Public Consultation on the Implementation of the UNECE Aarhus Convention in Ireland

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1. Introduction


1.2. It is binding on the EU since May 2005 and was ratified by Ireland on the 20th June 2012. In any event, it could be argued that the Convention was binding on Ireland since 2005 and prior to its ratification since international agreements entered into by the EU are binding on its institutions and Member States under art.216(2) of the Treaty on the Functioning of the European Union (TFEU) (ex art.300(7) of the European Community Treaty).  

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1 Contact details: davidbrowne2@gmail.com; david.browne@lawlibrary.ie  
3 The Aarhus Convention incorporates the three pillars of Principle 10 of the 1992 Rio Declaration.  
4 In the case of Case C-240/90, Lesoochranárske zoskupenie VLK v. Ministersvo zivotneho prostredia Slovenskej republiky [2011] I-01255, it was held at para.30 that “the Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 36, and Case C-459/03 Commission v Ireland [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 Haegeman[1974] ECR 449, paragraphs 4 to 6, and Case 12/86 Demirel [1987] ECR 3719, paragraph 7).”
1.3. The Aarhus Convention adopts a rights-based approach under three broad themes or ‘pillars’ and guarantees right of: (a) access to information; (b) public participation in decision-making and (c) access to justice in environmental matters.

1.4. Directive 2003/4/EC on Public Access to Environmental Information (the “AEI Directive”) was adopted by the EU to give effect, inter alia, to the Access to Information pillar, which is set forward in Articles 4 and 5 of the Aarhus Convention. This Directive has been transposed in Ireland by way of the European Communities (Access to Information on the Environment) Regulations 2007-2011 (“the AIE Regulations”).

1.5. Directive 2003/35/EC (the “Public Participation Directive”) was adopted to implement the right of the public to participate in decision-making and to comment on or make submissions on projects or proposals which may affect the environment. This Directive has been transposed by way of amendments to the Planning and the Development Act 2000, as amended; the Planning and Development Regulations 2001, as amended; as well as various Regulations, which purport to transpose Directive 85/337/EEC, as amended ("the EIA Directive), which has now been codified in Directive 2011/92/EU. This incorporates the provisions in Articles 6-8 of the Aarhus Convention.

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1.6. Article 9 of the Aarhus Convention aims to allow the public access to justice by way of a right to seek redress when the law is infringed and the right to review and challenge public decisions through the national courts or an independent tribunal. Article 9(1) has been implemented by the European Communities (Access to Information on the Environment) Regulations 2007-2011 as well as s.50 of the Planning and Development Act 2000, as amended.

1.7. It is submitted that the Aarhus Convention establishes minimum standards which must be achieved but does not set a ‘ceiling’ or prevent any Party from adopting measures which exceed the minimum standards in the Convention.8

2. Access to Information: Articles 4 and 5 of the Aarhus Convention

2.1. The Access to Information Pillar includes both ‘passive’ disclosure of information by way of acceding to requests for environmental information (Article 4) as well as ‘active’ disclosure of information by way of the collection and dissemination of environmental information (Article 5).9

2.2. Article 4(1) of the Aarhus Convention states that “Each Party shall ensure that public authorities, in response to a request for environmental information, make such information available to the public...where requested”. Article 3(1) of Directive 2003/4/EC (the “AEI Directive”) requires Member States to “ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest”.

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8 Jeremy Wates (2005), The Aarhus Convention: A Driving Force for Environmental Democracy, JEEPL (1).
2.3. This requires Member States to ensure that all public authorities make environmental information available on request. This is subject only to the exceptions in art.4 of the AEI Directive. The provisions under the AEI Directive provide that requests for environmental information should be acceded to by the relevant public authorities, subject to their proper formulation and the exemptions and exceptions provided for in art.4, and, therefore, should not be considered as discretionary.

2.4. It is submitted, therefore, that art.3 of the AEI Directive requires public authorities to make available all environmental information on request and does not enable public authorities to exclude environmental information, for example where information may be available under specific statutory codes or Freedom of Information legislation, unless the specific exceptions in art.4 apply.

2.5. Article 2(2) of Directive 2003/4/EC defines a ‘public authority’ as including: “(a) government or other public administration, including public advisory bodies, at national, regional or local level; (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)”.

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10 The definition of environmental information in art.2 of the AEI Directive is a very broad definition and encompasses various forms of media. See Case C-321/96 Mecklenburg v. Kreis Pinneberg [1998] ECR I-3809, which concerned Directive 90/313/EC which was the precursor to the AEI Directive, where the Court ruled that the Directive should be interpreted as covering a statement of views given by a countryside protection authority in development consent proceedings if that statement is capable of influencing the outcome of those proceedings as regards interests pertaining to the protection of the environment.

11 C.f. reg.4(1) of the AIE Regulations and para.6.1 of the May 2013 “Guidance for Public Authorities” on the AIE Regulations.
2.6. This includes all bodies performing public administration functions as well as private entities which have public responsibilities relating to the environment and which are under the aegis of a public authority. 12

2.7. The consolidated AIE Regulations specifies that the definition of ‘public authority’ includes: “(i) a Minister of the Government, (ii) the Commissioners of Public Works in Ireland, (iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001), (iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946), (v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004), (vi) a board or other body (but not including a company under the Companies Acts) established by or under statute, (vii) a company under the Companies Acts, in which all the shares are held — (I) by or on behalf of a Minister of the Government, (II) by directors appointed by a Minister of the Government, (III) by a board or other body within the meaning of paragraph (vi), or (IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information”.

2.8. It is not clear why such a non-exhaustive list should be incorporated in the AIE Regulations and it is not evident what its purpose is. Para.3.2 of the 2013 Guidelines states that “under Article 14.3 of the Regulations, the Minister for the Environment, Community and Local Government must ensure that an indicative list of public authorities is publicly available in electronic format.” It is submitted that such a list has not been made publicly available.

12 See Case C-217/97, Commission v. Germany [1999] ECR I-5087, where it was held that authorities, including the courts, which are acting normally in the exercise of their judicial powers and therefore not covered by Directive 90/313/EC, may also have responsibilities relating to the environment or be in possession of information on the environment within the meaning of the directive when they act outside their strict judicial functions. If that is the case they must be regarded as public authorities for the purposes of the Directive.
2.9. In Case C-515/11, *Deutsche Umwelthilfe v. Federal Republic of Germany* (Opinion of Advocate General of the 21st March 2013), a German administrative court referred the question of whether the executive branch of government is a body or institution acting in a legal capacity within the meaning of art.2(2) of Directive 2003/4/EC when it adopts regulatory instruments pursuant to a legal power conferred by enabling provisions in primary legislation. This followed a request by a German environmental association which sought access to information submitted by the German automotive industry on fuel consumption and CO₂ emissions of passenger cars.

2.10. This request was denied on the basis that that the Ministry had been acting in a legislative capacity and, therefore, was not subject to an obligation to provide environmental information. Advocate General Sharpston advised that an executive body is not excluded from the exception in art.2(2) when adopting regulating instruments or secondary legislation pursuant to an enabling power, unless the procedure for adopting such instruments guarantees a right of access to environmental information. The obligation is on the executive body to demonstrate that it is entitled to rely on the exception.

2.11. In Case C-204/09, *Flachglas Torgau v. Germany* (Judgment of the Court of 14 February 2012), it was noted that Member States are allowed to exclude public bodies from the requirement to disclose environmental information when they are acting in a legislative capacity but the Ministry which relied on this exception during the process was precluded from doing so once the legislative process is ended. In this case, Flachglas Torgau, which is a glass manufacturer in Germany covered by the EU emissions trading scheme (ETS), requested the Federal Ministry of Environment to provide information on the allocation of allowances but the request was refused.
2.12. Access to environmental information is only limited with respect to the exceptions specified in art.4 of the AEI Directive. In all cases where a request is refused the exceptions must be interpreted narrowly.\footnote{C-321/96 Mecklenburg v. KreisPinneberg [1998] ECR I-3809, para. 25.} With the exception of the interests listed in paragraph 1 and 2 (b), (c) and (e), there is always be an overriding public interest in disclosure of the information if it relates to emissions into the environment and emissions-related information must always be made public.

2.13. Article 4(5) of the AEI Directive states that “A refusal to make available all or part of the information requested shall be notified to the applicant in writing or electronically, if the request was in writing or if the applicant so requests, within the time limits referred to in Article 3(2)(a) or, as the case may be, (b)”.

2.14. Reg.7(4) of the consolidated AIE Regulations is silent on the requirement of a public authority to notify an applicant in writing or electronically and simply requires the public authority to “notify the applicant of the decision not later than one month following receipt of the request”. Although this does not preclude the applicant being notified in writing or electronically, it fails to specify the requirement set out in art.4(5) of the Directive.

2.15. Article 5(2) of the AEI Directive states that “public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount”. Article 5(3) states that “where charges are made, public authorities shall publish and make available to applicants a schedule of such charges as well as information on the circumstances in which a charge may be levied or waived”. Recital 18 indicates that public authorities may impose a reasonable charge for ‘supplying environmental information’ and, as a general rule, “charges may not exceed actual costs of producing material in question”.

2.16. Reg.15(1)(a) of the AIE Regulations retains the equivalent language and states that “a public authority may charge a fee when it makes available environmental information in accordance with these Regulations (including when it makes such information available following an appeal to the Commissioner under article 12), provided that such fee shall be reasonable having regard to the Directive”.

2.17. It is submitted that the term ‘reasonable’ should be construed in relation to the administrative cost of extracting, processing and disseminating environmental information if such information is already held.

2.18. The authorities may charge reasonable costs for the supply of the information— but not for the refusal of it. In Case 217/97, Commission v. Germany [1999] ECR I-5087, it was held that in the absence of more details in the Directive itself, what constitutes a reasonable cost must be determined in the light of the purpose of Directive 90/313/EC:

“any interpretation of what constitutes “reasonable cost” for the purposes of Article 5 of the directive which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected. Consequently, the term “reasonable” for the purposes of Article 5 of the directive must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search.”
2.19. Reading these provisions in conjunction with art.9(4) of the Aarhus Convention and the decision of the ECJ in Case C-260/11, *The Queen (on the application of David Edwards and Lilian Pallikaropoulos) v. Environment Agency & Others* (judgment of 11 April 2013), it is submitted that the question of ‘reasonable’ from the point of view of the requester might consider both subjective and objective factors, including the particular financial circumstances and exigencies of the requester.

2.20. Article 6(1) of the AEI Directive states that “Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.” It is submitted, therefore, that the ability of the appeals mechanism to expeditiously process appeals should not be curtailed or hindered by a lack of resources.

2.21. Reg.15(2) of the AIE Regulations states that “where a public authority charges a fee pursuant to sub-article (1), it shall make available to the public a list of fees charged, information on how they are calculated and the circumstances under which they may be waived”. It does not appear that all public authorities make available these lists of fees and it is imperative that public authorities who do charge a fee make available a fee schedule which is clear in how costs and fees are calculated.
2.22. Article 5(2) of the Aarhus Convention states that “Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible”.

2.23. The issue of transparency is one of the key objectives of the Aarhus Convention and a normative construction of transparency should include full disclosure and availability of environmental information to facilitate the empowerment of the public and to enable members of the public, which enables them to stay informed of administrative decisions and to assess the quality and legality of those decisions.

3. Public Participation in Decision-Making: Articles 6-8 of the Aarhus Convention

3.1. Article 6 of the Aarhus Convention is concerned with public participation in decision-making on certain activities. Article 7 covers public participation concerning plans, programmes and policies covering the environment. Article 8 covers public participation during the preparation of executive regulations and generally applicable legally binding normative instruments.

3.3. The provision in art.15a of Directive 96/61/EC was considered in Case C-416/10, *Jozef Krizan and Others v. Slovenská inspekcia zivotneho prostredia* (Judgment of the Court of 15 January 2013). It was held that art.15a does allow for the introduction of exemptions or restrictions, for example where disclosure of information would adversely affect the confidentiality of commercial or industrial information, but that exception could not be invoked for urban planning decisions such as the location of a new landfill, which required an integrated pollution prevention and control (IPPC) permit.

3.4. It was also held that art.15a of the IPPC Directive implies that members of the public may be able to request or apply for interim measures suspending a decision and that decisions of a national court implementing obligations resulting from art.15a of Directive 96/61/EC and art.9 of the Aarhus Convention did not constitute an “unjustified interference with the developer’s right to property” (art.17 of the Charter of Fundamental Rights of the European Union).

3.5. The provisions in art.7 of the Aarhus Convention covering public participation in plans and programmes were adopted in art. 2 of Directive 2003/35/EC, with the exception of plans and programmes relating to national defence or civil emergencies (art.2(4)) and plans and programmes for which a public participation procedure is already set out, including under Directive 2001/42/EC (“the Strategic Environmental Assessment (SEA) Directive”)14 and Directive 2000/60/EC (“the Water Framework Directive”).

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3.6. Annex 1 to the Public Participation Directive includes 6 Directives to which art.2 of the Directive applies and which are supplementary to the SEA Directive and the Water Framework Directive for which provisions were already in place. Provisions on public consultation can also be found in the field of GMO-legislation.\textsuperscript{15}

3.7. However, this does include plans for the management of Natura 2000 sites under Directive 92/43/EEC (the “Habitats Directive”) which would be covered by the criteria in art.7 of the Aarhus Convention but which are not subject to strategic assessment under the SEA Directive.\textsuperscript{16}

4. Access to Justice: Article 9 of the Aarhus Convention

4.1. The Access to Justice Pillar includes both the right to legal remedies in relation to access to information and public participation as well as the right to challenge administrative decisions in the public interest (\textit{actio popularis}).

4.2. Article 9(2) of the Aarhus Convention states that \textit{“Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition”}.

4.3. Therefore, it stipulates the right of access to review and expressly leaves to the Parties of the Convention the decision to require either a sufficient interest or alternatively the assertion of an impairment of a right as a condition for access to a review procedure.

\textsuperscript{15} Articles 9 and 24 of the GMO Deliberate Release Directive 2001/18.
\textsuperscript{16} Jerry Jendróska (2005), Aarhus Convention and Community Law: The Interplay, JEEPL (1).
4.4. It is submitted that art.9(2) allows applicants with a sufficient interest to challenge both the substantive and procedural legality of a decision, act or omission by a public body.\textsuperscript{17}

4.5. In Case C-263/08, \textit{Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd} [2009] I-09967, it was held that the EIA Directive provides for members of the public who fulfil certain conditions to have access to a review procedure before a court of law or another independent body in order to challenge the legality of measures which fall within its scope. This right is recognised in particular for non-governmental organisations (NGOs), which promote environmental protection and meet certain conditions. The conditions laid down by national law must ensure "wide access to justice", in accordance with the \textit{effet utile} of the Directive and render effective the provisions of the Directive relating to this right of appeal.

4.6. It was held that the limitation of the right of appeal by the Swedish Environment Act exclusively to associations with more than 2000 members was too restrictive and, therefore, did not conform with the EIA Directive. The Court also specified that this right of appeal is independent of whether or not the association concerned has participated in the administrative procedure concerning the decision it intends to challenge.\textsuperscript{18}

\textsuperscript{17} Section 50A(3) of the Planning and Development Act 2000 was amended by section 20 of the Environment (Miscellaneous Provisions) Act 2000 and the test for leave to apply for judicial review was modified from 'substantial interest' to 'sufficient interest'.

\textsuperscript{18} This provision has now been modified in section 50A(3) of the Planning and Development Act and allows standing for an applicant which is: (a) 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, if it were to make an appeal under section 37(4)(c), would have to satisfy by virtue of section 37(4)(d)(iii).
4.7. In Case C-182/10, *Solvay v Région wallonne* (Judgment of 16 February 2012), it was held that articles 3(9) and 9(2) to (4) of the Aarhus Convention and art.10a of the EIA Directive must be interpreted as meaning that when a project falling within the scope of those provisions is adopted by a legislative act, the question of whether that legislative act satisfies the conditions laid down in art.1(5) of the amended EIA directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law. If no review procedure of that nature and scope were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.19

4.8. Article 3(7) of Directive 2003/35/EC has inserted a new Article 10a into the EIA Directive: “Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (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 this Directive. Member States shall determine at what stage the decisions, acts or omissions may be challenged. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access

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19 See also the joined cases of Case C-128/09, Antoine Boxus and Willy Roua; Case C-129/09, Guido Durlet and Others; Case C-130/09, Paul Fastrez and Henriette Fastrez; Case C-131/09, Philippe Daras; Case C-134/09 and Case C-135/09, Association des riverains et habitants des communes proches de l’aéroport BSCA (Brussels South Charleroi Airport) (ARACH) and Léon L’Hoir and Nadine Dartois v Région wallonne. It was held that art.9(2) of the Aarhus Convention must be interpreted as meaning that when a project falling within the ambit of art.10a of the EIA Directive is adopted by a legislative act, it must be possible for the question of whether that legislative act satisfies the conditions laid down in art.1(5) of the Directive to be submitted to a court or law or independent or impartial tribunal under national procedural rules.
to justice”. This is now included in Article 11(1), (2) and (3) of the codified EIA Directive.

4.9. In Case C-115/09, **Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg** [2011] I-03673, which was a reference for a preliminary ruling concerning the authorisation granted to Trianel Kohlekraftwerk GmbH & Co. KG (‘Trianel’) for the construction and operation of a coal-fired power station in Lünen, it was held that organisations whose primary purpose is environmental protection were entitled to have access to a review procedure before a court of law or another independent and impartial body established by law and to challenge the substantive or procedural legality of decisions, acts or omissions pursuant to art.10a of the EIA Directive.

4.10. It was also held that in the absence of EU rules it was for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derived from EU law. Therefore, NGOs promoting environmental protection have standing by virtue of access to justice provisions in the EIA Directive and national provisions should not be overly restrictive.

4.11. The Court further held that an NGO could derive, from the last sentence of the third paragraph of art. 10a, the right to rely before the courts in an action contesting a decision authorising projects “likely to have significant effects on the environment” even where, on the ground that the rules relied on protected only the interests of the general public and not the interests of individuals, national procedural law did not permit this.
4.12. In the case of Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministersvo zivotneho prostredia Slovenskej republiky [2011] I-01255, it was held that art.9(3) of the Aarhus Convention does not enjoy direct effect in European law but national courts must take into account ‘to the fullest extent possible’ the requirements of the Aarhus Convention and the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3). Therefore, although certain provisions of the Aarhus Convention may be directly applicable and may have direct effect the competency to decide on direct effect lies with the Court of Justice of the European Union (CJEU) and may not be decided solely by the national courts of the Member States.

4.13. Article 9(4) of the Aarhus Convention states that “the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”.

4.14. Article 11(4) of the codified EIA Directive, which purports to give effect to art.9(4), states that: “The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.”
4.15. In Case C-260/11, The Queen (on the application of David Edwards and Lilian Pallikaropoulos) v. Environment Agency & Others (judgment of 11 April 2013), it was held that the requirement that legal proceedings should not be prohibitively expensive means that potential applicants should not be prevented from pursuing judicial review proceedings by reason of the financial burden that might arise.

4.16. Furthermore, the national court which is required to adjudicate on the matter of costs must satisfy that this requirement has been complied with, taking into account both the individual interest of the applicant and the genuine public interest, and, therefore, cannot act solely on the basis of the applicant’s financial situation but must also carry out an objective analysis of the costs requirement or obligation.

4.17. The court may also take into account the situation of the parties concerned, whether the applicant has a reasonable prospect of success, the importance of the claim to the applicant, whether the claim is potentially frivolous and the existence of a national ‘environmental civil legal aid’ scheme or protective costs regime.

4.18. In the previous Opinion, delivered by Advocate General Sharpston on the 18th October 2012, it was opined that the national courts must adopt both an objective test and a subjective test when deciding whether costs are prohibitive or not. Furthermore, it was recommended that the subjective test would need to be based on whether the individual applicant had an ‘extensive’ economic interest in the outcome and not just his or her financial means.
4.19. In Case C-427/07, *Commission v. Ireland* [2009] I-06277, it was held that one of the underlying principles of Directive 2003/35/EC was to promote access to justice in environmental matters and the obligation to make available to the public practical information on access to administrative and judicial review procedures amounted to an obligation to obtain a precise result which the Member States must ensure was achieved.

4.20. The Court held that, in the absence of any specific statutory or regulatory provision concerning information on the rights being made publicly available, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions could not be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned was in a position to be aware of its rights on access to justice in environmental matters.\(^{20}\)

4.21. Furthermore, under art.9(5) of the Aarhus Convention, Parties to the Convention are obliged to “*ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.*” This places a positive obligation on Parties to consider whether ‘appropriate assistance mechanisms’ are in place.

\(^{20}\) The Court also reiterated that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which required 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 (see Case C-197/96, Commission v. France [1997] I-01489 and Case C-207/96, Commission v Italy [1997] I-06869).
4.22. It is submitted that where there are legitimate concerns about access to justice, for example procedural or financial barriers, there is an obligation on Parties to consider how these can be ameliorated. Therefore, if there is a financial limitation on access to courts it is imperative that active consideration be given to alternative models of providing for legal costs, for example protective costs orders, costs caps, an environmental civil legal aid scheme, etc.\textsuperscript{21}

4.23. In \textit{R (on the application of Sonia Burkett) v London Borough of Hammersmith & Fulham} [2004] EWCA Civ 1342, see paras 74-80, the [then] Master of the Rolls, Lord Justice Brooke, first raised the problem of high legal costs in the context of the Aarhus Convention.

4.24. In the Court of Appeal case of \textit{R (Corner House Research) v Secretary of State for Trade & Industry} [2005] 1 W.L.R. 2600, the Court laid down a number of governing principles for awarding protective costs orders (PCOs): (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

4.25. In *River Thames Society v First Secretary of State & 3 ORS sub nom Lady Berkeley v First Secretary of State* [2006] EWHC 2829, Underhill J. refused an application for a PCO on the basis that the issues raised, despite involving a large development in a prominent local site, was not one of general public importance.


4.27. Thus, an applicant in proceedings who is seeking to judicially review an administrative decision or action by a public body or failure by that body to take specific action will generally not be liable for costs if he or she loses and each party, including any notice party, will bear its own costs, irrespective of the outcome.

4.28. The amended section 50B now provides that the costs of proceedings (or a portion of the costs) may be awarded to the applicant in judicial review proceedings in so far as the applicant succeeds on any of the reliefs sought. Thus, it appears that an order of costs may be awarded in favour of a successful applicant but that no order as to costs would be made against an unsuccessful

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22 The provision in section 50B also applies to an appeal to the Supreme Court from a decision of the High Court and proceedings in the High Court or Supreme Court for interim or interlocutory relief.

23 In the case of Eileen Stack Shanahan & Or. v. Ireland [2012] II JIC 1206. O’Malley J. held at para.14 that the “full impact of [section 50B] has yet to become clear but I do consider that there is cause for disquiet. 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, the section could not have a “chilling” effect on their willingness or capacity to provide their services”.
applicant, unless the application was frivolous or vexatious or the applicant had behaved in a certain reprehensible manner.

4.29. This applies where the proceedings are ‘pursuant to a law of the State that gives effect’ to either: (a) a provision of Directive 85/337/EEC (“the EIA Directive”), as amended by Article 10a of Directive 2003/35/EC, which provides for public participation and access to justice;24 (b) Directive 2001/42/EC (“the SEA Directive”) or (c) Directive 2008/1/EC (“the IPPC Directive”).

4.30. Where a costs order is made in favour of the applicant, these costs must be borne by the respondent or notice party to the extent that their actions or omissions contributed to the applicant succeeding in its application and the Court has discretion to decide on the allocation and apportionment of a costs order should the applicant succeed in all or part of its case.

4.31. It does not follow, however, that the applicant would have a prima facie entitlement to its costs and it appears on the face of the wording of section 50B of the Planning and Development Act 2000 that the Court has considerable discretion as to whether to allow or refuse to make a costs order.

4.32. However, it could be argued that this discretion may in fact be limited and may be interpreted more narrowly in the context of C-427/07, Commission v. Ireland [2009] I-06277, where the ECJ ruled that the requirement for legal certainty, clarity and specificity in EU law also applied to costs rules and found that Ireland had failed to fulfil the requirements of Article 10a of Directive 2003/35/EC and had failed to ensure that access to justice was not ‘prohibitively expensive’.

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24 The Environmental Impact Assessment Directive has been amended a number of times and is now codified in Directive 2011/92/EU.
4.33. In the case of *JC Savage Ltd. v. An Bord Pleanála* [2011] IEHC 488, it was held that the new costs rules in the original section 50B only applied to the aforementioned Directives and did not apply to all ordinary planning cases.

4.34. This position was subsequently approved in *Shillelagh Quarries Ltd. v. An Bord Pleanála (No.2)* [2012] IEHC 402, where Hedigan J. held that where an unsuccessful judicial review had been brought by a developer, the unsuccessful applicant was not obliged to pay the costs of either the respondent or the notice party on the basis that the project concerned required an environmental impact assessment (EIA), as was acknowledged by the respondent, and, therefore, fell within the section 50B class. In that case, there was no order as to costs and each party was obliged to bear its own costs.

4.35. Under section 50B(3), the Court may award costs against a party in proceedings where the Court considers it appropriate to do so and: (a) the Court considers the claim or counterclaim to be frivolous or vexatious; (b) because of the manner in which either party conducts proceedings; or (c) where a party is in contempt of Court. In *JC Savage Supermarket Ltd. v. An Bord Pleanála* [2011] IEHC 488, Charleton J. held that the “special rule may exceptionally be overcome through the abuse by an applicant, or notice party supporting an applicant, of litigation as set out in s. 50B(3).”

4.36. This provision was relied upon in *Indaver NV t/a Indaver Ireland v. An Bord Pleanála* [2013] 1 JIC 2101, where the applicant brought judicial review proceedings seeking to challenge a decision of the respondent to refuse permission in respect of an incinerator. Ultimately the applicant withdrew the proceedings and it was contended that the applicant had allowed the legal

25 Section 3(3) of the Environment (Miscellaneous Provisions) Act 2011.
costs of the respondent to escalate unnecessarily by failing to act expeditiously. It was held by Kearns P., in granting an order of costs against the applicant, that the applicant had not acted promptly in withdrawing the proceedings and that it was evident that after a certain point the applicant’s behaviour amounted to an abuse of process.

4.37. Furthermore, under section 50B(4), the Court may award costs in favour of a party where a ‘matter of exceptional public importance’ has been raised or it is in ‘the interests of justice’ to do so. It is not clear what constitutes a matter of exceptional public importance but it would appear that the Court has discretion to decide whether an issue that has been raised would qualify as such.

4.38. It is submitted that, notwithstanding, the recent amendments to section 50B, there is no direct provision or costs protection for applicants who may seek to judicially review a decision pursuant to the Habitats Directive or a decision based on a flawed Natura Impact Statement (NIS) or appropriate assessment.

4.39. Although an NIS may invariably be submitted with an EIS, this does not resolve the issue where the application for judicial review is focussed on Habitats Directive points and is only tangentially related to the EIS. In that regard, the provisions in section 50B which limit protection to the EIA Directive, the SEA Directive and the IPPC Directive are somewhat limited.

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26 This provision is also set out in section 3(4) of the Environment (Miscellaneous Provisions) Act 2011.
4.40. Furthermore, it is not clear how the costs rules apply where a judicial review involves a number of grounds challenging the EIS and/or EIA with residual grounds challenging other (non-EIA) planning points.

4.41. Secondly, clarity is required on the provision ‘pursuant to a law of the State’ in section 50B(1) as it might be argued that this extends to all decisions or acts under the Planning and Development Act 2000, as amended, which, *inter alia*, includes EIA provisions, whether those decisions or acts are related to decisions or acts concerning an EIS or EIA.

4.42. Finally, it is submitted that clarity is required on the provision of ‘sufficient interest’ in section 50A(3) of the Planning and Development Act 2000, as amended, and whether that requirement or threshold will be interpreted restrictively or more expansively.

David Browne

9th August 2013.