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Access to Justice under Irish Environmental Impact Assessment Law

Case C-427/07 *Commission v Ireland* European Court of Justice (Second Chamber) 16 July 2009 (not yet reported)

Keywords: planning law – environmental impact assessment (EIA) – judicial review – ‘substantial interest’ requirement – ‘sufficient interest’ requirement – Århus Convention – public participation – access to justice – non-governmental organisations – development consents – fair, equitable, timely and not prohibitively expensive – practical information available to the public – implementation information required by European Commission

Ireland was recently found not to have fully implemented Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (the EIA Directive) and Directive 2003/35 (the Århus Convention Directive).ⁱ

As the name implies, this second directive arises from the Århus Convention itself, which was negotiated under the auspices of the United Nations Economic Commission for Europe and aims to improve public participation and access to justice in environmental matters.ⁱⁱ The European Union and all

of its member states are signatories and it entered into force on 30 October 2001.ⁱⁱⁱ The Århus Convention Directive was to be brought into force in member states by 25 June 2005.^{iv}

This case was, in many ways, a missed opportunity. The implementation of the Århus Convention – and ensuring access to justice in environmental matters – raises a number of interesting and difficult issues. To what extent must access be granted, and what must the Member States do in order to support individuals and NGOs who wish to assert their rights in development consent procedures? In particular, is there a conflict between the use of ‘sufficient interest’ in the Convention and Directive and the ‘substantial interest’ standard in Irish planning law, is this justifiable^v and is the process for judicial review for Irish planning permission decisions in fact ‘fair, equitable, timely and not prohibitively expensive’ (as required under the Convention)?

Unfortunately, as the Advocate General highlighted,^{vi} the Commission seems to have contradicted itself, putting forward complaints of lack of implementation and transposition but supporting those with arguments regarding the quality of implementation. As a result, the European Court of Justice (ECJ) decided important questions on narrow and technical grounds, leaving us without substantial responses to the policy issues involved.

Factual Background

Although heard as one case, the actions arose separately. One had its roots in damage to a coastal wetland in Kinsale, County Cork caused by a private road project. When the European Commission investigated this, it appeared that no development consent had been granted for the project and that no environmental impact assessment (EIA) had been carried out, despite the sensitivity of the site.^{vii} It requested observations from Ireland on 18 October 2002, which were received on 5 March 2003, and issued a reasoned opinion on 11 June 2003, to which Ireland replied on 10 November 2003.^{viii}

The second was brought due to Commission concerns regarding the transposition of the Århus Convention Directive into Irish law. On 28 July 2005, the Commission requested observations from Ireland because the latter had not informed it of implementing measures. Ireland replied on 7 September 2005. The Commission issued a first reasoned opinion on 19 December 2005 and a second on 18 October 2006, giving Ireland until 18 December 2006 to transpose the directive. Ireland replied several times, but were not able to satisfy the Commission.^{ix}

Transposition of the EIA Directive

Environmental Impact Assessment of Private Roads

In Ireland, Environmental Impact Assessment is integrated into the planning permission process. Under section 32 of the Planning and Development Act 2000 (PDA), any ‘development’ (defined widely to include ‘the carrying out of

any works on, in, over or under land or the making of any material change in the use of any structures or other land', but subject to exceptions) requires planning permission. There is an extensive regulatory code governing applications, objections against applications, granting of permissions and appeals. This code has its roots in legislation dating from 1963 which had been amended many times and was becoming unwieldy. It was consolidated into the Planning and Development Act 2000 and certain aspects were reformed.

The requirement under Directive 85/ 337/ EEC on the assessment of the effects of certain public and private projects on the environment (the EIA directive), as amended by Directive 97/ 11/ EC, that certain projects likely to have significant effects on the environment should have these effects assessed before a development consent is issued is generally integrated into the planning permission process.

Under section 172 of the PDA 2000,

[w]here a planning application is made in respect of a development or class of development referred to in regulations [which define a project likely to have significant effects on the environment], that application shall, in addition to meeting the requirements of the permission regulations, be accompanied by an environmental impact statement [EIS].

Section 176 of the PDA authorises the Minister for the Environment to make regulations,

(a) identifying development which may have significant effects on the environment, and

(b) specifying the manner in which the likelihood that such development would have significant effects on the environment is to be determined.

These regulations are the Planning and Development Regulations 2001,^x Schedule 5 of which lists developments for which EIA is mandatory if certain thresholds are exceeded. Unfortunately for Ireland, private road developments are not one of these, whereas item 10 (e) of Annex II to Directive 85/ 337 (as amended by Directive 97/ 11) included ‘[c]onstruction of roads, harbours and port installations, including fishing harbours’ (with no distinction between public and private road projects).

Ireland conceded this point^{xi} (and subsequently amended its legislation^{xii}) but contended that private road construction ‘almost invariably forms an integral part of other developments which, for their part, are subject to the requirement of an environmental impact assessment under the combined provisions of Article 176 of the PDA and Schedule 5 to the Planning and Development Regulations 2001 if they are likely to have significant effects on the environment.’^{xiii} The Advocate General^{xiv} and the Court rejected this argument on the basis that ‘a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from [EIA] would exceed the limits of its discretion ... unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment’.^{xv}

Transposition of the Århus Convention Directive

The Convention Directive amended parts of the EIA Directive, which in turn required a number of changes to domestic law. Ireland had not fully implemented all of these.

Rights of Non-Governmental Organisations

Article 3(1) of the Århus Convention Directive inserted new definitions into Article 1(2) of the EIA Directive so that non-governmental organisations (NGO) would have standing in EIA-related procedures:

'the public' means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

'the public concerned' means: the public affected or likely to be affected by, or having an interest in, [EIA] decision-making procedures; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest

Irish planning law was amended in 2006 to take this into account. Judicial review procedure in Ireland follows a two-step process: the applicant first applies for leave to apply, which is discretionary and decided following a short hearing, then (if successful) applies for full judicial review of the decision or matter in question. In most judicial review applications, an applicant must have a 'sufficient interest'.^{xvi} This standard was applied in applications concerning planning decisions until the Planning and Development Act 2000 came into force. That Act (as amended by section 13 of

the Planning and Development (Strategic Infrastructure) Act 2006) provides, in relevant part:

50A.— ... (3) The Court shall not grant section 50 leave unless it is satisfied that—

(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a substantial interest in the matter which is the subject of the application, or

(ii) where the decision or act concerned relates to a development [requiring EIA], the applicant—

(I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) satisfies such requirements (if any) as a body or organisation [which can appeal a planning decision to An Bord Pleanála (the planning appeals board)] would have to satisfy [under the relevant legislation].

In other words, there must be substantial grounds to challenge the decision *and* the applicant must *either* have a substantial interest in the matter *or* be an environmental NGO in existence for at least 12 months. (The requirement that

an NGO exist for a minimum period is presumably to ensure that only legitimate organisations have legal standing.)

The Commission argued that this did not go far enough, as the rights required by Article 3(1) of the Århus Convention Directive were not ‘sufficiently guaranteed’ (although it is not clear what was meant by this), and the Commission’s arguments seem to have been restricted to the rights of NGOs.^{xvii} Ireland countered that it did not need to introduce legislative definitions of ‘the public’ and ‘the public concerned’, and that NGOs are exempted from the requirement to show a substantial interest in the matter.^{xviii}

The Advocate General held that in light of section 50A(3)(b)(ii) of the 2000 Act, the Commission had not shown that Ireland had failed to transpose Articles 10a and 15a.^{xix} The Court agreed with Ireland, although on narrow grounds: first, that it was not necessary to reproduce exactly the words of the Directive,^{xx} so long as the implementation had

unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights[.]^{xxi}

Second, on the same basis as the Advocate General, the Commission’s complaint was a failure to transpose, but their arguments were based on a failure to implement.^{xxii}

Implementation of EIA Procedures Beyond Planning Law

The planning permission system is not the only way in which development consents are controlled in Irish law.^{xxiii} The Commission alleged that portions of the Århus Convention Directive were not fully transposed into Irish law because, although EIA was required for planning permission, it was not required for the other development consent procedures. Although the Commission did drop its claims with regard to certain Articles as Ireland had introduced implementing measures,^{xxiv} Ireland conceded this issue overall, mentioning specifically the Dublin Docklands Development Authority Act 1997, the Fisheries Act 1980, the Foreshore Act 1993, the Dumping at Sea Acts 1996 to 2006, the Arterial Drainage Acts 1945 and 1995,^{xxv} the Environmental Protection Agency (Licensing) Regulations 1994 to 2004 and the Waste Management (Licensing) Regulations 2004^{xxvi} as examples of legislation that needed to be amended.

Access to Justice

The Århus Convention Directive amends the EIA Directive and Directive 96/ 61 concerning integrated pollution prevention and control (the IPPC Directive). Identical Articles, numbered 10a and 15a respectively, and based on Article 9 of the Convention, were inserted into these directives, requiring Member States to ensure

members of the public concerned [with an environmental matter]:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of [the relevant Directive]

...

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

The Commission put forward five arguments for incomplete transposition:^{xxvii}

1. That the ‘substantial interest’ required for judicial review of a planning decision is not the same as the ‘sufficient interest’ required under the directive, relying on the High Court decision in *Friends of the Curragh Environment v An Bord Pleanála (No. 2)*,^{xxviii} which stated that the first is more restrictive than the second. Ireland countered by pointing to the flexible interpretation given to the ‘substantial interest’ requirement by the High Court in *Sweetman v An Bord Pleanála*.^{xxix}
2. That applicants must be able to challenge the substantive legality of decisions, acts or omissions subject to the relevant public participation provisions, and that this has not been done. Ireland countered that

judicial review provides a means to challenge the substantive legality and that an exhaustive review is not necessary.

3. That the procedures for challenging decisions are not timely, as required.
4. That the procedures for challenging decisions can be prohibitively expensive, as there is no ceiling to costs. Ireland countered that procedures are fair, equitable and not prohibitively expensive.^{xxx}
5. That Ireland had not made available to the public practical information on access to administrative and judicial review procedures. Ireland countered that the relevant rules of court, Order 84 of the Rules of the Superior Courts, were publicly available legislation and that the Courts Service web site provides access to information on the courts, their functioning and High Court judgements.

The Advocate General felt that all of these claims were inadmissible because the Commission's complaint was a failure to transpose, rather than inadequate transposition,^{xxx} but went on to consider them in case the Court disagreed, agreeing with Ireland on the first four but not the last. The Court regarded the first three arguments as unfounded, but agreed with the last two:

1. Because the commission had only challenged a failure to transpose, rather than incomplete or incorrect transposition, the Advocate General considered that the existence of *some* process of judicial review answered the complaint,^{xxxii} while the Court did not investigate further whether 'substantial interest' and 'sufficient interest' are, in fact,

different. Both discounted the *Friends of the Curragh Environment* case as coming before the amendments introduced by the 2006 Act.^{xxxiii} The Advocate General also did not agree that the principle of equivalence applied, planning law includes claims not based on European law.^{xxxiv}

2. Judicial review allows applicants to challenge the substantive or procedural legality of decisions; the Advocate General held,^{xxxv} as did the Court,^{xxxvi} that as this was not a complaint of incorrect transposition, it was not possible to examine the arguments regarding the extent of review conducted by the High Court.
3. Both the Advocate General^{xxxvii} and the Court^{xxxviii} held that the fact that sections 50A(10) and (11)(b) of the PDA 2000 require that courts determine applications as expeditiously as possible consistent with the administration of justice', dealt with the timeliness issue.
4. The Advocate General held that although Ireland could not rely on legal aid under the Attorney General's Scheme^{xxxix} (as it did not apply to judicial review of planning cases),^{xl} the discretionary power of Irish courts not to require an unsuccessful party to pay the costs of an action, or even to require the other party to pay those costs, was sufficient implementation.^{xli} The Court, however, held that the fact that this is discretionary makes it inadequate as an implementation of Århus Convention obligations.^{xlii}
5. Both the Advocate General^{xliii} and the Court^{xliv} held that simply making available the rules of administrative and judicial review procedures and court decisions is inadequate as an implementation of Århus

Convention obligations, as the public concerned will not be aware of its rights of access to justice in environmental matter in a sufficiently clear and precise manner.

Informing the Commission of Implementation Measures

Article 6 of the Århus Convention Directive required member states to bring into force any measures necessary to implement that Directive by 25 June 2005, and ‘forthwith inform the Commission thereof’. Ireland had provided some information to the Commission, but it was not specific and omitted mention of the *Friends of the Curragh Environment* cases.^{xlv} Ireland accepted that it did provide full information, but pointed out that it did not need to inform the Commission of existing provisions that already implemented the Århus Convention Directive.^{xlvi} Both the Advocate General^{xlvii} and the Court^{xlviii} held that this was not adequate, as ‘every provision of the directive must be examined individually in order to determine what measures are necessary to transpose the provision’.^{xlix} The *Friends of the Curragh Environment* cases should have been mentioned:

Judgments stating that a directive has not yet been transposed are important precisely when a Member State is proceeding on the basis that the existing case-law already transposes the directive adequately.

Ireland therefore should have submitted to the Commission an account of the Irish case-law showing that the provisions of Directive 2003/35 on access to justice were transposed adequately.¹

Commentary

The Århus Convention contains three pillars: access to information, public participation and access to justice. Although these would seem to be welcome on the surface,^{li} because they threaten established practices, the authority of professional bureaucracies and the interests of certain private individuals and organisations, they are unlikely to be welcome in western European democracies.^{liii} As Ireland has a strong tradition of public participation in planning matters, combined with a (recently-ended) economic boom, it provides a good example of how these tensions will play out in practice.^{liiii} The indications are that the changes which the Convention is to bring about will be resisted, and that the process of change will be a slow one.

As a general issue for common law systems, it is not clear whether judicial review meets the Article 9 requirement of providing a ‘substantive challenge’ to a decision.^{liv} This decision leaves us none the wiser. Judicial review is also ‘notoriously slow and expensive’,^{lv} whereas to comply with the Convention, it should be ‘timely and not prohibitively expensive’. Although here the court at least made clear that a discretion not to award costs is not enough meet the last requirement, it remains unclear how quick or inexpensive these processes must be in practice, giving no clear guidance to Member States seeking to reform their processes.

It is unfortunate that the meaning of ‘substantial interest’ in section 50A of the PDA 2000 seems to change depending on whether a case involves EIA;^{lvi} it is doubly so that this approach now seems to have the sanction of the ECJ, as

does the adequacy of Irish judicial review (which deals almost exclusively with procedure^{lvii}). If this was an area that needed an ECJ decision for clarification,^{lviii} are we now left with an unsatisfactory outcome? Not necessarily: as both the Advocate General and the Court made clear, the Commission's strategy in this case, raising complaints of *lack* of transposition but making arguments based on *inadequate* transposition, means that this is a weak precedent, decided on narrow, procedural grounds. The Commission was only barely successful in this case, something that is perhaps reflected in the Court's decision that it should pay its own costs,^{lix} but this does not mean that it might not be successful in the future. We must await further developments with patience and interest.

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ⁱ Case C-427/07 *Commission v Ireland* European Court of Justice (Second Chamber) 16 July 2009 (not yet reported).

ⁱⁱ For more information on the Convention, see <http://www.unece.org/env/pp/> and <http://ec.europa.eu/environment/aarhus/>. For an overview and commentary, see R. McCracken and G. Jones, 'The Aarhus Convention' (2003) J. P. & E. L. 802, E. Morgera, 'An Update on the Aarhus Convention and its Continued Global Relevance' (2005) 14(2) RECIEL 138 and B.W. Cramer, 'The Human Right to Information, the Environment and Information about the

Environment: From the Universal Declaration to the Aarhus Convention’
(2009) 14 Communication Law and Policy 79.

iii

See

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVII-13&chapter=27&lang=en.

^{iv} Article 6 of Directive 2003/ 35.

^v See the discussion in paragraphs 66 to 69 of the Advocate General’s opinion: ‘a balance must necessarily be struck. Effective enforcement of the law militates in favour of wide access to the courts. On the other hand, it is possible that many court actions are unnecessary because the law has not been infringed. Unnecessary actions not only burden the courts, but also in some cases adversely affect projects, whose implementation can be delayed’ (paragraph 69).

^{vi} Paragraph 2 of the Advocate General’s opinion.

^{vii} Paragraph 25 of the judgment.

^{viii} Paragraph 19 of the Advocate General’s opinion.

^{ix} Paragraph 20 of the Advocate General’s opinion.

^x SI 2001, No. 600.

^{xi} Paragraph 27 of the Advocate General’s opinion.

^{xii} Paragraph 7 of the Planning and Development Regulations 2008 (SI 2008, No. 235).

^{xiii} Paragraph 38 of the judgment.

^{xiv} Paragraph 28 to 29 of the Advocate General’s opinion.

^{xv} Paragraph 42 of the judgment, relying on Case C-72/ 95 *Kraaijeveld and Others* [1996] ECR I- 5403 and paragraph 53, and Case C- 435/ 97 *WWF and Others* [1999] ECR I- 5613, paragraph 38.

^{xvi} Order 84 r. 20(4) of the Rules of the Superior Courts.

^{xvii} Paragraph 37 of the Advocate General's opinion.

^{xviii} Paragraphs 52 to 53 of the judgment.

^{xix} Paragraph 80 of the Advocate General's opinion.

^{xx} Relying on Case C- 214/ 98 *Commission v Greece* [2000] ECR I- 9601, paragraph 49; Case C- 38/ 99 *Commission v France* [2000] ECR I- 10941, paragraph 53; and Case C- 32/ 05 *Commission v Luxembourg* [2006] ECR I- 11323, paragraph 34

^{xxi} Paragraph 55 of the judgment, relying on Case C- 197/ 96 *Commission v France* [1997] ECR I- 1489, paragraph 15; Case C- 207/ 96 *Commission v Italy* [1997] ECR I- 6869, paragraph 26; and *Commission v Luxembourg* [2006] ECR I- 11323, paragraph 34.

^{xxii} Paragraph 59 of the judgment.

^{xxiii} Y. Scannell, *Environmental and Land Use Law* (Thomson RoundHall, 2006), p. 451.

^{xxiv} Paragraph 31 of the Advocate General's opinion.

^{xxv} Paragraph 30 of the Advocate General's opinion.

^{xxvi} Paragraph 31 of the Advocate General's opinion.

^{xxvii} Paragraphs 67 to 81 of the judgment.

^{xxviii} [2006] IEHC 390; [2007] 1 ILRM 386.

^{xxix} [2007] 2 ILRM 328. For commentary, see R. Kennedy, ‘Access to Justice Under the Århus Convention and Irish Judicial Review’ (2008) 10(2) ELR 139, 141.

^{xxx} Article 3(8) of the Convention allows national courts to award “reasonable costs” in judicial proceedings.

^{xxxi} Paragraph 45 to 46 of the Advocate General’s opinion.

^{xxxii} Paragraph 57 to 58 of the Advocate General’s opinion.

^{xxxiii} Paragraph 64 of the Advocate General’s opinion.

^{xxxiv} Paragraph 70 to 71 of the Advocate General’s opinion.

^{xxxv} Paragraph 82 to 83 of the Advocate General’s opinion.

^{xxxvi} Paragraph 88 to 89 of the judgment.

^{xxxvii} Paragraph 85 to 86 of the Advocate General’s opinion.

^{xxxviii} Paragraph 91 of the judgment.

^{xxxix} ‘The Attorney General's Scheme provides payment for legal representation in certain types of legal cases not covered by civil legal aid or the criminal legal aid scheme. The kinds of cases covered include certain types of judicial review, bail applications, extradition and habeas corpus applications.’ See <http://www.attorneygeneral.ie/ac/agscheme.html>.

^{xl} Paragraph 96 of the Advocate General’s opinion.

^{xli} Paragraph 97 to 98 of the Advocate General’s opinion.

^{xlii} Paragraph 93 to 94 of the judgment.

^{xliii} Paragraph 105 to 108 of the Advocate General’s opinion.

^{xliv} Paragraph 98 of the judgment.

^{xlv} Paragraph 116 to 119 of the Advocate General’s opinion.

^{xlvi} Paragraph 104 of the judgment.

^{xlvii} Paragraph 123 to 124 of the Advocate General's opinion.

^{xlviii} Paragraph 109 to 110 of the judgment.

^{lix} Paragraph 120 of the Advocate General's opinion.

^l Paragraph 122 to 123 of the Advocate General's opinion.

^{li} See J.S. Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press: Oxford 1997) 84-85.

^{lii} S. Rose-Ackerman and A.A. Halpaap, 'The Aarhus Convention and the Politics of Process: The Political Economy of Procedural Environmental Rights', (2002) 20 *Research in Law and Economics*, 27.

^{liii} See Á. Ryall, 'Access to Justice and the EIA Directive' in J. Holder and D. McGillivray (eds.) *Taking Stock of Environmental Assessment: Law, Policy and Practice* (Routledge: Oxford 2007) 191, 195.

^{liv} See M. Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation Under the Århus Convention' (2003) 66 *MLR* 80, at 103.

^{lv} *Ibid.* Although this article refers to judicial review in the United Kingdom, the same comment would be generally true in Ireland and probably in other common law jurisdictions also.

^{lvi} Kennedy, above n.xxix, at 144.

^{lvii} See *Ibid.* at 145.

^{lviii} *Ibid.* at 146.

^{lix} Paragraph 115 of the judgment.