

**Beyond Aarhus Ratification:
What Lies Ahead for Irish Environmental Law?**

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INTRODUCTION

The Aarhus Convention is a dynamic international treaty with enormous potential to deliver environmental rights in practice.¹ It guarantees three procedural rights – involving information, participation in decision-making and access to justice in environmental matters – which underpin the right of every person to live in an environment adequate to their health and well-being.² Although Ireland signed the Convention in June 1998, it was the last Member State of the European Union (EU) to ratify it. Ireland's formal instrument of ratification was lodged with the United Nations on 20 June 2012³ and the Convention entered into force on 18 September 2012 (ninety days after the date of deposit of the instrument of ratification).⁴ This article considers the impact of Ireland's ratification of the Aarhus Convention. It explains that the most significant impact, in practical terms, is that as and from 18 September 2013 members of the public will be in a position to lodge 'communications' with the Aarhus Convention Compliance Committee (ACCC) alleging breach of Convention obligations by Ireland.⁵ Apart from this particular development, the article suggests that the direct impact of ratification on Irish environmental law will be relatively modest, at least in the short term. This is because the Convention has been part of the EU legal order since 2005.⁶ As a Member State of the EU, Ireland is bound by EU law. It follows that, prior to ratification in June 2012, Ireland was already required to give effect to the rights guaranteed under the Convention – at least in so far as these rights are part of EU law. Consequently, the main practical impact of ratification is the pending availability of what could loosely be described as a new 'complaints mechanism' whereby alleged breach of Convention rights by Ireland may be brought to the attention of the ACCC by members of the public.

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) hereafter 'Aarhus Convention', text available at: www.unece.org/env/pp/treatytext.html. See also Stec, S, et al, *The Aarhus Convention: An Implementation Guide* (2000) text available at: www.unece.org/fileadmin/DAM/env/pp/acig.pdf. In Case C-182/10 *Solvay v Région wallonne* [2012] ECR I-0000 paras 27 and 28, the CJEU determined that while the Guide may be regarded as 'an explanatory document', which can be taken into consideration for the purposes of interpreting the Convention, it has no binding force or normative effect.

² Aarhus Convention, Art 1.

³ The amendment to the Aarhus Convention on public participation in decisions on deliberate release into the environment and placing on the market of genetically modified organisms (the 'GMO Amendment') and the Protocol to the Convention on Pollutant Release and Transfer Registers were also ratified at this time.

⁴ Aarhus Convention, Art 20(3). See further: www.environ.ie/en/Environment/AarhusConvention/.

⁵ Members of the public may bring 'communications' concerning Ireland before the ACCC on the expiry of twelve months from the date of entry into force of the Convention with respect to Ireland i.e. 12 months from 18 September 2012. See further Decision I/7 *Review of Compliance* adopted at the first meeting of the Parties, Lucca, Italy, 21-23 October 2002, Annex, *Structure and Functions of the Compliance Committee and Procedures for Review of Compliance*, section IV para 18, text available at: www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf. On the ACCC generally, see www.unece.org/env/pp/ccBackground.html and Kravchenko, S, 'The Aarhus Convention and Innovation in Compliance with Multilateral Environmental Agreements' (2008) 7 *Yearbook of European Environmental Law* 1.

⁶ The EC ratified the Convention in February 2005 and has been a Party to the Convention since May 2005. See Council Decision 2005/370/EC [2005] OJ L 124/1.

The article opens by explaining the status of the Aarhus Convention in Irish law. This is followed by an inventory of the impact that the Convention has had on Irish environmental law to date.⁷ The article concludes by considering future directions, including the likely impact of the availability of the ACCC as a complaints mechanism for the public, including environmental non-governmental organisations (NGOs), from September 2013. It suggests that the independent, robust and very public scrutiny delivered by the ACCC, taken together with European Commission enforcement activity, will hopefully spur the Irish authorities to address current shortcomings in delivery of the rights guaranteed by the Convention.

STATUS OF AARHUS CONVENTION IN IRISH LAW

The Aarhus Convention is a United Nations Treaty - in other words - international law. Under Article 29.6 of the Constitution, no international agreement is part of the domestic law of the State except as may be determined by the Oireachtas. Prior to ratification, Ireland adopted legislative measures aimed at giving effect to certain Articles of the Convention in domestic law and provided for judicial notice to be taken of the Convention, but the Oireachtas went no further than that. As things stand, therefore, by virtue of Article 29.6 of the Constitution, the Convention, as such, is not part of Irish domestic law.⁸ This remains the position notwithstanding that Ireland has now ratified the Convention. Put simply, ratification means that Ireland is bound by the Convention as a matter of international law. It does not mean that the Convention may be invoked directly in proceedings before the Irish courts. The position is complicated, however, because of the impact of EU law. The Court of Justice of the European Union (CJEU) has confirmed that the Convention is 'an integral part' of the EU legal order.⁹ It follows that the Convention has legal force in domestic law by virtue of Ireland's obligations under EU law. As Hogan J explained in admirably clear terms in *NO2GM Ltd v Environmental Protection Agency*¹⁰ and *O'Connor v Environmental Protection Agency*:¹¹

[I]n so far as the [Aarhus] Convention has binding force as part of the domestic law of this State, it is only by virtue of the force of and within the proper scope of application of European Union law.¹²

At a more general level, the Aarhus Convention may have an impact in the domestic legal order via principles of statutory interpretation. In *O'Domhnaill v Merrick*,¹³ McCarthy J accepted 'as a general principle' that:

[A] statute must be construed, so far as possible, so as not to be inconsistent with established rules of international law and that one should avoid a construction which will lead to a conflict between domestic and international law.¹⁴

⁷ The Department of the Environment, Community and Local Government (DECLG) has published a very useful Implementation Table on its website. See *The Aarhus Convention: Implementation Table in respect of Ireland's Implementation Measures* (undated). This document states expressly that it is provided 'as an information guide only.' It does not purport to be a legally binding interpretation of the relevant provisions. Text available at: www.environ.ie/en/Environment/AarhusConvention/AarhusLegislation/.

⁸ *Kenny v Trinity College Dublin* [2012] IEHC 77; *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369 and *O'Connor v Environmental Protection Agency* [2012] IEHC 370.

⁹ Case C-240/09 *Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ('LZ') [2011] ECR I-0000 para 30.

¹⁰ *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369.

¹¹ *O'Connor v Environmental Protection Agency* [2012] IEHC 370.

¹² *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369 para 12 and *O'Connor v Environmental Protection Agency* [2012] IEHC 370 para 12. The position is the same in the United Kingdom. As Lord Carnwath explained in *Walton v The Scottish Ministers* [2012] UKSC 44 para 100: 'the Convention is not part of domestic law as such (except where incorporated through European directives)'.

¹³ *O'Domhnaill v Merrick* [1984] IR 151.

It follows from this principle that domestic legislative provisions fall to be construed and applied in conformity with the Aarhus Convention, at least in so far as such an interpretation is possible, with a view to avoiding any conflict between domestic law and international law obligations. This principle of statutory interpretation may be deployed to address gaps in implementation of Aarhus obligations in the domestic legal order in certain circumstances. The interpretative obligation that arises here is similar in scope to the obligation to interpret national law in conformity with EU law.¹⁵

IMPACT OF AARHUS CONVENTION ON IRISH ENVIRONMENTAL LAW TO DATE

EU measures aimed at implementing Aarhus obligations at national level

The general position to date is that the Aarhus Convention has impacted on Irish environmental law primarily via obligations arising under EU law. As is well-known, two directives were adopted with a view to aligning certain aspects of EU law with Aarhus requirements prior to EU ratification of the Convention in 2005: Directive 2003/4/EC on public access to environmental information¹⁶ and Directive 2003/35/EC¹⁷ (the ‘public participation directive’).¹⁸ Directive 2003/4/EC aimed to implement Articles 4, 5 and 9(1) and (4) of the Convention, while Directive 2003/35/EC was adopted with a view to implementing Articles 6, 7 and 9(2) and (4). More specifically, the public participation directive provided inter alia for significant amendments to the Environmental Impact Assessment (EIA) directive¹⁹ and the Integrated Pollution Prevention and Control (IPPC) directive²⁰ as regards public participation and access to justice. The access to justice clause inserted into the EIA directive in 2003²¹ has already generated a significant body of jurisprudence from the CJEU. One key element of the contemporary CJEU jurisprudence on access to environmental justice concerns the correct interpretation of the obligation on Member States to ensure that the cost of judicial review procedures is ‘not prohibitively expensive.’ At the time of writing, judgment is pending in a reference on this point from the United Kingdom (UK) Supreme Court in *Edwards*.²² It is hoped that this highly anticipated ruling will provide clear and practical guidance on how the ban on prohibitively expensive costs should be interpreted and applied at national level.

Article 9(3) of the Aarhus Convention obliges Contracting Parties to ensure that members of the public, including environmental NGOs, have access to administrative or judicial procedures to challenge the acts or omissions of private persons, and of public authorities, that contravene national environmental law. With a view to implementing the obligations arising under Article 9(3), a third (general) directive on access to justice in

¹⁴ *O’Domhnaill v Merrick* [1984] IR 151, 166. See also Henchy J at 159.

¹⁵ *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR I-1891 para 26 and *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 para 8.

¹⁶ [2003] OJ L 41/32.

¹⁷ [2003] OJ L 156/17.

¹⁸ Regulation 1367/2006/EC on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13 (the ‘Aarhus regulation’) was also adopted with a view to applying Aarhus obligations to the EU institutions. This article focuses primarily on the EU measures that impact on the law of the Member States.

¹⁹ Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (codification) [2011] OJ L 26/1 – formerly Directive 85/337/EEC as amended.

²⁰ Directive 96/61/EC concerning integrated pollution prevention and control [1996] OJ L 257/26. See now Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (Recast) [2010] OJ L 334/7 - the Industrial Emissions Directive (IED).

²¹ Art 11, Directive 2011/92/EU [2011] OJ L 26/1, formerly Article 10a of Directive 85/337/EEC as amended.

²² Case C-260/11 *R (Edwards) v Environment Agency* [2011] OJ C 226/16. Advocate General Kokott delivered her Opinion on 18 October 2012.

environmental matters was also proposed by the Commission in 2003.²³ However, this proposal failed to gain traction with the Member States due to fears of further EU interference with national procedures governing administrative and judicial review. The legislative gap left in the wake of the EU's failure to adopt a directive to implement Article 9(3) in the Member States was addressed, at least to some extent, by the CJEU in its ruling in *LZ* (a reference for a preliminary ruling from the Supreme Court of the Slovak Republic).²⁴ On this occasion, the CJEU determined that Article 9(3) of the Aarhus Convention did not have direct effect at national level because its provisions 'do not contain any clear and precise obligation capable of directly regulating the legal position of individuals.'²⁵ The CJEU went on to observe, however, that although drafted 'in broad terms', Article 9(3) is 'intended to ensure effective environmental protection.'²⁶ In the absence of EU rules, it fell to the Member States to set down the detailed procedural rules governing actions brought to safeguard EU law rights and to ensure the effective protection of those rights.²⁷ The CJEU insisted that 'in order to ensure effective judicial protection in the fields covered by EU environmental law', national courts must interpret national law 'in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention'.²⁸ This interpretative obligation is articulated in strong and expansive terms by the CJEU with a view to ensuring that the rights guaranteed under the Convention are enforced at national level. It would be far more satisfactory, of course, if the EU adopted a specific measure to give effect to Article 9(3) in the Member States. It is therefore heartening to note that the European Commissioner for Environment, Janez Potočnik, recently expressed the view that 'a directive on access to justice in environmental matters is indispensable.'²⁹ Given the strong political interest (in the Commission and the European Parliament in particular) to strengthen access to environmental justice at national level, it would not be surprising to see the revival of the Commission's 2003 proposal, or a new proposal being put forward, in the not too distant future.³⁰ Meanwhile, *LZ* provides clear authority that the Aarhus Convention forms an integral part of the EU legal order and that national courts are bound to interpret national law so as to ensure consistency with Convention obligations. Most recently, in *Križan*, the CJEU confirmed that directives which aim to bring EU law into line with Aarhus requirements must be interpreted in light of, and having regard to, the provisions of the Convention.³¹

²³ European Commission, Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters COM(2003) 624 final, text available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0624en01.pdf.

²⁴ Case C-240/09 *Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ('LZ') [2011] ECR I-0000.

²⁵ Case C-240/09 *Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ('LZ') [2011] ECR I-0000 para 45.

²⁶ Case C-240/09 *Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ('LZ') [2011] ECR I-0000 para 46.

²⁷ Case C-240/09 *Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ('LZ') [2011] ECR I-0000 para 47.

²⁸ Case C-240/09 *Lesoochránárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ('LZ') [2011] ECR I-0000 para 50.

²⁹ Speech by European Commissioner for Environment, Janez Potočnik, "The Fish Cannot go to Court" - the environment is a public good that must be supported by a public voice', seminar on Access to Justice and Organisation of Jurisdictions in Environment Litigation by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe), Brussels, 23 November 2012, text available at: http://europa.eu/rapid/press-release_SPEECH-12-856_en.htm.

³⁰ See generally, Proposal for Proposal for a decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 *Living well, within the limits of our planet* [7th Environment Action Programme (EAP)] COM(2012) 710 final, in particular paras 60 and 63.

³¹ Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* [2013] ECR I-0000 paras 77 and 89. See also Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-0000 para 41.

Ireland's response to EU directives purporting to implement Aarhus obligations

Right of access to environmental information

Member States were required to transpose Directive 2003/4/EC on public access to environmental information by 14 February 2005. Regulations purporting to transpose this directive – the European Communities (Access to Information on the Environment) Regulations 2007³² (the 'AIE regulations') – were eventually made on 28 March 2007 and came into force on 1 May 2007 (over two years after the deadline for transposition had passed). On 3 May 2007, the CJEU ruled that Ireland had failed to fulfil its obligations under Directive 2003/4/EC by failing to transpose the directive on time. The AIE regulations have been the subject of sustained criticism from environmental NGOs, the Commissioner for Environmental Information ('the Commissioner')³³ and the author.³⁴ Notwithstanding a number of amendments in 2011,³⁵ the AIE regulations remain defective, in particular as regards the inclusion of mandatory exceptions to the right of access. More significantly, there are serious problems with practical implementation including: the disappointing lack of public awareness of the AIE regulations and of the rights guaranteed under Directive 2003/4/EC and the Aarhus Convention; the poor handling of requests for access by certain public authorities (including unacceptable delays and failure to apply the exceptions to the right of access and the public interest test correctly); and the long-running failure to provide the Commissioner with sufficient resources to ensure that appeals are dealt with in a timely fashion. In October 2012, a well-known environmental NGO, Friends of the Irish Environment (FIE), lodged a complaint with the European Commission alleging systemic breach of Directive 2003/4/EC. FIE also published the complaint on its website.³⁶ It remains to be seen how vigorously the Commission will pursue the various matters raised in the FIE complaint with the Irish authorities and whether pressure from the Commission will improve the situation in practice for those who seek environmental information. Depending on how things develop in response to the FIE complaint, it will be interesting to see whether members of the public and/or environmental NGOs complain to the ACCC later this year over the Irish authorities' persistent failure to deliver on environmental information rights in practice.

Right of access to justice under EIA and IPPC directives

As regards the public participation directive (Directive 2003/35/EC), the initial position adopted by the Irish authorities was that no new legislative measures were required to transpose the access to justice provisions introduced under this directive. This conservative approach was grounded on the argument that the existing system of judicial review met the obligation to provide access to a review procedure to challenge certain planning and environmental decisions. Subsequently, however, amendments to the Planning and Development Act 2000 (PDA) provided inter alia that environmental NGOs that meet certain requirements did not have to satisfy the 'substantial interest' standing test in the specific case of a challenge to a planning decision that is subject to

³² SI No 133 of 2007.

³³ See, most recently, *Commissioner for Environmental Information Annual Report 2011 (2012)* pp73-74 text available at: <http://www.ocei.gov.ie/en/>.

³⁴ Ryall, Á, "Access to Environmental Information in Ireland: Implementation Challenges" (2011) 24 *Journal of Environmental Law* 45.

³⁵ European Communities (Access to Information on the Environment) Regulations 2011 (SI No 662 of 2011). An unofficial consolidated version of the AIE regulations is available at: <http://www.environ.ie/en/Legislation/Environment/Miscellaneous/FileDownload,30002,en.pdf>.

³⁶ The text of the FIE complaint is available here: <http://www.friendsoftheirishenvironment.net/cmsfiles/Library/Full-text-of-systemic-complaint-re-access-to-information-in-Ireland---5-October-2012---Final.pdf>.

EIA.³⁷ It appears that this measure was prompted by the express requirement in the EIA directive (inspired by the Aarhus Convention) that environmental NGOs that meet the criteria set down in national law are *automatically* deemed to have standing to challenge decisions that are subject to EIA. Notwithstanding this welcome amendment, the Commission did not share the Irish authorities' assessment that the existing judicial review procedure was compatible with Aarhus and EU access to justice obligations. Infringement proceedings ensued alleging that Ireland had failed to transpose correctly the access to justice clauses in the EIA and IPPC directives. In July 2009, the CJEU ruled *inter alia* that Ireland had failed to transpose the obligation to ensure that costs in cases involving the EIA directive and the IPPC directive were 'not prohibitively expensive.'³⁸ More specifically, the CJEU determined that a judicial discretion to depart from the general rule that costs follow the event (i.e. the 'loser pays' principle) did not constitute adequate transposition of the obligation that the costs involved in judicial review procedures must not be 'prohibitively expensive.' The CJEU also determined that Ireland had failed to fulfil the obligation to make practical information on access to administrative and judicial review procedures available to the public. In summer 2010, in response to this adverse ruling from Luxembourg, Ireland introduced legislation providing for a special costs regime for judicial review proceedings involving a challenge to a decision, act, or failure to act under any provision of Irish law that gives effect to the EIA directive, the IPPC directive, or the Strategic Environmental Assessment (SEA) directive.³⁹ In brief terms, the special costs regime introduced pursuant to PDA section 50B established a general rule that each of the parties to the proceedings bears their own costs, subject to certain exceptions.⁴⁰ The net result is that the usual 'loser pays' principle does not apply in this particular category of proceedings. The special costs rule was subsequently refined, pursuant to section 21 of the Environment (Miscellaneous Provisions) Act 2011 ('the 2011 Act'), following sharp criticism of the potential negative impact on arrangements whereby lawyers would agree to act on a contingency fee basis in planning and environmental judicial review proceedings.

Notwithstanding this refinement, the special costs rule remains problematic in that it still involves a considerable element of judicial discretion. A person contemplating judicial review proceedings cannot be certain at the outset as to how the court will ultimately exercise its discretion as to liability for costs. At the time of writing, the scope of the special costs rule, and its impact on access to environmental justice, remains to be teased out.⁴¹ More significantly, although the special costs rule aims to eliminate the risk of an applicant for judicial review being liable for the costs of the respondent(s) and any notice parties, an applicant will usually require expert legal advice in order to mount a compelling challenge. The high price of legal services in Ireland, taken in conjunction with the limited availability of civil legal aid, means that the cost of engaging legal advice may well be prohibitive in cases where an individual or NGO has limited resources. The special costs rule does nothing to address this fundamental problem. As O'Malley J observed insightfully in *Stack Shanahan and Sheehan*:

Fear of an order of costs being made against one may be a serious matter, but so too is the inability to obtain representation, no matter how meritorious the case, unless one can pay for it "up front". It is hard to see how, from the point of view of legal practitioners, [section 50B] could not have a "chilling" effect on their willingness or capacity to provide their services. There is also the possibility that unmeritorious

³⁷ This amendment was introduced pursuant to s13 of the Planning and Development (Strategic Infrastructure) Act 2006. Note that the 'substantial interest' test has now been replaced with a 'sufficient interest' test as a result of an amendment introduced pursuant to the Environment (Miscellaneous Provisions) Act 2011.

³⁸ Case C-427/07 *Commission v Ireland* [2009] ECR I-6277.

³⁹ Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30.

⁴⁰ PDA, section 50B, introduced pursuant to s33 of the Planning and Development (Amendment) Act 2010.

⁴¹ See generally, Simons, G, 'New Rules on Legal Costs and the Aarhus Convention' (2012) 19 *IPELJ* 151.

cases will take up the time of the courts where timely and effective legal advice could have stopped them.⁴²

It will be recalled that in *Commission v Ireland*,⁴³ the CJEU also determined that Ireland had failed to transpose the obligation to 'ensure that practical information is made available to the public on access to administrative and judicial review procedures.' In response to this aspect of the CJEU ruling, Ireland introduced a range of legislative amendments to provide expressly that public authorities that take decisions falling within the scope of the public participation directive are obliged to provide practical information on the relevant review mechanism.⁴⁴ At a more general level, a certain amount of basic information on judicial review proceedings in the planning and environmental law context is now available on the Citizens' Information Board website.⁴⁵

Current state of play

Notwithstanding the introduction of the special costs rule, and measures to provide for publication of practical information on review procedures, the Commission remains dissatisfied with Ireland's efforts to comply with the access to justice obligation in the EIA and IPPC (now IED) directives. A letter of formal notice issued to Ireland in June 2012 questioning both transposition and implementation of the access to justice obligation as regards inter alia: the scope of judicial review proceedings; the provision of practical information on access to justice; the requirement that review procedures be timely; the cost burdens and cost-related barriers to access to the Irish courts; and the recognition of environmental NGOs.⁴⁶ At the time of writing, it remains to be seen whether the Commission will follow up with a Reasoned Opinion and whether it will ultimately decide to refer Ireland to the CJEU. Given the long-running problems with access to environmental justice in Ireland, and the persistent calls for effective action on this fundamental issue, it is likely that a Reasoned Opinion will issue in the not too distant future.

Irish legislative measures aimed at implementing Aarhus obligations

According to the Department of Environment, Community and Local Government (DECLG) website, over 60 pieces of legislation are relied on to implement the Aarhus Convention in Irish law.⁴⁷ The various legislative measures outlined in the previous section were adopted primarily to give effect to obligations arising under the EU directives on public access to environmental information (Directive 2003/4/EC) and public participation (Directive 2003/35). These two directives, in turn, aim to implement specific Aarhus obligations in the Member States. In anticipation of ratification, Part 2 of the 2011 Act introduced a number of provisions that aimed to give

⁴² *Stack Shanahan and Sheehan v Ireland, the Attorney General, An Bord Pleanála, the Minister for the Environment, the Minister for Arts, Cork County Council and the National Roads Authority* [2012] IEHC 571 para 14. Note that the costs rule at issue in *Stack Shanahan* was s50B prior to its amendment by the 2011 Act.

⁴³ Case C-427/07 *Commission v Ireland* [2009] ECR I-6277.

⁴⁴ Waste Management (Licensing) (Amendment) Regulations 2010 (SI No 350 of 2010); Environmental Protection Agency (Licensing) (Amendment) Regulations 2010 (SI No 351 of 2010) and European Communities (Public Participation) Regulations 2010 (SI No 352 of 2010). It is notable that An Bord Pleanála has published a 'Judicial Review Notice' on its website www.pleanala.ie/ which includes a general account of the special costs rule. There is no equivalent document on the EPA website at the time of writing.

⁴⁵ www.citizensinformation.ie/en/environment/environmental_law/ (updated 12 December 2012).

⁴⁶ As is well known, both the Commission and the Irish authorities consider letters of formal notice and reasoned opinions to be confidential and so these documents not publicly available. See *Sweetman v An Bord Pleanála* [2009] IEHC 174. However, in June 2012, although no press release was issued, the Commission wrote to the complainants to inform them that a letter of formal notice had issued and to provide a summary of the main topics addressed in the letter of formal notice. As a result of the Commission's communication with the complainants, a general summary of the key points raised in the letter of formal notice has entered the public domain.

⁴⁷ DECLG, *The Aarhus Convention: Implementation Table in respect of Ireland's Implementation Measures* (undated) text available at: www.envron.ie/en/Environment/AarhusConvention/AarhusLegislation/.

effect to other obligations arising under the Convention, including the access to justice obligation under Article 9(3) and (4). It also provided that judicial notice must be taken of the Aarhus Convention.⁴⁸

The most significant element of Part 2 of the 2011 Act is that it extends the special costs rule (described above) to certain categories of civil proceedings aimed at enforcement of planning and environmental law.⁴⁹ The special costs rule established in section 3 of the 2011 Act follows the template set down in PDA section 50B (as amended): in cases that fall within the scope of section 3, the default position is that each party must bear its own costs, subject to certain exceptions. Pursuant to sections 5 and 6, the special costs rule established in section 3 also applies to certain proceedings relating to the European Communities (Access to Information on the Environment) Regulations (as amended).⁵⁰ Section 7 makes provision for what could be described an 'Aarhus certificate', whereby a party to proceedings falling within the scope of section 3 may apply to the court at any time before, or during, the proceedings, for a determination that section 3 applies to the proceedings in question. It is also open to the parties to agree that section 3 applies.

It is notable that Part 2 of the 2011 Act makes no attempt to extend the special costs rule to judicial review proceedings that involve a challenge to a decision that does not fall within the (limited) scope of section 50B PDA (it will be recalled that section 50B only covers challenges involving the EIA, IPPC and SEA directives). The usual 'loser pays' principle continues to apply in judicial review proceedings that are not caught by section 50B. Another noteworthy feature of the special costs rule set down in section 3 of the 2011 Act is that it does not apply where court proceedings are brought to ensure compliance with planning or environmental law in a situation where no planning permission, consent or licence (as the case may be) has been obtained – in other words, in the case of unauthorised development or unlicensed activity.⁵¹ It is also interesting to note that Part 2 of the 2011 Act does not create any express obligation on public authorities to provide practical information to the public on access to administrative and judicial review procedures to enforce planning and environmental law as required under Article 9(5) of the Convention.⁵² These are striking omissions that create significant gaps in implementation of the Aarhus Convention and EU law obligations. Given the obvious legislative reluctance to tackle access to justice obligations in a robust manner, it will fall to the national courts to deal with these implementation gaps pending full transposition. As explained earlier, following the *LZ*⁵³ ruling, national courts are obliged to interpret domestic law, in so far as possible, to ensure that it is Aarhus-compliant. It follows that, in this scenario, a national court would be obliged to ensure that the cost involved in bringing proceedings to enforce national planning and environmental law is 'not prohibitively expensive', even in the case of proceedings that do not fall within the narrow scope of section 50B and section 3 of the 2011 Act.

Beyond the issue of the cost of proceedings, the 2011 Act also introduced a significant change to the standing test for judicial review proceedings under PDA section 50. Previously, an applicant seeking leave to bring judicial review proceedings to challenge certain planning decisions was required to demonstrate that they had a

⁴⁸ Environment (Miscellaneous Provisions) Act 2011, s8.

⁴⁹ Environment (Miscellaneous Provisions) Act 2011, ss 3 and 4.

⁵⁰ SI No 133 of 2007 as amended by SI No 662 of 2011.

⁵¹ The reasoning behind this approach is found in the Minister for Environment, Community and Local Government's written answers to Parliamentary Questions 588, 589 and 590 of 14 September 2011. It appears that a policy decision was taken to ensure that persons who proceed without any required planning permission, licence or other relevant consent should not have the benefit of the special costs rule. It is clear from the Minister's response, that the Irish authorities take the view that enforcement proceedings are a matter for the relevant regulatory authority.

⁵² It is notable that the recent DECLG publication, *A Guide to Planning Enforcement in Ireland* (November 2012) does not contain any reference to the special costs rule created in section 3 of the 2011 Act.

⁵³ Case C-240/09 *Lesoochranské Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ('LZ') [2011] ECR I-0000.

'substantial interest' in the matter to which the application related. The concept of a 'substantial interest' was interpreted strictly by the Irish courts.⁵⁴ Under section 21 of the 2011 Act, the standing test was changed from one of 'substantial interest' to 'sufficient interest' (in other words, the test for standing has now reverted to that which applied prior to the enactment of the PDA in 2000). This welcome revision to the standing test was triggered by concerns that the restrictive 'substantial interest' test was likely to fall foul of the access to justice obligation in Article 9 of the Aarhus Convention and Article 11 of the (codified) EIA directive.

Aarhus Convention in the Irish Courts

The Aarhus Convention, as such, has had a fairly limited impact on the Irish jurisprudence to date. The most significant developments in the case law have come about primarily due to EU obligations and, in particular, Article 10a of the EIA directive (now Article 11 of the codified EIA directive). As a consequence of the persistent legislative failure to transpose Article 10a correctly (this obligation was to have been implemented by 25 July 2005), the judiciary was called upon to give effect to the right of access to a review procedure that is 'not prohibitively expensive.' The judiciary's response to arguments based on Article 10a was generally mixed and, overall, could be described as conservative and disappointing. The high water mark in this fascinating body of jurisprudence is probably the judgment of Clarke J in *Sweetman v An Bord Pleanála (No 1)*.⁵⁵ On this occasion, the High Court ruled that national standing rules should be interpreted in light of EU obligations with a view to delivering 'wide access to justice' and, furthermore, to the extent that EU law might demand a greater degree of scrutiny in planning and environmental cases, any such requirement could be accommodated within the existing judicial review regime. Clarke J also determined that 'proper regard' should be had to the Aarhus Convention when interpreting the public participation directive.⁵⁶ Two subsequent rulings, *Sweetman v An Bord Pleanála (No 2)*⁵⁷ and *Hands Across the Corrib Ltd v An Bord Pleanála*,⁵⁸ witnessed the High Court apply well-established domestic rules on costs so as to give effect to the ban on prohibitive expense. The extensive CJEU and Irish case law on the access to justice clause in the EIA directive is considered in detail elsewhere.⁵⁹ This section focuses exclusively on the Irish jurisprudence where the Convention has been directly in issue. (It is also worth noting, in passing, that the Commissioner for Environmental Information has referred regularly to the Convention in her decisions in appeals concerning the right of access to information on the environment).⁶⁰

The High Court has confirmed, in the context of efforts to enforce the ban on prohibitively expensive costs under Article 9(4), that the Convention, in itself, is not part of Irish domestic law.⁶¹ In *NO2GM Ltd v Environmental Protection Agency*⁶² and *O'Connor v Environmental Protection Agency*,⁶³ the applicants (who were not represented by a solicitor or counsel) sought an *ex ante* and *ex parte* order granting them what Hogan J described as 'a not prohibitively expensive costs order' on the basis of Article 9(4). The High Court concluded that it had no jurisdiction to make such an order without notice to the other parties who would be actually or

⁵⁴ See, in particular, *Harding v Cork County Council* [2008] IESC 27.

⁵⁵ *Sweetman v An Bord Pleanála (No 1)* [2007] IEHC 153.

⁵⁶ *Sweetman v An Bord Pleanála (No 1)* [2007] IEHC 153 para 7.7.

⁵⁷ *Sweetman v An Bord Pleanála (No 2)* [2007] IEHC 361.

⁵⁸ *Hands Across the Corrib Ltd v An Bord Pleanála (No 2)*, unreported, High Court, 21 January 2009 (ruling on costs).

⁵⁹ See, e.g., Ryall, Á, 'Access to Environmental Justice: Pulling the Threads Together' (2011) 18 *IPELJ* 152.

⁶⁰ The Commissioner's decisions are available at: www.ocei.gov.ie/en/.

⁶¹ *Klohn v An Bord Pleanála* [2011] IEHC 196 para 6.5, *Kenny v Trinity College* [2012] IEHC 77, *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369 paras 11-14 and *O'Connor v Environmental Protection Agency* [2012] IEHC 370 paras 9-12. The status of the Convention, post ratification, was considered in the first part of this article.

⁶² *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369.

⁶³ *O'Connor v Environmental Protection Agency* [2012] IEHC 370.

potentially affected by such an order and it declined to grant the relief sought.⁶⁴ More recently, in *Maher*,⁶⁵ the applicant (a lay litigant) sought an order *ex parte* protecting her against any liability for costs in proceedings she wished to bring in respect of certain planning decisions.⁶⁶ This application was based on the argument that (in the words of Hedigan J), the High Court 'is a European Court and should give effect to the prohibitive costs prevention provisions of the Aarhus Convention.' The High Court referred to section 3 of the 2011 Act and concluded that the legislature had made no provision for the court to grant such an order *ex parte*. Hedigan J stated that it was not the court's role to legislate and that the correct way for the applicant to proceed was to seek the consent of the intended defendant that section 3 applied to the proceedings or, in the alternative, to bring a motion on notice for a declaration that section 3 applied. Following on from this determination, the applicant in *Maher* sought an order that no costs would be awarded against her should the motion on notice fail. Hedigan J was of the view that the court did not have jurisdiction to make such an order (that was a matter for the judge hearing the motion), but the court acknowledged that the costs involved 'may amount to an insuperable obstacle to the applicant bringing a motion.' While expressing sympathy for the applicant, Hedigan J insisted that there was no legal authority to permit him to make the order sought by the applicant. However, Hedigan J observed that:

[It was] very arguable that the absence of some legal provision permitting an applicant to bring such a motion, without exposure to an order for costs, acts in such a way as to nullify the State's efforts to comply with its obligation to ensure that costs in certain planning matters are not prohibitive. As things stand, I have no power to change this.⁶⁷

In *Swords v Department of Communications, Energy and Natural Resources*,⁶⁸ the High Court granted the applicant leave to bring judicial review proceedings to challenge the legality of the National Renewable Energy Action Plan (NREAP) and the Renewable Energy Feed In Tariff (REFIT) scheme on the basis of alleged breach of the SEA directive and Article 7 of the Aarhus Convention. The applicant is also seeking a protective costs order. In his Statement of Grounds, the applicant (a lay litigant) relies inter alia on ACCC findings and recommendations with regard to communication ACCC/C/201/54 concerning compliance by the European Union with the Aarhus Convention.⁶⁹

The recent case law outlined above demonstrates two interesting developments post-Aarhus ratification. First, awareness of the ban on prohibitive expense under Article 9(4) of the Convention is gradually increasing.

⁶⁴ See also *In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Stella Coffey et al* [2013] IESC 11 para 12.

⁶⁵ *In the matter of an application by Dymphna Maher* [2012] IEHC 445.

⁶⁶ The brief High Court judgment does not specify what category of planning decisions the applicant was seeking to challenge.

⁶⁷ *In the matter of an application by Dymphna Maher* [2012] IEHC 445 para 5.

⁶⁸ *Swords v Department of Communications, Energy and Natural Resources*, Record No 2012/920JR. Peart J granted leave on 12 November 2012.

⁶⁹ In ACCC/C/2010/54, the ACCC determined that the EU had failed to comply with Article 7 of the Convention: (1) by not having in place a proper regulatory framework to implement Article 7 in the context of the adoption of NREAPs by its Member States under Directive 2009/28/EC on the promotion of the use of energy from renewable sources [2009] OJ L 140/16; and (2) by not having properly monitored Ireland's implementation of Article 7 of the Convention in the adoption of its NREAP. The ACCC also found non-compliance with Article 3(1) in that the EU did not have a proper regulatory framework in place to enforce Article 7 with respect to the adoption of NREAPs in its Member States. The argument that Mr Swords presented to the ACCC in his communication concerning compliance by the EU was based inter alia on the manner in which Ireland's NREAP was adopted, including inadequate opportunities for public participation. Text of the ACCC's findings and recommendations available here: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece_mp.pp_c.1_2012_12_eng.pdf.

Second, lay litigants are coming before the courts seeking *ex parte* pre-emptive protection from legal costs on the basis of Article 9(4) and these applications have not met with any measure of success to date.⁷⁰

FUTURE DIRECTIONS

Notwithstanding the Legislature's belated attempts to deliver affordable access to environmental justice (PDA s50B and Part 2 of the 2011 Act), it is clear that there are significant gaps in the scope of the special costs rule. Moreover, the rule does not deliver the degree of certainty as to potential costs liability that litigants require before deciding on whether or not to bring proceedings. Predictably, the lack of clarity around the special costs rule has extended litigation in relation to the costs aspects of proceedings and there is a developing body of jurisprudence from the High Court on PDA section 50B (both in its original form and as amended) and section 3 of the 2011 Act.⁷¹ The scope of the special costs rule, and its practical implications, will gradually begin to crystallise as the jurisprudence evolves. At the time of writing, however, it is clear that in the absence of more fundamental reforms, high legal costs and the (largely untried and untested) special costs rule, will continue to present a barrier to access to the courts for individuals and NGOs with limited resources. The Commission remains dissatisfied with Ireland's efforts to implement the access to justice clauses in the EIA and IPPC directives and it is likely that a Reasoned Opinion will issue shortly. The long-running, serious problems with access to environmental justice in Ireland, together with persistent complaints to the Commission around this fundamental issue, means that there is a strong likelihood of infringement proceedings coming before the CJEU in the not too distant future.

It is difficult to disentangle the Aarhus Convention provisions on access to justice from the EU measures that aim to implement those provisions in the Member States. The inter-relationship between international law (Aarhus Convention), EU law and national law is complex, particularly as regards enforcement of Aarhus obligations. The ACCC, the CJEU and the national courts all play a vital enforcement role. It is necessary to consider ACCC findings and recommendations in conjunction with the evolving jurisprudence from the CJEU and the national courts in order to get a full picture of the current position. The pending CJEU ruling in *Edwards* will be a significant development in the access to environmental justice saga and it is hoped that the Luxembourg Court will provide much needed guidance on how the ban on prohibitive expense should be interpreted and applied at national level. It will also be interesting to see how the obligation in Article 9(5) of the Aarhus Convention, which creates an express obligation on Parties to 'consider' the establishment of 'appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice', will be developed into the future by the ACCC and the CJEU.

In the case of Ireland, the most significant impact of Aarhus ratification in the short term is the pending availability of the ACCC compliance mechanism in the case of alleged breach of Convention obligations. In addition to Commission enforcement activity and litigation before the national courts, the ACCC will provide another avenue by which members of the public and NGOs can highlight shortcomings in Irish implementation of Aarhus obligations. As explained earlier, as and from 18 September 2013, it will be open to the public to bring

⁷⁰ At the time of writing, *Swords* is pending before the High Court.

⁷¹ *JC Savage Supermarket Ltd v An Bord Pleanála* [2011] IEHC 488; *Shilleagh Quarries Ltd v An Bord Pleanála* [2012] IEHC 402; *Rowan v Kerry County Council* [2012] IEHC 544 *Stack Shanahan and Sheehan v Ireland, the Attorney General, An Bord Pleanála, the Minister for the Environment, the Minister for Arts, Cork County Council and the National Roads Authority* [2012] IEHC 571; and *Indaver NV T/A Indaver Ireland v An Bord Pleanála and Cork County Council and Cork Harbour Alliance for a Safe Environment* [2013] IEHC 11.

'communications' (complaints) before the ACCC concerning Ireland's compliance with the Convention. Given the high levels of dissatisfaction among the public with Irish implementation of the (Aarhus-driven) EU environmental directives (Directive 2003/4/EC and Directive 2003/35/EC), it is very likely that the ACCC will receive communications alleging non-compliance by Ireland in early course.⁷² It is notable that the ACCC has made a number of significant findings and recommendations in a series of communications alleging non-compliance on the part of the UK, including on the matter of costs rules in environmental litigation.⁷³ It has also made interesting observations on the question of whether or not the standard of judicial review applied by the UK courts is Aarhus compliant.⁷⁴ The UK cases from the ACCC are of considerable interest in the Irish context given the similarities between the legal systems in these two common law jurisdictions, and in particular the deeply-entrenched role of judicial discretion on the question of costs liability.

While much of the focus to date has been on the access to justice provisions in Article 9 of the Aarhus Convention, it is important to recall that there is far more to the Convention than the access to justice provisions. In particular, a number of the 'General Provisions' in Article 3 of the Convention contain important obligations designed to underpin the effectiveness of Convention rights in practice, including, for example, the requirement in Article 3(1) 'to establish and maintain a clear, transparent and consistent framework' to implement Convention provisions, and the obligation in Article 3(3) to promote environmental education and awareness among the public, in particular on how to use the rights conferred by the Convention. These provisions could be relied on before the ACCC to challenge the fragmented nature of Irish environmental law (in particular the lack of consolidated legislation) and the lack of effective measures to promote public awareness of environmental rights.

The independent, transparent, robust and very public scrutiny offered by the ACCC should intensify the pressure on the Irish authorities to re-examine current arrangements for delivery of the various rights guaranteed by the Aarhus Convention and to craft workable solutions to long-standing problems. It is hoped that ACCC oversight will give the access to environmental justice debate a higher profile in Ireland and will prompt meaningful discussion on how best to deliver a system of environmental governance that is Aarhus compliant. There are high expectations of the ACCC among the public and environmental NGOs in Ireland, who remain frustrated at the slow pace of change in response to EU and Aarhus obligations. Irish environmental law is at the crossroads; now is the time to explore how best to deliver affordable and effective access to environmental justice and to work to avoid adverse findings from the ACCC and any further embarrassing rulings from the CJEU. There are challenging - and potentially transformative - times ahead for Irish environmental law.

⁷² A detailed critique of the Irish measures purporting to implement Article 9(3) and (4) of the Convention is found elsewhere. See Ryall, Á, European Commission, DG Environment, *Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in 17 Member States of the European Union: Report on Ireland* (September 2012), text available at: http://ec.europa.eu/environment/aarhus/access_studies.htm.

⁷³ See e.g. Findings and Recommendations of the ACCC with regard to Communication ACCC/C/2008/33 concerning compliance by the UK, adopted on 24 September 2010), text available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf. See also Pedersen, O, 'Price and Participation: the UK before the Aarhus Convention's Compliance Committee' (2011) 13 *Environmental Law Review* 115.

⁷⁴ Findings and Recommendations of the ACCC with regard to Communication ACCC/C/2008/33 concerning compliance by the UK, adopted on 24 September 2010), paras 123-127.