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Charging for Public Participation: Fees for Submissions or Observations on Environmental Impact Assessment

Case C-216/05 *Commission v Ireland* [2006] ECR 2006 I-10787

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In case C-216/05, *Commission v Ireland*, the European Court of Justice (ECJ) ruled that Irish legislation which required the payment of a fee by those making submissions regarding an environmental impact assessment (EIA) did not breach the EIA directive. Although the net legal issue in the case was straightforward, the wider implications of the case for both the EIA regime and the general freedom which Member States have in implementing directives are important. Given this, the analysis of both the Advocate General and the Second Chamber is sometimes shallower than the case warranted.

Environmental Impact Assessment in Ireland

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’) 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. (There are some specific procedures for particular types of projects which are not subject to the planning requirements.¹)

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].

It is open to any member of the public to lodge a submission or observation to the planning authority considering a planning application at first instance. Although only the applicant or those who made submissions or observations to the planning authority can lodge an appeal to An Bord Pleanála (the Planning Appeals Board) against the first instance decision of the planning authority, any other person can make submissions or observations to the Board once an appeal has been commenced.

As part of the consolidation and reform of planning legislation in 2000, the Irish government introduced a requirement that those lodging submissions on an application for planning permission would have to pay fees for doing so. (A small number of named bodies are exempted, but only one environmental non-governmental organisation, An Taisce.ⁱⁱ) This led to considerable protest on the part of environmental non-governmental organisations (ENGOs). An umbrella body, Friends of the Irish Environment, compiled information on the likely impact of the fees and sent a complaint to the European Commission, alleging that this created a barrier to participation in the planning process and was not in compliance with the EIA directive.ⁱⁱⁱ

Factual Background

The day after the Act was enacted, 29th August 2000, but before it had been brought into force, the Commission wrote to the Irish authorities requesting comment on various aspects of the legislation. The new requirement that third-party objectors should pay a fee in order to make a submission as part of the planning permission decision-making process was a particular concern. The Commission were of the view that this was not compatible with Articles 6 and 8 of the EIA directive. Ireland disagreed.

In January 2003, the Commission issued a reasoned opinion again stating this view and, when the Irish authorities continued to disagree, began infringement proceedings against Ireland before the European Court of Justice in April 2005. On 22 June 2006, Advocate-General Stix-Hackl gave an opinion which concluded that the complaint was unfounded. The Second Chamber gave judgment on 9 November 2006 which also rejected the Commission's argument.^{iv}

Relevant Legislation

At issue in the case were sections 33 and 144 of the PDA and (by implication) the Planning and Development Regulations 2001 (S.I. No. 600 of 2001). Section 33 provides, in relevant part:

33.— (1) The Minister shall by regulations provide for such matters of procedure and administration as appear to the Minister to be necessary or expedient in respect of applications for permission for the development of land.

(2) Without prejudice to the generality of subsection (1) , regulations under this section may make provision for the following—

...

(c) enabling persons to make submissions or observations on payment of the prescribed fee and within a prescribed period;

Section 144 provides, in relevant part:

144.— (1) Subject to the approval of the Minister, the Board may determine fees in relation to appeals, referrals, the making of an application under section 37(5), the making of submissions or observations to the Board under section 130, and requests for oral hearings under section 134, and may provide for the payment of different fees in relation to different classes or descriptions of appeals and referrals, for exemption from the payment of fees in specified circumstances and for the waiver, remission or refund in whole or in part of fees in specified circumstances.

(2) The Board shall review the fees determined under subsection (1) from time to time, but at least every three years, having regard to any change in the consumer price index since the determination of the fees for the time being in force, and may amend the fees to reflect the results of that review, without the necessity of the Minister's approval under subsection (1) .

The Commission felt that if these fees were payable for submissions and appeals regarding applications for planning permission for prescribed projects which were likely to have significant effects on the environment and which thus fell within the ambit of the EIA Directive, it would contravene Article 6 and 8 of the Directive.

At the relevant time,^v Article 6 provided, in relevant part:

2. Member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 [which deals with consultation with ‘authorities likely to be concerned by the project’] are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.

3. The detailed arrangements for such information and consultation shall be determined by the Member States, which may in particular, depending on the particular characteristics of the projects or sites concerned:

- determine the public concerned,
- specify the places where the information can be consulted,

- specify the way in which the public may be informed, for example by bill-posting within a certain radius, publication in local newspapers, organisation of exhibitions with plans, drawings, tables, graphs, models,
- determine the manner in which the public is to be consulted, for example, by written submissions, by public enquiry,
- fix appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.

Article 8 provides:

The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.

Based on these articles, the Commission made four arguments against the introduction of fees in Ireland. These were rejected by both the Advocate-General and the Chamber in broadly similar terms.

Opinion of the Advocate General

The first argument put forward by the Commission was that the EIA Directive does not expressly permit the imposition of fees whereas other legislation in the environmental arena (such as Directive 90/313/EC on the freedom of access to information on the environment) explicitly allows it. The Commission further claimed that fees can only be imposed if they are 'objectively necessary and proportionate'. The Advocate General felt that 'anything not prohibited by Community law remains, generally speaking, open to a Member State'. She did not feel that the fact that one directive expressly granted authority to impose fees led to a general presumption that such authority must always be

so granted. She also noted that neither the Directive nor Article 249 EC contain any requirement of objective justification and proportionality, whereas other provisions of the treaty do.

The second argument was that imposing fees went against the 'scheme and purpose' of the EIA Directive as it would make it less likely that the public would participate. The third argument was that the imposition of fees is not part of the 'detailed arrangements for consultation' which are within the discretion of member states. Article 6(3) only gives Member States power to enact legislation that is necessary to give effect to Article 6(2). If fees are to be imposed, they should not be imposed on the public but, following the polluter pays principle in Article 174(2) EC, should be imposed on applicants.

Taking these issues together, the Advocate General was of the view that the Member States were expressly entitled to 'determine both the public concerned and how the consultation is carried out'.^{vi} The latitude given to Member States by Article 6(3) to define the 'detailed arrangements' for consultation could encompass the imposition of fees as a pre-requisite for public participation in the consultation process. It was clear from the Directive that the Member States could limit aspects of the consultation process, such as the time allotted to it, and that it did not need to be open to all members of the public. It was not incompatible with the Directive to extent this limitation to include those who paid fees.

However, the Advocate General did not deal directly with the argument that the polluter pays principle indicated that applicants should not be permitted to externalise their costs to the public or those objecting to a development. There may well be countervailing arguments on this point: developers are already liable for fees at each stage of the

process, the Irish government felt it needed to recoup at least some of the administrative costs associated with the processing of submissions and if these costs were passed onto applicants, it would provide an easy means for objectors to cause significant financial difficulties for applicants. However, for the Advocate General to pass over the issue without discussion is somewhat unsatisfactory.

The final argument was that the fees potentially impede the exercise of the rights given to the public by Article 6(2), particularly those who are relying on social welfare payments as their principal source of income. At the time, the fees for making a submission at both the planning authority and appeal stages, at €65, represented 50% of their weekly income. This, the Commission argued, was a breach of Article 8 of the Directive.

The Advocate General's approach to this aspect of the case was curious:

The weekly income of the category of persons constituted by social welfare recipients, the yardstick used by the Commission, is as extreme a yardstick as, for example, the average annual income of people in the highest income brackets would be. An assessment having regard to average monthly income in Ireland appears to me more sensible, even though no clear conclusions can be drawn from this either. On the whole, however, Ireland's view that EUR 20 and EUR 45 are, generally, affordable sums is probably to be accepted as correct. Furthermore, as is apparent from the case-file and Ireland's submissions, the amount of these fees falls perfectly within the normal range for various fees and charges in connection with administrative procedures in Ireland.^{vii}

It is not clear from this paragraph why 'average monthly income' is more sensible or on what basis the Advocate General chose between the various options available. This is

particularly unsatisfactory as the income bracket selected does not give any clear answer to the question posed. In addition, the phrase ‘probably to be accepted as correct’ does not give the decision the ring of legal certainty.

In addition, this paragraph omits any discussion of an important issue and the root cause of the litigation – the impact on ENGOs. The Commission’s reasoned opinion in the case was founded on, and quoted from, a dossier compiled by Irish ENGOs. While it is ‘probably to be accepted as correct’ that even a person in receipt of social welfare payments could find €20 or €45 in order to make a submission on a single planning application and EIS which was of significant concern, the impact on an ENGO which may be involved in several, or even many, different processes will be more significant. Although the individual amount is small, the cumulative effect of paying out as much as €65 each time is bound to limit the number of instances of engagement with the EIA process. This is particularly unsatisfactory as by giving an exemption to one ENGO, An Taisce, the Irish legislation implicitly recognises that ENGOs should be treated differently (although this exemption is itself inadequate and should be reviewed and extended).

The Advocate General went on to say that, despite the Commission’s arguments, the fact that the fees were to be set by the Minister or An Bord Pleanála without any clear definition of their discretion in the primary legislation equated them with a ‘mere administrative practice’. The resulting fees were sufficiently specific, precise and clear to satisfy the principle of legal certainty as defined in Community law.

Judgment of the Court

In considering the Commission's first argument, the court also did not accept that the omission of explicit authority to impose fees meant that a Member State was unable to do so. With regard to the third argument, that the imposition of fees went beyond the margin of discretion allowed, the Court pointed to the words 'in particular' in Article 6(3) and stated that 'the Member States are, in principle, free to impose a participation fee such as the one at issue, provided that it is not such as to constitute an obstacle to the exercise of the rights of participation conferred',^{viii} even if such arrangements are not necessary to give effect to the Directive.

The Court considered the second and fourth arguments together. The Court noted that both Directive 90/313/EEC on the freedom of access to information on the environment and Directive 2003/4/EC on public access to environmental information permit the charging of fees, demonstrating that the Community legislature does not consider the charging of a reasonable fee as incompatible with access to information. Given the low level of the fees and the costs incurred in processing submissions from the public, the court did not accept that they were contrary to the scheme and purpose of the Directive, nor that the power to determine their amount was defined too loosely. Unfortunately, there was no detailed analysis of the appropriate level of fees. The Court seemed to accept, by implication, the Advocate General's unsatisfactory conclusion and stated that the fees did not constitute an obstacle to participation.

As a consequence of the finding that there was no breach of article 6, the alleged infringement of Article 8 could not be established.

Commentary

This case can be considered at three different levels of detail. In the context of the EIA directive and other related European laws, there is the important practical question of the ability of Member States to impose fees for public participation. In the broader context of European law as a whole, it raises the question of the margin of discretion available to Member States in implementing directives and how far they can use this discretion in ways that go against the spirit, if not the letter, of an individual directive. Finally, the case may point towards an impending conflict with the Århus Convention, at least for Ireland.

Members of the public with environmental concerns and ENGOs may now be wondering if this is the thin edge of a wedge that will see Member States exploit the gaps left in the broad strokes of environmental directives which do not prohibit fees. For example, Ryall has pointed to the possible introduction of participation fees in national implementations of the Strategic Environmental Assessment directive (2001/42/EC), which similarly leaves the 'detailed arrangements' to the Member States.^{ix} Time will tell how this will develop.

Placing these concerns in a wider context, the narrow, literal reading which the ECJ took of the EIA directive may indicate a move from its previous strong support for public participation in the planning process. While the case does stand in contrast to the court's interpretation of the Access to Information Directive (90/313/EEC), where it did not permit the use of fees to undermine the right of access,^x it would not be correct to see this case as a rolling back of the court's jurisprudence. However, a possible combination of further legislative enactments that limit public participation and a continuation of the

court's constricted construction of such directives may lead to a restriction of general consultation on environmental issues.

Finally, we must note the Århus Convention.^{xi} This is intended to give effect to Principle 10 of the Rio Declaration,^{xii} facilitating the 'participation of all concerned citizens', 'appropriate access to information concerning the environment that is held by public authorities' and '[e]ffective access to judicial and administrative proceedings'. Both the European Union and Ireland are signatories, although Ireland has not yet ratified it. (The Commission intends to refer Ireland to the ECJ for alleged failure to adopt the Public Participation Directive (2003/35/EC) which aims to give effect to the Convention.^{xiii})

While the Convention does not explicitly deal with the issue of fees, the recitals do recognise that the public should have 'free access' to 'the procedures for participation in environmental decision-making' and the Convention's Implementation Guide says that the State should not impose financial constraints on those who do participate.^{xiv} Given the likely serious impact of the new planning fees on ENGOs,^{xv} that the introduction of fees for appeals led to a reduction in their number,^{xvi} and that these bodies are seen as the 'principal clients' of the convention,^{xvii} it is arguable that Ireland is not in compliance with the Convention. The participation of both the public and ENGOs is important in ensuring both the effectiveness and the legitimacy of the EIA process.^{xviii} In this context, it is surprising and unfortunate that the Court's judgement makes no mention of ENGOs and it may be that the Court's reading of the EIA directive runs counter to the Convention.

Overall, therefore, although the case does answer the net issue of the compatibility of public participation fees with the EIA regime, it raises further questions for the future

regarding the approach which the ECJ should take in interpreting environmental legislation, particularly taking into account the focus of the Århus Convention on effective involvement by all.

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ⁱ Y. Scannell, *Environmental and Land Use Law* (Thomson RoundHall, 2006), p. 451.

ⁱⁱ Planning and Development Regulations 2001 (SI 2001, No. 600), article 168(2).

ⁱⁱⁱ F. McDonald, “Planning fee illegal says EU Commission”, *Irish Times*, 13 February 2003.

^{iv} [2006] ECR I-10787.

^v Directive 2003/35/EC amended Article 6 and other parts of Directive 85/337/EEC.

^{vi} [2006] ECR I-10787 at paragraph 40.

^{vii} *Id.* at paragraph 45.

^{viii} At paragraph 33.

^{ix} Á. Ryall, ‘EIA and Public Participation: Determining the Limits of Member State Discretion’ (2007) 19(2) *Journal of Environmental Law* 1, 8.

^x Case C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg-Der Landrat* [1998] ECR I-3809 and Case C-217/97 *Commission v. Germany* [1999] ECR I-5087, cited in Á. Ryall,

‘Access to Information on the Environment: The Challenge of Implementing Directive 2003/4/EC’ (2005) 12 *Irish Planning and Environmental Law Journal* 162, 164.

^{xi} The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, <http://www.unece.org/env/pp/>.

^{xii} E. Morgera, ‘An Update on the Aarhus Convention and its Continued Global Relevance’ (2005) 14(2) *RECIEL* 138.

^{xiii} T. Flynn, ‘Recent European Environmental Developments’ (2007) 14(2) *Irish Planning and Environmental Law Journal* 78, 80.

^{xiv} See Ryall, above n. 7 at 10.

^{xv} *Ibid.*

^{xvi} Á. Ryall, ‘The EIA Directive and the Irish Planning Participation Fee’ (2002) 14(3) *Journal of Environmental Law* 317, 322-323.

^{xvii} Morgera, above n. 10 at 139.

^{xviii} A. Marong, ‘From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development’ (2003) *Georgetown International Environmental Law Review* 21, 72-75.