planning Interest: this entails an initial assessment by the relevant Minister of whether the developer can complete the project. It is intended as an entry point into the process and does not, as the name might imply, confer on the developer any form of planning permission or development consent. The Minister will assess whether the proposed development is broadly in line with the NMPF and other relevant policies. If a Planning Interest is granted, then the developer can proceed to apply for and secure a development consent through the planning permission process within a specific timeframe. There is a limitation on the lifespan of a Planning Interest in order to prevent long term sterilisation/hoarding of the marine areas by developers unable to complete their projects. However, it is not clear from the General Scheme what this time limit will be.

In deciding whether to grant a Planning Interest the relevant Minister shall have regard to a number of specified criteria, including somewhat curiously, the applicant's previous performance under any other relevant consent granted to the applicant by the State.

- b) Maritime Area Consent: this new consent will govern occupation within the maritime area, replacing the existing consent regimes under both the Foreshore and Continental Shelf Acts. The Maritime Area Consent is intended to provide the developer an exclusive (or in some cases non-exclusive) right to occupy the area in question and does not confer any consent to construct the relevant project. The development consent and related environmental assessments will be undertaken separately by the relevant local Planning Authority or, for offshore renewable energy projects and other projects requiring EIA / AA, by An Bord Pleanála (the **Board**).

It is important to note that a developer cannot apply for a Maritime Area Consent until such time as he has received both a Planning Interest and a subsequent Planning Permission for the project in question. The consenting chronology therefore is:

- Apply to the relevant Minister for a Planning Interest in respect of the sea area in question
- If and when a Planning Interest is granted, carry out the necessary environmental studies
- Apply to the Board for Planning Permission for both the onshore and offshore elements of the project, being careful to avoid project splitting in contravention of the EIA Directive
- If and when Planning Permission is granted, apply to the relevant Minister for a Maritime Area Consent

The Maritime Area Consent will set out the financial terms and contractual obligations to be observed by the developer, similar to the existing Foreshore Leases. There is likely to be a variety of financial terms including fees, annual rent/royalties, decommissioning bonds, (etc) that will apply to the specific proposal or development. It is not clear from the General Scheme what the maximum term of the Maritime Area Consent will be and this is likely to be set out in secondary legislation to be issued following the enactment of the MPDM Bill.

3. Development Consent

Part 5 of the MPDM seeks to apply the planning permission regime to the Maritime Area. It defines and distinguishes the planning permission roles of the Board and the various local Planning Authorities. When it comes to offshore renewable energy projects, the Board will be the body responsible for assessing and granting planning permission for offshore windfarms, offshore gas storage and energy interconnectors.

It is intended that comprehensive guidelines will be prepared to provide clarity to planners, decision makers and the public on the new development consent procedure under Part 5. These guidelines will provide both guidance for general development management and certain specific sectors eg offshore renewable energy.

A person will not be able to apply to the local Planning Authority or the Board for planning permission unless that person has already been granted a Planning Interest by the relevant Minister. In many ways this mirrors the existing precondition under the terrestrial planning system whereby the applicant for permission must first show sufficient title or interest in the subject lands.

This Part of the Bill also introduces a new standalone development consent, modelled on the existing strategic infrastructure development (**SID**) provisions in the Planning and Development Acts. It is likely that applications for large offshore renewable energy projects, including offshore wind farms will be treated as marine SID.

4. Enforcement

Part 6 of the MPDM sets out a new framework for compliance and enforcement of both the State consents and the development consents. The Bill recognises the need for enhanced and robust enforcement mechanism. Provision is made for the service of Warning Letters and Compliance Notices by the relevant Minister in respect of breaches of the State consents and by the relevant local Planning Authority in respect of breaches of the development consents. It is not clear yet from the General Scheme who will be responsible for enforcement activities in respect of those developments for which the Board has responsibility from a development management perspective? Under the terrestrial planning system the Board has no enforcement functions. Instead the relevant Planning Authority in whose functional area the development is situated is responsible for enforcement, even where the permission was granted by the Board. It remains to be seen whether this will also apply to offshore planning enforcement?

The future management of offshore renewable energy under the MPDM

This new development management regime incorporates the decision making process for Offshore Renewable Energy (ORE), which is a key enabler in Ireland's transition to a low carbon economy. The MPDM provides for a flexible approach allowing for both a zonal "decentralised" and a site specific "centralised" approach to the development of ORE projects. The MPDM recognises that it is imperative to the future development of ORE that both models be recognised and that Marine Area Consents can be granted under both structures.

The "decentralised" approach closely follows the general approach adopted in the UK whereby the developer builds the connection to the grid, builds the windfarm itself and carries out all planning permitting. The Government then holds auctions between competing sites for subsidy support.

The "centralised" approach is more similar to the plan led approach to development as set out in the NMPF and the National Development Plan. This approach is common in continental Europe (Germany, Denmark, the Netherlands) where the State identifies development areas for ORE, conducts site investigations, obtains the required planning consents, and the transmission system operator provides the connection to the electricity grid. The State then tenders for bids from developers to construct and operate the windfarm with a price subsidy if required. However, this model requires significant State involvement (and expenditure) at the initial stages of project developments, including site selection. Accordingly the Government has conceded that it may not be feasible to apply the centralised approach to the initial stages of ORE development in Ireland. It is expected that a Government decision on the offshore grid framework (expected in Q2 2020) and the MSP will inform whether a decentralised or centralised model will ultimately be operated in Ireland for ORE.

Transitional measures for legacy projects with consents under the Foreshore Acts

The introductory note to Chapter 2 of the General Scheme, relating to Maritime Area Consents, states that *"consents granted under existing regimes will be managed under the relevant existing legislation until expiry, termination, assignment or any material change is proposed – at which time an application will have to be made under the new regime."* However, Head 47, which deals with transitional provisions goes on to provide that *"DCCA will develop appropriate drafting instructions for transitional provisions relevant to policy sectors within the scope of this Act."* This would appear to imply that further drafting is required to deal with the transitional measures for ORE projects and in particular the proposed offshore wind farms which have an extant Foreshore Lease under the Foreshore Acts and/or a live application under the existing offshore consenting regime.

The Climate Action Plan distinguishes between what it refers to as "legacy" projects and "enduring" projects. It is expected that those projects which have already secured a Foreshore Lease under the existing regime will be classified as legacy projects, while all others will be deemed enduring projects. However, clear definitions of both terms are not provided in either the Climate Action Plan or the General Scheme of the MPDM. Department guidelines and/or secondary legislation are urgently needed on this point so as to clarify the status of those ORE projects where an application was made for development consent under the Foreshore Acts and which applications are still pending final determination by the Department.

Commentary

The MPDM Bill highlights the key role marine planning plays in our national climate efforts in terms of meeting our renewable energy targets through the delivery of ORE, particularly large scale offshore wind farms. The recently launched All of Government Climate Action Plan promises to deliver the connection of at least 3.5 GW of offshore wind, based on competitive auctions, to the grid by 2030. Given that we currently have only 25MW of installed capacity from offshore wind, delivering 3.5 GW by 2030 will be a tall order.

On the positive side there are a number of large scale offshore wind farms in the development stage, particularly along Ireland's east coast. The developers of these projects, many of whom are experienced international ORE developers, have indicated a willingness to deploy the skills and financial resources required to deliver thousands of megawatts of additional renewable capacity in the next 10 years. However, in order to stand any chance of realising this opportunity in the medium term it is imperative that the MPDM Bill and supporting secondary legislation is enacted as soon as possible. Equally important is the requirement to properly resource both the

DCCAIE and the Board who be processing these consent applications. 2030 may seem like a long way off, but when you consider the scale and complexity of these projects and the fact that Ireland will be competing with other countries for a limited offshore wind supply chain (turbines, installation vessels, subsea cables, etc) we need to start now or else run the risk of missing our 2030 renewable energy targets, just as we are unfortunately set to miss our 2020 targets.

We will provide further detail and commentary when the Bill itself is published.

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