Access to justice falling outside of the scope of EIA, IPPC/IED, access to information and ELD

## 1.1. Decisions, acts or omissions concerning specific activities falling within the scope of EU environmental legislation outside the scope of the EIA and IED Directives[1]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission and its content (in particular, the conditions to be fulfilled and any time-limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

There are no express standing rules for persons wishing to challenge decisions, acts or omissions concerning specific activities falling within the scope of EU environmental legislation outside the scope of the EIA and IED Directives. In each case, the High Court will have to be satisfied that the applicant has sufficient interest to bring the proceedings: Order 84 of the Rules of the Superior Courts. Given that numerous Irish statutory provisions have been made to give eNGOs deemed standing in certain specific situations, it would be prudent to proceed on the basis that outside these specific statutory regimes/situations it will be necessary for eNGOs to demonstrate a sufficient interest rather than expecting that they will effectively be deemed in practice to have standing in all environmental/planning cases.

It is worth noting that the High Court has in recent judgments noted the impact of the CJEU's judgment in C-243/15 *LZ II*, noting that the various stages of decision-making under Article 6(3) of the Habitats Directive, for example, engage Article 9(2) of the Aarhus Convention (*Sweetman v EPA* [2019] IEHC 81), and that proceedings which raise issues under the Habitats Directive are subject to the procedural requirements of the Aarhus Convention (*Friends of the Irish Environment v An Bord Pleanála* [2019] IEHC 80). The High Court has also noted the impact of C-664/15 *Protect Natur*, where the CJEU held that a decision under Article 4 of the Water Framework Directive attracted the provisions of Article 9(3) of the Aarhus Convention (*Sweetman* case just mentioned).

In the case of the Environmental Liability Directive, applications for leave must be made to the High Court in accordance with ordinary judicial review procedures under Order 84 of the Rules of the Superior Courts, which requires a "sufficient interest" in order to be granted leave. The Art 13(1) ELD requirement to provide access to a review procedure to the "persons referred to in Article 12(1)" (which includes persons with deemed standing as an eNGO) has not been transposed in Ireland in this context, in that Order 84 simply refers to a sufficient interest and does not in addition deem eNGOs to have standing in the circumstances described in the ELD.

It is worth noting that the State will litigate standing points against eNGOs; e.g. in 2020 the Government successfully argued before the Supreme Court that Friends of the Irish Environment, as a corporate body, did not have standing to vindicate personal constitutional rights or human rights under the ECHR in 'Climate Case Ireland': see *Friends of the Irish Environment v Government of Ireland & Ors.* [2020] IESC 49.

It is hard to provide a general assessment of the effectiveness of access to Irish courts in light of CJEU case law, but the following remarks may be salient: as will be evident from the names of cases cited here, a small number of individuals and NGOs bring many of the important environmental cases in Ireland: Friends of the Irish Environment, An Taisce and Peter Sweetman stand out. Further, based on the authors' experience of litigation in practice, the majority of challenges are brought in the field of planning consents, with fewer cases in other areas.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Administrative review procedures operated by, for example, An Bord Pleanála, the Aquaculture Licences Appeals Board, and the Forestry Appeals Committee involve considering the merits of the decision under appeal. For example, the ultimate decision for An Bord Pleanála on deciding a planning appeal is whether the proposed development amounts to "proper planning and sustainable development" (s.37(1)(b) PDA 2000). Regarding whether administrative review procedures cover procedural and substantive legality, it is worth noting the decision of Kelly J in the High Court in *Harding v Cork County Council* (No. 1) [2006] 1 IR 294 in the planning law context, in which the Court held that certain issues are not matters appropriate to An Bord Pleanála. On the facts of the case, Kelly J cited in this category points relating to *vires*, fair procedures and bias, which, the Court held, should properly be determined by a court rather than by An Bord Pleanála. The relevant passage was recently referred to with approval by the Supreme Court in *Friends of the Irish Environment v An Bord Pleanála* [2020] IESC 14. While the High Court's decision in *Harding* related to An Bord Pleanála on the facts, its reasoning would seem applicable to other administrative review procedures.

Judicial review: in *Sweetman v An Bord Pleanála* [2008] 1 IR 277, the High Court concluded that current Irish judicial review law goes a long way towards (and indeed may well meet) the requirement to provide for a review of substantive legality as well as procedural legality. Judicial review proceedings can review whether it was, as a matter of law, open to the decision maker to come to the decision taken. It can review whether statutory obligations were complied with, whether all proper matters were taken into account and no improper matters taken into account. The limitation on the review is that the court is not permitted to "second guess" a judgment made by the decision maker on the basis of materials which could allow such a judgment to be reached.

The Irish courts defer to the technical expertise of decision-makers such as planning authorities, ABP and the EPA and apply curial deference since the courts are not themselves experts on planning and environmental matters. As such, the courts will generally not review the scientific accuracy or validity of an environmental statement and will be deferential to the decision-maker, provided that the procedural requirements are met.

Where the substance of a planning or environmental decision is challenged in judicial review proceedings, the High Court may quash such a decision where the decision in question is found to be "unreasonable" or "irrational," applying either the general test in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] IR 642 (whether the decision is *"fundamentally at variance with reason and common sense"*) or the narrower test in *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39, which applies where the review is of a decision of a technical or skilled or professional decision maker in the area of that special technical or skilled knowledge (see Denham J in the Supreme Court in *Meadows v Minister for Justice, Equality and Reform* [2010] 2 IR 701). Under this *O'Keeffe* test, the onus is on an applicant for judicial review to establish that the public authority decision-maker had *"no relevant material"* (cf. the mention of the *Halpin* case in 1.2(3) above) before it to support its decision and in default of the applicant so establishing, the court cannot reach a conclusion that the decision was unreasonable/irrational.

It has been determined in a number of cases that a greater level of scrutiny than *O'Keeffe* may potentially apply in planning/environmental cases, albeit accommodated within the existing judicial review regime: see *Sweetman v An Bord Pleanála* [2007] 2 ILRM 328, at 6.16 and 6.21; *Klohn v An Bord Pleanála* [2008] 2 ILRM 435, at 458; *Keane v. An Bord Pleanála* [2012] IEHC 324, paras 18 and 19.

In cases relating to fundamental rights, the courts apply a proportionality test (see *Meadows v Minister for Justice, Equality and Reform* [2010] 2 IR 701 and *AAA & anor -v- Minister for Justice & ors* [2017] IESC 80), providing for a more intensive form of review.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Some legislation provides for an administrative appeal, for instance to An Bord Pleanála (ABP) in the planning permission context; to the Aquaculture Licences Appeals Board (ALAB) in respect of aquaculture licensing; and to the Forestry Appeals Committee in the context of certain forestry activities.

There is a doctrine that one must generally exhaust administrative remedies before leave will be granted by the High Court to pursue judicial review proceedings (for a discussion, see Simons 2014). While it is possible for an applicant to pursue judicial review proceedings without first exhausting administrative appeal possibilities, often an

applicant would be advised to pursue the administrative route first owing to the risk of being refused leave to bring the action for judicial review (or ultimately refused relief by the court exercising its discretion) for failing to exhaust administrative remedies before resorting to court.

However, if for example the available administrative review procedure is not capable of addressing the particular issue(s) arising, then there is nothing to prevent an individual/NGO from proceeding directly to judicial review.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Participation in the process will undoubtedly confer standing (see the judgment in *Grace and Sweetman*, cited below). However, having participated is not always a necessary precondition.

As regards individuals: in a number of cases the Irish Courts have considered standing requirements where the applicants have not participated in the administrative process. In *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10 the Supreme Court stated that the requirement to establish a sufficient interest on the part of an applicant for leave to bring judicial review proceedings now defines the limits of standing to bring a judicial review challenge irrespective of the form of order sought. The Supreme Court further observed that the Irish courts have traditionally applied the same rules on standing which were identified in respect of constitutional cases in *Cahill v. Sutton* [1980] IR 269, in judicial review proceedings not involving a constitutional dimension. As noted by the Supreme Court, the overall approach to standing in judicial review proceedings can fairly be described as "reasonably flexible".

Applying traditional Irish standing rules, and without considering the impact of EU law, standing was accorded to Ms. Grace even though she had not participated at all in the administrative process. It should be noted, however, that she lived within 1 km of the proposed development, had a long history of activism in relation to the development and was certainly directly affected. The decision of the Supreme Court should not therefore be regarded as authority for the proposition that the prior participation rule has been dispensed with. That said, the Court indicated that had Mr. Sweetman (the other challenger, who did not live near to the wind farm in question) participated in the permission granting process *or given the Court some cogent explanation for non-participation*, then it would have been much easier to resolve the standing question in his favour (ultimately the Court did not find it necessary to reach a final determination on the question of Mr. Sweetman's standing).

Whilst this arose in the EIA context, by way of parallel it is worth noting that, subsequently, the High Court held in *Conway v An Bord Pleanála* [2019] IEHC 525 that there is nothing in Article 11 of the EIA Directive or in C-263/08 *Djurgården* or C-137/14 *Commission v. Germany* which would preclude a national court, as a matter of EU law, from considering as among the factors to be taken into account in determining standing, the non-participation by the applicant in the prior administrative or planning process which led to the impugned decision and any explanation for that non-participation (factors which, as the Supreme Court in *Grace and Sweetman* confirmed, can be considered under Irish national standing rules). Indeed, the Court held, C-664/15 *Protect Natur* suggests that a prior participation requirement may not infringe the right of access to effective judicial mechanisms, at least under Article 9 of the Aarhus Convention and potentially also under Article 11 of Directive 2011/92. However, the Court did not reach a definitive conclusion on that point. Subsequently, in January 2021, the CJEU in Case C-826/18 *Stichting Varkens in Nood* held that Article 9(2) of the Aarhus Convention precludes a prior participation requirement in respect of proceedings within the scope of Article 9(2) brought by eNGOs which are part of the "public concerned". The CJEU further held that Article 9(3) of the Convention does not preclude a prior participation requirement, unless the applicant cannot reasonably be criticised, in light of the circumstances of the case, for not having intervened in the earlier procedure.

As regards NGOs: with the exception of situations in which an NGO has deemed standing (see section 1.8.1(1) above), it would be prudent to proceed on the basis that an NGO will need to satisfy the court that it has a sufficient interest in order to have standing rather than expecting that they will effectively be deemed in practice to have standing in all environmental/planning cases.

5) Are there some grounds/arguments precluded from the judicial review phase?

Respondents in planning/environmental judicial review regularly argue that applicants may only raise points before the courts that they raised previously during the administrative process. Applicants argue that this is inconsistent with the CJEU's judgment in C-137/14 *Commission v. Germany*. For example, such an exchange arose recently in

the proceedings that ended in a judgment of the Supreme Court in *Friends of the Irish Environment v Government of Ireland & Ors.* [2020] IESC 49. However, the Government of Ireland dropped its objections before the case came to hearing before the High Court.

In *M28 Steering Group v An Bord Pleanála* [2019] IEHC 929 the High Court held that as a matter of law there is no general rule that a prior participant who has not raised particular points before An Bord Pleanála is automatically precluded from raising such points before the court. On the other hand, neither do the authorities establish an unrestricted right to raise new points, held the Court. This is particularly so, as was recognised in C-137/14 *Commission v. Germany*, where there is evidence of bad faith or a deliberate decision to withhold a point.

6) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

Order 84, r.24(3) of the Rules of the Superior Courts provides that on the hearing of an application for leave directed to be on notice or for judicial review (or on any adjournment of such hearing), the Court may give directions and make orders for the conduct of the proceedings as appear convenient for the determination of the proceedings in a manner which is *inter alia* just. There is no statutory guidance on what is meant by just (or fair and equitable) but there are of course many instances where the principle is applied in practice.

In *Coffey and others v. Environmental Protection Agency* [2013] IESC 31, the Supreme Court considered a series of appeals in which applicants had sought a protective costs order at the outset of their cases on an *ex parte* basis (i.e. without the respondent or notice parties present, in order to avoid the possibility of the applicants being ordered to pay the other parties' costs arising from the hearing to determine if a protective costs order would apply). The High Court had refused to grant such an order on an *ex parte* basis, holding that it would be unfair to make a final order of this kind without having given the EPA and any notice parties the opportunity to have been heard on the matter. The Supreme Court upheld the High Court's conclusion.

In *An Taisce v An Bord Pleanála* [2015] IEHC 604, the applicant argued that it was not fair that the respondent public body was permitted by the court to raise a key legal issue only in person at the hearing, without having made the argument in the prior written procedure. An Taisce argued that Article 11(4) of the EIA Directive imports fairness and equity into planning decision review procedures. The High Court held (at para 50), however, that Article 11(4) applies only to review processes *prior to* any judicial review and not to judicial review itself, such that there is no requirement for Irish judicial review to be fair and equitable pursuant to the EIA Directive. This is contradicted by, for example, the CJEU's judgment in Case C-470/16 *NEPPC*. To the authors' knowledge, the *An Taisce* judgment is the only Irish judgment to have considered the question of fairness/equity for Aarhus Convention/related EU law purposes outside the context of costs. While the judgment was not appealed and could be cited by litigants in future cases, it is fair to say that the relevant part of the judgment is widely considered to have been wrongly decided, may in any event be *obiter*, and has not been applied since. Further, the judgment does not reflect the treatment or practical application of Article 11(4) of the EIA Directive in Irish legislation or in other case law at the national level (e.g. application of Ireland's special costs rules to judicial review raising EIA issues via s.50B PDA 2000).

Aspects of fairness/equity remain of concern to applicants in environmental cases: e.g. applicants for judicial review have to meet tight, strictly-applied deadlines in order to commence proceedings: e.g. 8 weeks in the case of challenges to planning permission decisions. Thereafter, parties are not routinely required to keep to the statutory timelines as set down in the Rules of the Superior Courts - this flexibility after leave has been granted is applied equally to applicants as it is to respondents and notice parties.

7) How is the notion of "timely" implemented by the national legislation?

There is no statutory requirement that judicial review procedures must be timely in respect of decisions falling within the scope of EU environmental legislation but outside the scope of the EIA and IED Directives although:

- Order 84, r.24(3) of the Rules of the Superior Courts provides that on the hearing of an application for leave directed to be on notice or for judicial review (or on any adjournment of such hearing), the Court may give directions and make orders for the conduct of the proceedings as appear convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings. This applies to judicial review generally and would include decisions outside the scope of the EIA and IED Directives.
- In the planning law context, which could cover decisions within the scope of EU environmental legislation

but outside the scope of the EIA and IED Directives, s.50A(10) Planning and Development Act 2000 provides that the Court shall, in determining an application for leave or an application for judicial review on foot of such leave, act as expeditiously as possible consistent with the administration of justice; and s.50A(11) provides that on an appeal from a determination of the Court in respect of an application referred to in s.50A(10), the Court of Appeal shall in determining the appeal, act as expeditiously as possible consistent with the administration of justice (cf. s.74 of the Court of Appeal Act 2014).

The Courts Service's latest statistics reveal the following:

- In the High Court, judicial review cases in 2019 lasted on average 392 days from issue to disposal (p.100). (In the Commercial List, where cases are expedited, 1 week to 6 months for a hearing in the High Court from the first return date.)
- In the Court of Appeal, in 2019 the average wait from when the appeal was entered in the court list to the hearing was 20 months (p.110). There is then of course a wait after the hearing for judgment.
- In the Supreme Court, in 2019 the average wait from the determination of the leave application to the hearing of the appeal was 55 weeks (p.110). There is then of course a wait after the hearing for judgment.

8) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

It is possible to seek interlocutory injunctive relief in judicial review proceedings and this is provided for by Order 84 of the Rules of the Superior Courts. There are no special rules applicable to each sector mentioned in the area of judicial review. However, there are special statutory rules for injunctive relief as a means of enforcement. Section 160 PDA 2000 provides a general injunctive power in the planning law context. This is available where an unauthorised development has been, is being or is likely to be carried out or continued. In such circumstances, the High Court or the Circuit Court may, on the application of a planning authority *or any other person, whether or not the person has an interest in the land*, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order.

In the area of waste management law, s.57 of the Waste Management Act 1996 provides that where, on application by any person to the High Court, that Court is satisfied that waste is being held, recovered or disposed of in a manner that causes or is likely to cause environmental pollution or a waste permit or licence is contravened, it may by order— (a) require the person holding, recovering or disposing of such waste to carry out specified measures to prevent or limit, or prevent a recurrence of, such pollution or contravention, within a specified period, (b) require the person holding, recovering or disposing of such waste to do, refrain from or cease doing any specified act, or to refrain from or cease making any specified omission, (c) make such other provision, including provision in relation to the payment of costs, as the Court considers appropriate. Such applications may include applications for interim and interlocutory orders, as appropriate.

Section 11 of the Local Government (Water Pollution) Acts 1977-1990 also provides that where a contravention of s.3(1) or s.4(1) of that Act has occurred or is occurring, the High Court may by order prohibit the continuance of the contravention on the application of a local authority or any other person, whether or not the person has an interest in the waters. There is no standing requirement for such applications and they can be made by any person.

More generally, the Supreme Court has set out the relevant principles for injunction applications in judicial review cases in *Okunade v Minister for Justice, Equality and Law Reform* [2012] 3 IR 152. It was held in that case that, in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings, the court should apply the following considerations:

1. the court should first determine whether the applicant had established an arguable case; if not the application must be refused, but if so, then;
2. the court should consider where the greatest risk of injustice would lie. The court set out a range of factors to consider in this regard;
3. the court should, in those limited cases where it was relevant, have regard to whether damages were available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and
4. subject to the issues arising in the judicial review not involving detailed investigation of fact or complex questions of law, the court could place all due weight on the strength or weakness of the applicant's case.

Although this decision was applied in the field of immigration law, it also applies in the area of environmental law. In *Friends of the Irish Environment Ltd. v. Minister for Communications, Climate Action and Environment* [2019] IEHC 555 the High Court noted that *some limited assessment should be made of the strength of the defence to the proceedings* in the context of an EU law claim. The *Okunade* principles were also applied in *Irish Coastal Environment Group Coastwatch CLG v The Sea Fisheries Protection Authority & Ors.* [2019] IEHC 677 where an injunction application on notice was brought to restrain dredging for razor clams (*Ensis siliqua*) in Waterford estuary.

9) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive, and do these include express statutory reference to a requirement that costs should not be prohibitive?

There is no express statutory reference in Irish law to the effect that costs should not be prohibitive.

As described above, the High Court in *Heather Hill* [2019] IEHC 186 held that the special costs rules under s.50B Planning and Development Act 2000 apply to the entirety of proceedings, i.e. to all grounds of challenge and not just those relating to the directives listed in s.50B (EIA, SEA, IPPC (IED) and Art 6(3)/(4) Habitats Directive). In other words, where the impugned decision is made pursuant to a statutory provision that gives effect to the relevant provision(s) of any of the four named EU Directives, then the special costs rules apply to *all grounds of challenge*. This judgment is under appeal to the Court of Appeal. For now, the effect of the judgment is essentially that all planning permission challenges will have cost protection.

With the exception of:

- judicial review of planning decisions (cost protection under s.50B, though this is under appeal to the Court of Appeal in *Heather Hill*);
- enforcement actions in respect of the licences/permits listed in s.4(4) of the Environment (Miscellaneous Provisions) Act 2011 (cost protection under Part 2 EMPA 2011)
- which in the case of enforcing statutory requirements must be future-looking only to have cost protection: see the discussion of *O'Connor v Offaly County Council* [2020] IECA 72 in section 1.7.3(6) above;
- judicial review of forestry development decisions involving EIA (cost protection under s.50B PDA by virtue of reg 18 of the Forestry Regulations 2017); and
- judicial review in respect of certain on-farm impact assessment decisions/acts/omissions (cost protection under s50B PDA by virtue of Regulation 22 of the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011, S.I. 456/2011),

the scope of cost protection in Ireland remains unclear.

Applicants who proceed despite the uncertainty may choose in such circumstances to point in litigation to the CJEU's judgment in C-470/16 *NEPPC*, where the CJEU held that, where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive. Applicants may argue that the national courts have a strong duty of interpretation to exercise their discretion in considering costs under Order 99 of the Rules of the Superior Courts in such a way so as to avoid prohibitive expense. See the High Court's discussion in *Heather Hill* of the use of the court's discretion under Order 99 in such circumstances.

However, the uncertainty means that applicants will decide in some cases to litigate (or not) unsure whether cost protection will apply. The EMPA 2011 allows for a determination to be made re cost protection by the court upfront, though s50B PDA 2000 does not provide for this; also, there is no cost protection for any hearing required to determine upfront whether cost protection applies (*In the Matter of an Application by Dymphna Maher* [2012] IEHC 445; *Coffey and others v. Environmental Protection Agency* [2013] IESC 31). Further, there are areas of environmental litigation where it is unclear whether the strong duty of interpretation set down by the CJEU in C-470/16 *NEPPC* applies: e.g. does environmental litigation raising constitutional rights or human rights under the ECHR amount to the application of "national environmental law"?

The consequences of losing a case where all or part of the proceedings did not benefit from cost protection would be a costs order on the normal 'loser pays' basis, subject to the court's discretion.

## 1.2. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with national implementing legislation for the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[2]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

The Strategic Assessment Directive (Directive 2001/42/EC) is principally transposed by:

- the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (S.I. No. 435 of 2004), as amended by the European Communities (Environmental Assessment of Certain Plans and Programmes) (Amendment) Regulations 2011) (S.I. No. 200 of 2011) and
- the Planning and Development (Strategic Environmental Assessment) Regulations 2004 (S.I. No. 436 of 2004), as amended by the Planning and Development (Strategic Environmental Assessment) (Amendment) Regulations 2011 (S.I. No. 201 of 2011).

Decisions or failures relating to strategic environmental assessment of planning decisions are subject to the standing rules in s.50A of the PDA 2000: generally a sufficient interest must be demonstrated; there is deemed standing for eNGOs active over the past 12 months; plus substantial grounds must be demonstrated in all cases. However, challenges under the SEA Directive are not confined to planning. General challenges brought by way of judicial review are subject to the standing rules in Order 84 of the Rules of the Superior Courts, where the test is simply a sufficient interest. Where a planning decision is challenged on the basis that it breaches the SEA Directive, the applicant must raise substantial grounds and bring the challenge within eight weeks (subject to any extension), and an eNGO applicant may be deemed to have standing. In the case of a non-planning decision, where the SEA Directive is relied upon, the applicant is subject to the lower threshold of arguability and a time limit of three months, but will need to demonstrate a sufficient interest.

An example of a recent action for judicial review on inter alia SEA grounds can be found in *Friends of the Irish Environment v Government of Ireland* [2020] IEHC 225 where the applicant challenged the validity of the assessments that were carried out by the respondents and alleged that due to shortcomings in the various assessments and due to the lack of certain monitoring and other provisions, the assessments themselves and the resultant National Planning Framework (NPF) were fatally flawed. However, the High Court found that there was no breach of the SEA Directive.

Access to the courts is relatively good in respect of SEA challenges, particularly in the planning context where s.50B PDA 2000 clearly provides cost protection. However, compared to cases raising issues in respect of the EIA and Habitats Directives there have been relatively few cases relating to SEA in Ireland.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Administrative review is not provided for in respect of plans/programmes subjected to SEA in Ireland.

Regarding judicial review, please see the answer under section 2.1(2) above.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

N/A - while there is public participation/consultation in such procedures, administrative review is not provided for, and the only mechanism by which to challenge the decision of a public authority is by way of judicial review proceedings in the High Court.

4) In order to have standing before the national courts is it necessary to participate in the public consultation

phase of the administrative procedure – to make comments, participate at hearing, etc.?

Decisions or failures relating to strategic environmental assessment of planning decisions are subject to the standing rules in s.50A of the PDA 2000: generally a sufficient interest must be demonstrated; there is deemed standing for eNGOs active over the past 12 months; plus substantial grounds must be demonstrated in all cases. However, challenges under the SEA Directive are not confined to planning. General challenges brought by way of judicial review are subject to the standing rules in Order 84 of the Rules of the Superior Courts, where the test is simply a sufficient interest. For more details regarding standing for individuals and NGOs, please see the answer to section 2.1(4) above. As will be clear from that discussion, in certain cases it may be possible to demonstrate a sufficient interest without having participated in the administrative process.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief is available as a matter of general judicial review under Order 84 of the Rules of the Superior Courts but there are no special procedures or requirements for decisions under the SEA Directive. Order 84, r.18(2) of the Rules of the Superior Courts provides that an application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to:

1. the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition, certiorari, or quo warranto,
2. the nature of the persons and bodies against whom relief may be granted by way of such order, and
3. all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

Order 84, r.20(8) also provides that where leave to apply for judicial review is granted then the Court, should it consider it just and convenient to do so, may, on such terms as it thinks fit:

1. grant such interim relief as could be granted in an action begun by plenary summons,
2. where the relief sought is an order of prohibition or certiorari, make an order staying the proceedings, order or decision to which the application relates until the determination of the application for judicial review or until the Court otherwise orders.

The Supreme Court has set out the relevant principles for injunction applications in judicial review cases in *Okunade v Minister for Justice, Equality and Law Reform* [2012] 3 IR 152. It was held in that case that, in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings, the court should apply the following considerations: (a) the court should first determine whether the applicant had established an arguable case; if not the application must be refused, but if so, then; (b) the court should consider where the greatest risk of injustice would lie. The court set out a range of factors to consider in this regard; (c) the court should, in those limited cases where it was relevant, have regard to whether damages were available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and, (d) subject to the issues arising in the judicial review not involving detailed investigation of fact or complex questions of law, the court could place all due weight on the strength or weakness of the applicant's case.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

There is no general express statutory reference in Irish law to the effect that costs should not be prohibitive. However, challenges on SEA grounds should benefit from cost protection under s.50B of the Planning and Development Act 2000.

## 1.3. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with the public participation requirements of Article

## 7 of the Aarhus Convention in respect of plans and programmes not submitted to the procedures set out in the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[3]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Article 7 of the Aarhus Convention has not been given effect in Ireland beyond the scope of SEA: see Ireland's Implementation Table in respect of the Convention.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Where (despite not having transposed Art. 7 of the Aarhus Convention beyond the scope of SEA) the public is given the opportunity to participate in the adoption of a plan or programme not subject to SEA:

- there is no administrative review possibility; and
- judicial review would be available and its scope would be as described in section 1.8.1(5) above.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Not applicable.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

In relation to plans or programmes that do not engage the terms of the SEA Directive the standing requirements are the same as described above in section 2.1(4).

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Please see the answer to section 2.2(5) above.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

In a judicial review challenging a plan or programme not subject to SEA on the basis of national law relating to the environment, applicants may point to the CJEU's judgment in C-470/16 *NEPPC*, where the CJEU held that, where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive. Applicants will argue that the national courts have a strong duty of interpretation to exercise their discretion, in considering costs under Order 99 of the Rules of the Superior Courts, in such a way so as to avoid prohibitive expense. See the High Court's discussion in *Heather Hill* of the use of the court's discretion under Order 99 in such circumstances.

However, the uncertainty means that applicants will decide to litigate (or not) unsure whether cost protection will apply. The consequences of losing a case where all or part of the proceedings did not benefit from cost protection would be a costs order on the normal 'loser pays' basis, subject to the court's discretion.

## 1.4. Decisions, acts or omissions also concerning plans and programmes

## required to be prepared under EU environmental legislation[4]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the content of the plan (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Administrative review: there is no administrative review available in respect of such plans/programmes.

Legal challenge before court: there are no specific procedures for decisions, acts or omissions concerning plans and programmes required to be prepared under EU environmental legislation. The standing rules are the same as the general rules in judicial review, as set out in Order 84 of the Rules of the Superior Courts: a sufficient interest. Injunctive relief may also be sought under the general judicial review rules in Order 84, as described above.

In terms of effectiveness, access to national courts would be reasonably good, albeit both individuals and NGOs would need to demonstrate a sufficient interest. Where the prospective litigant has not participated in the earlier administrative process, this could cause difficulties in terms of establishing standing: see the High Court's decision in *Conway v An Bord Pleanála* [2019] IEHC 525, but cf. the CJEU's subsequent judgment in Case C-826/18 *Stichting Varkens in Nood*. Uncertainty regarding cost protection might put some off litigating – more below.

2) Does the form in which the plan or programme is adopted make a difference in terms of legal standing (see also Section 2.5 below)?

Please see answer under 1).

3) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

Please see the answer under section 2.1(2) above.

4) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

N/A - while there is public participation/consultation in such procedures, administrative review is not provided for, and the only mechanism by which to challenge the decision of a public authority is by way of judicial review proceedings in the High Court.

5) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

The standing rules are the same as the general rules in judicial review, as set out in Order 84 of the Rules of the Superior Courts: the applicant must have a sufficient interest. While there is no mandatory requirement for prior participation (Supreme Court in *Grace and Sweetman*), such participation is one of the factors that may be assessed in considering the sufficiency of a person's interest for this purpose according to the High Court in *Conway v An Bord Pleanála* [2019] IEHC 525 (also see the CJEU's later judgment in Case C-826/18 *Stichting Varkens in Nood*).

6) Are there some grounds/arguments precluded from the judicial review phase?

Please see the answer to section 2.1(5) above.

7) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

Please see the answer to section 1.8.1(9) above.

8) How is the notion of "timely" implemented by the national legislation?

Please see the answer to section 2.1(7) above.

9) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Please see the answer to section 2.2(5) above.

10) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Please see the answer to section 2.3(6) above.

## 1.5. Executive regulations and/or generally applicable legally binding normative instruments used to implement EU environmental legislation and related EU regulatory acts[5]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedure for adopting or the content of the decision, act or omission of the national regulatory act (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

There are no specific procedures for decisions, acts or omissions concerning executive regulations and/or generally applicable legally binding normative instruments used to implement EU environmental legislation and related EU regulatory acts. The standing rules are the same as the general rules in judicial review, as set out in Order 84 of the Rules of the Superior Courts – the test is a sufficient interest. Injunctive relief may also be sought under the general judicial review rules in Order 84. Both primary and secondary legislation can be challenged by way of judicial review (subject to time limits) or plenary proceedings. Where primary legislation is challenged, the reliefs will be declaratory in nature and the applicant will have to demonstrate that it has standing to challenge the legislation.

The general position is that a party only has locus standi to challenge the constitutionality of a statutory provision if imminently affected by a decision made or about to be made under it (*Cahill v Sutton* [1980] IR 269). The question of whether or not a person has a sufficient interest depends upon the circumstances of each particular case. In each case, the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but there is greater importance attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates (*The State (Lynch) v Cooney* [1982] IR 337).

There is authority for the proposition that an NGO can directly challenge secondary legislation in judicial review proceedings on the basis *inter alia* of a contravention of EU law. For example, in *Friends of the Irish Environment Ltd. v Minister for Communications, Climate Action and the Environment* [2019] IEHC 646, the applicant, in judicial review proceedings, challenged the validity of two statutory instruments. The High Court concluded that the Ministerial Regulations were invalid as they were inconsistent with the requirements of the EIA Directive and the Habitats Directive, and the use of secondary legislation to introduce the legislative amendments required to give effect to the new licensing regime was ultra vires.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

There is no administrative review in this context. Please see the answer to section 2.1(2) regarding judicial review.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

N/A - administrative review is not provided for, and the only mechanism by which to challenge in this context is by way of judicial review proceedings in the High Court.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

The standing rules are the same as the general rules in judicial review, as set out in Order 84 of the Rules of the Superior Courts: the applicant must have a sufficient interest. While there is no mandatory requirement for prior participation (Supreme Court in *Grace and Sweetman*), such participation is one of the factors that may be assessed in considering the sufficiency of a person's interest for this purpose according to the High Court in *Conway v An Bord Pleanála* [2019] IEHC 525 (also see the CJEU's later judgment in Case C-826/18 *Stichting Varkens in Nood*).

In the context being considered here – the making of legislation – while there will be a parliamentary process, there may not always be an opportunity for public participation as such. In those circumstances, clearly non-participation would not represent a bar to standing.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Please see the answer to section 2.2(5) above. For a recent example of injunctive relief being granted in this context, see *Friends of the Irish Environment v Minister for Communications, Climate Action and Environment & Ors* [2019] IEHC 555, where an interlocutory injunction was granted restraining the implementation of certain Regulations.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The precise jurisdictional basis for a costs order in this context is unclear and will depend to some extent on the underlying nature of the legislation that is challenged. For example, in the Friends of the Irish Environment case cited in 5) immediately above, the legislation challenged related to the EIA and Habitats Directives. The State conceded that an order for costs should be made in favour of Friends and the court therefore did not have to resolve whether an order for costs should be made under s.50B PDA 2000 (special cost protection rules pursuant to the Aarhus Convention) or under the general provision governing costs (Order 99 of the Rules of the Superior Courts): see *Friends of the Irish Environment v Minister for Communications, Climate Action and Environment & Ors* [2019] IEHC 685.

For a discussion of s.50B, please see the answer to section 1.7.3(6) above.

For a discussion of Order 99, please see the answer to section 2.3(6) above.

7) Is it possible to bring a legal challenge before a national court concerning any related EU regulatory act with a view to a validity reference under Article 267 TFEU, and if so how[6]?

It is possible to bring such a challenge. There is however no specific procedure provided to allow that to occur and the very first validity reference in Ireland was instituted in January 2020 (*Friends of the Irish Environment v Minister for Communications, Climate Action and the Environment & Ors.* [2020] IEHC 383). This challenged the validity of the decision of the European Commission to include Shannon LNG Terminal on the Union list of Projects of Common Interest in November 2019. It also challenged the domestic decision-making in respect of the inclusion of the Terminal. The latter element allowed the proceedings to be brought to Court as this element provided a domestic respondent that allowed for the proceedings to be instituted. However, the main respondent party was the European Commission who were not, for reasons of comity, named in the proceedings.

The proceedings are judicial review proceedings which seek reliefs against the domestic respondents and ask that the matter be referred to the CJEU for a determination on the validity of the Commission's measure. The High Court rejected the challenge on the basis that, in the absence of a domestic implementing measure, the High Court had no jurisdiction to refer to the matter to the CJEU. The authors understand it is the intention of the applicant to appeal.

[1] This category of case reflects recent case-law of the CJEU such as *Protect C-664/15, the Slovak brown bear case*

*C-240/09, see as described under the Commission Notice C/2017/2616 on access to justice in environmental matters*

[2] The SEA Directive relates to plans and programmes. These are also covered by Article 7 and Article 9(3) of the Aarhus Convention.

[3] See findings under ACCC/C/2010/54 for an example of a plan not submitted to SEA but subject to the public participation requirements of Article 7 of the Aarhus Convention.

[4] These fall within the scope of both Article 7 and Article 9(3) of the Aarhus Convention. See also relevant case-law of the Court of Justice of the European Union such as Case C-237/97, Janecek and cases such as Boxus and Solvay C-128/09-C-131/09 and C-182/10, as referred to under the Commission Notice C/2017/2616 on access to justice in environmental matters.

[5] Such acts come within the scope of Article 8 and Article 9(3) of the Aarhus Convention. An example of such an act concerns the decision of the national administration that featured in Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774

[6] For an example of such a preliminary reference see Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774

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