# Tiesu pieejamība ar vidi saistītās lietās

Īrija

Lai uzzinātu vairāk par iespēju vērsties attiecīgās valsts tiesu iestādēs saistībā ar vides jautājumiem, noklikšķiniet uz kādu no zemāk redzamajām saitēm:

1. Tiesu iestāžu pieejamība dalībvalstu līmenī
2. Tiesu iestāžu pieejamība ārpus ietekmes uz vidi novērtējuma, piesārņojuma integrētas novēršanas un kontroles, Rūpniecisko emisiju direktīvas, piekļuves informācijai un Direktīvas par atbildību vides jomā tvēruma
3. Citi attiecīgie noteikumi par pārsūdzībām, tiesiskās aizsardzības līdzekļiem un tiesu iestāžu pieejamību ar vidi saistītās lietās

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## Access to justice at Member State level

### 1.1. Legal order – sources of environmental law

Ireland's Parliament - the Oireachtas - is the national legislature empowered to make laws for the State. The Oireachtas consists of two Houses (Dáil Éireann (the lower house) and Seanad Éireann (the upper house)) plus the President of Ireland.

New primary legislation begins as a *Bill*. Bills are normally initiated by the government, although opposition bills - called Private Members' Bills - are also possible, albeit less likely to make it onto the statute book.

A Bill may be commenced in either the Dáil or the Seanad but it must be passed by both Houses to become law. Before a government Bill is introduced to the Oireachtas, the contents of the Bill are approved by the government. Often there will be a consultation process with government departments and groups likely to be affected by the Bill. Once a Bill has successfully passed the parliamentary process, the Bill must then be signed by the President before it becomes an Act of the Oireachtas. Ireland's Constitution (Bunreacht na hÉireann) provides the President with the power to refer certain Bills to the Supreme Court for a determination as to whether the Bill or any provision thereof is repugnant to the Constitution.

As well as primary legislation, Ireland also relies heavily on secondary legislation or 'statutory instruments' in the field of environmental law. Secondary legislation must be consistent with, and based on, legislation adopted by the Oireachtas. Thus, each statutory instrument will have a preamble citing its 'enabling powers'; that is, the provision(s) of primary legislation under which the statutory instrument is made. Statutory instruments can take the form of orders, regulations, rules, etc. Hundreds are issued each year, in contrast to a much smaller number of Bills/Acts. If EU law requires transposition by Ireland, this is implemented by primary legislation or more usually by secondary legislation (statutory instrument) under the European Communities Act 1972.

If the government wishes to change the Constitution, it must first introduce the proposal to amend the Constitution as a Bill, which must pass the Oireachtas. Then the proposed change must be approved by way of a popular referendum allowing citizens to approve or reject the proposal by way of a majority vote.

Finally, local authorities are empowered to make bye-laws relating to anything within their remit by virtue of the Local Government Act 2001. Such bye-laws are not a prominent feature of environmental law in Ireland, which tends to be dominated by EU law, Acts of the Oireachtas, and statutory instruments, some of which are of course made in fulfilment of obligations under international law. Since Article 29.6 of Ireland's Constitution provides that no international agreement forms part of the domestic law of the State except as may be determined by the Oireachtas, legislation must be put in place in order to give effect to international agreements in the domestic legal system.

Numerous pieces of UK legislation remain in force in Ireland dating from before the foundation of the Irish State in 1922, albeit again these are not a prominent feature in the environmental law field. Many of the pre-1922 laws which had no ongoing relevance to Ireland were repealed by the Statute Law Revision Acts 2005-2016.

Further information on how laws are made in Ireland can be found here.

Texts of primary legislation (Acts of the *Oireachtas*) and secondary legislation are available via the Irish Statute Book website. The website generally carries the original text of the legislation as made, with subsequent amendments to each piece of legislation listed. In some cases the website provides a revised/consolidated version.

Bills (i.e. draft primary legislation) are available via the Oireachtas website.

Since Ireland has a common law system, in which both legislation and judicial decisions make up the national law, it is typically necessary to consult case law in addition to legislation in order to determine the current state of the law. Much case law can be found on the Courts Service's website or on the websites of the Irish Legal Information Initiative (IRLII) and British and Irish Legal Information Institute (BAILII), though some judgments - particularly older judgments - are accessible only from subscription services or in hard copy.

Main elements of the fact sheet:

**1) General introduction to the system of protection of environment and procedural rights of persons (natural, legal, NGOs) in the specific national order**

Environmental policy in Ireland is heavily influenced by EU law and international law, of course, with implementation and enforcement being the responsibility of various public authorities, including for example, central government, the EPA, the Gardaí (police) and local authorities (county councils, city councils).

The Minister currently responsible for environmental issues (including matters relating to the Aarhus Convention, which Ireland ratified in 2012) is the Minister of the Environment, Climate and Communications. Several other Ministers have significant environmental responsibilities, including for instance the Minister of Housing, Local Government and Heritage (marine environment, water, planning, landscape, biodiversity and nature conservation), and the Minister of Agriculture, Food and the Marine (Common Agricultural Policy implementation, sea fisheries and aquaculture).

The Environmental Protection Agency (EPA) is responsible for *inter alia* environmental research development, monitoring, certain licensing regimes (e.g. Integrated Pollution Control (IPC) and Industrial Emissions (IED); waste; waste water discharges; genetically modified organisms (both contained use and deliberate release); emissions trading; volatile organic compounds; and dumping at sea). It also performs enforcement functions in certain areas of environmental law, alongside a wide range of other bodies, including other government agencies and local government.

There are over 30 national environmental NGOs in Ireland covering a wide range of policy areas, plus a number of regional and local organisations. Ireland's national NGOs include, for example, An Taisce, The National Trust for Ireland (the oldest eNGO in Ireland, established in 1948), BirdWatch Ireland, Friends of the Earth Ireland, Friends of the Irish Environment, and the Irish Wildlife Trust. There are two complementary 'umbrella organisations' of environmental NGOs in Ireland: the Environmental Pillar and the Irish Environmental Network, the latter of which disburses core funding from the government.

Relatively broad standing rules (the rules on access to courts) exist for individuals and NGOs in Ireland. See the Supreme Court's decision in *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10 and the High Court's decision in *Conway v An Bord Pleanála* [2019] IEHC 525 for a recent summary and discussion of the situation relating to individuals (more below).

The environmental rights of individuals and NGOs include the right to access environmental information which is held by or for public authorities, and such public authorities have a statutory duty, subject to the provisions of the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. 133 of 2007, as amended)(the AIE Regulations), to provide information and guidance to those seeking access to environmental information.

There are also rights of early and effective public participation in environmental decision-making including around planning permission matters and licensing decisions (such as EPA decisions to grant waste and other licences), including the right to access all information relevant to the decision-making procedure and the right to be promptly informed of environmental decisions.

Individuals and NGOs also have the right to seek a review of decisions that have been made which may affect the environment, or regarding their right to access environmental information, including an administrative appeal (where this is available) and/or by way of judicial review (following an application for leave to bring proceedings) via the courts. The courts may make an order to quash a decision, to prohibit a body from taking certain actions, or more rarely, to require it to take specific actions, or to require a body to act where it has failed to do so.

Planning and environmental law also provides for a range of statutory remedies with a view to enforcement by third parties such as individuals and NGOs, including the remedy of a planning injunction under section 160 of the Planning and Development Act 2000 (as amended)(PDA 2000), whereby *"any person"* may apply for a court order in the context of unauthorised development; and similarly for judicial enforcement of certain EPA licences under section 99H of the Environmental Protection Agency Act 1992.

The potential for litigants to be exposed to high litigation costs has proven one of the main barriers to accessing environmental justice in Ireland. The introduction of special costs rules in 2010/11 has certainly improved access to justice (more below), although progress in this regard has been gradual over the past decade as a result of uncertainty regarding the scope of these rules and resulting 'satellite' litigation to determine the scope. This form of cost protection does not, in any event, apply to all environmental litigation (discussed further below), and concerns also remain over the effectiveness of judicial remedies, and potential time delays for judgments, as noted in the Environmental Governance Assessment on Ireland and the related country fiche. For example, in November 2020 the Aarhus Convention's Compliance Committee found in ACCC/C/2016/141 that by failing to put in place measures to ensure that the Office of the Commissioner for Environmental Information and the courts decide appeals regarding environmental information requests in a timely manner, Ireland fails to comply with the requirement in Article 9(4) of the Aarhus Convention to ensure timely procedures for the review of environmental information requests; and by maintaining a system whereby courts may rule that information requests fall within the scope of the AIE Regulations without issuing any directions for their adequate and effective resolution thereafter, Ireland fails to comply with the requirement in Article 9(4) of the Convention to ensure adequate and effective remedies for the review of environmental information requests.

In addition to the Department of the Environment, Climate and Communications' webpages on the Aarhus Convention, the Citizens' Information website (a government initiative) has a page on the Aarhus Convention which describes the broad requirement for access to justice, including the judicial review process. This page directs readers to the website of the Courts Service *"for information on the court fees payable"*. These court fees (e.g. stamp duty when a case commences) are however only a very small element of the costs of litigation in Ireland, and should not be confused with the legal fees that may be payable to an applicant's own legal team and potentially the costs also payable to the opposing litigant in the event that the applicant's case is unsuccessful.

The Citizens' Information's 'Judicial review' page is probably the best currently available reference source for the public to consult regarding the potential costs of environmental litigation in practice and potential ways to ameliorate these costs (e.g. by way of 'no win, no fee' arrangements with lawyers) in order to provide improved access to justice. This said, the webpage's summary of the special cost protection rules in s.50B PDA 2000 should now be read in light of the High Court's judgment in *Heather Hill* [2019] IEHC 186, which extended cost protection in practice in the field of planning law (NB. this judgment has been appealed to the Court of Appeal).

**2) Constitution – main (content of + including references) provisions on environment and access to justice in the national constitution (if applicable) including procedural rights**

The Constitution of Ireland (Bunreacht na hÉireann), dating from 1937, does not contain any reference to the environment or to environmental rights.

The European Convention on Human Rights (ECHR), to which Ireland is a Party, has effect in the domestic legal order via primary legislation, namely the European Convention on Human Rights Act 2003. The European Court of Human Rights has determined that a State's positive obligations under Article 2 (right to life) ECHR may be violated with respect to environmental risks, and that Article 8 ECHR (the right to respect for the home, private and family life) may be engaged in respect of environmental pollution that impacts on enjoyment of the home. Article 6 (the right to a fair hearing) and Article 13 (right to an effective remedy) of the ECHR are also potentially relevant in the environmental protection context, as well as Articles 1 of the First Protocol to the ECHR (the right to property), for example. These rights also find expression in the Irish Constitution.

The fundamental rights of the citizen are guaranteed in Articles 40 to 44 of the Constitution. Article 40 provides that all citizens are to be held equal before the law and obliges the State to vindicate the personal rights of the citizen, including the right to life. The term "personal rights", as interpreted by the courts, has led to the recognition and vindication of several rights not expressly provided for in the text of the Constitution. These 'unenumerated rights' include the right to bodily integrity, among others. In July 2020, in *Friends of the Irish Environment v Government of Ireland & Ors.* [2020] IESC 49, the Supreme Court held that there is no unenumerated or derived constitutional right to a healthy environment in Ireland.

There is no express (or explicit) right of access to justice in the Irish Constitution, but the courts have recognised an 'unenumerated' constitutional right of "access to the courts", and a constitutional right to litigate: *Macauley v Minister for Posts and Telegraphs* [1966] IR 345. The right to litigate is not absolute, however, and the State may place objectively justifiable and proportionate limitations on this right (e.g. by setting reasonable time limits within which proceedings must be brought). Parties to litigation are entitled to fair procedures, often described as "constitutional justice", which has also been recognised by the courts as an unspecified constitutional right.

There is no express constitutional right to legal aid. However, the courts have recognised a constitutional right to legal aid where an accused is facing a serious criminal charge and is unable to fund legal representation from their own resources. As regards legal aid in civil cases, the courts have accepted that a constitutional right to civil legal aid may arise in limited circumstances as an aspect of the constitutional right of access to the courts and the right to fair procedures, where a plaintiff is not in a position to fund legal representation from their own resources. In *O'Donoghue v. Legal Aid Board & Others* [2004] IEHC 413, for instance, the High Court found that the plaintiff's constitutional right to civil legal aid had been infringed by the very long delay in granting her a

certificate for legal aid. However, the precise parameters of any such rights have yet to be fully determined. Although the Legal Aid Scheme maintained by Ireland does, in principle, permit aid to be provided for environmental cases, in practice legal aid is only extremely rarely, if ever, provided for environmental litigation (see the Supreme Court at para 2.30 of *Conway v Ireland, the Attorney General & Ors* [2017] IESC 13). In the *Conway* case, the Supreme Court raised the possibility of an entitlement to legal aid pursuant to the Aarhus Convention and/or the Public Participation Directive (Directive 2003/35/EC), but the point did not fall to be determined on the facts of the case.

Article 29.6 of the Constitution provides that no international agreement forms part of the domestic law of the State except as may be determined by the Oireachtas (meaning Ireland has what is known as a dualist legal system). This means that legislation must be put in place in order to give effect to international agreements in the domestic legal system. Ireland ratified the Aarhus Convention in June 2012 and the Convention entered into force for Ireland in September 2012. As Ireland has a dualist legal system, it was necessary to transpose all provisions of the Convention into national law prior to ratification. In addition to specific transposition of the provisions of the Convention, section 8 of the Environment (Miscellaneous Provisions) Act 2011 provides that judicial notice must be taken of the Aarhus Convention.

**3) Acts, Codes, Decrees, etc. - main provisions on environment and access to justice, national codes, acts**

As noted above, due to Ireland's dualist legal system, specific implementation measures were required to give effect to the Aarhus Convention in the domestic legal system. An implementation table totalling some 56 pages was completed on ratification of the Convention, listing the legislation used to implement the Convention in Ireland. The sheer volume of legislation cited makes the framework complex, lacking in clarity in certain respects, and difficult when it comes to public engagement with and understanding of the rules. Certain additional measures that have since been enacted are listed here on the Department of the Environment, Climate and Communications' website.

For the access to information pillar the situation is relatively simple, in that Ireland has introduced one main statutory instrument – the European Communities (Access to Information on the Environment) Regulations 2007-2018 (S.I. 133 of 2007, as amended: consolidated version) – to transpose obligations under the AIE Directive (Directive 2003/4/EC). Ireland lists an additional eight pieces of transposing legislation in its notification of implementing measures to the European Commission.

On access to justice, the situation is more complex, not least because there is no horizontal EU access to justice directive. The two most significant pieces of national legislation in this area are section 50B of the PDA 2000, and Part 2 of the Environment (Miscellaneous Provisions) Act 2011, both of which introduced new costs rules to apply in certain environmental cases, as well as (in the case of the 2011 Act) a requirement that judicial notice be taken of the Aarhus Convention, as noted above.

In terms of the public participation pillar under the Aarhus Convention, multiple pieces of legislation have been used to transpose the Public Participation Directive (Directive 2003/35/EC) into Irish law, including the integration of its requirements into Irish planning law and into legislation governing other environmental consents. Indeed, Ireland notified the European Commission of 71 separate pieces of legislation as its national transposition of the Directive. For example, in the planning system, members of the public may submit observations on planning applications and may appeal planning decisions to An Bord Pleanála (Ireland's Planning Appeals Board).

**4) Examples of national case-law, role of the Supreme Court in environmental cases**

As Ireland has a common law system (where both legislation and judicial decisions make up the national law), case law is highly relevant to the access to justice provisions of the Aarhus Convention. Many judgments can be found on the Courts Service's website or on the websites of the Irish Legal Information Initiative (IRLII) and British and Irish Legal Information Institute (BAILII), though some judgments - particularly older judgments - are accessible only from subscription services or in hard copy. A list of judgments related to access to information on the environment can be found here. The list below outlines a number of relevant rulings since the ratification of the Aarhus Convention by Ireland but is by no means comprehensive. More recent rulings have tended to be preferred here as they better represent the current state of the law and often discuss earlier jurisprudence:

*McCoy & anor -v- Shillelagh Quarries Ltd & ors* [2015] IECA 28: interpretation of the special cost protection rules in Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

*North East Pylon Pressure Campaign Ltd. & anor v An Bord Pleanála & ors (No.5)* [2018] IEHC 622: interpretation of the special cost protection rules in section 50B of the Planning and Development Act 2000 and Part 2 of the Environment (Miscellaneous Provisions) Act 2011; conclusion that these provisions do "not fully give effect to the not-prohibitively-expensive principle that applies in all national environmental challenges within fields covered by EU environmental law".

*Heather Hill Management Company Clg & anor -v- An Bord Pleanála & anor* [2019] IEHC 186: interpretation of the special cost protection rules in section 50B of the Planning and Development Act 2000 and Part 2 of the Environment (Miscellaneous Provisions) Act 2011. This judgment has been appealed to the Court of Appeal.

*O'Connor v Offaly County Council* [2020] IECA 72: interpretation of the special cost protection rules in Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

*Coffey and others v Environment Protection Agency* [2013] IESC 31: on protective costs orders, including the question of the costs of a hearing to determine if a protective costs order will apply.

*Sandymount & Merrion Residents Association v An Bord Pleanála & ors* [2013] IESC 51: on the standing of unincorporated associations to bring environmental legal proceedings.

*Grace and Sweetman v An Bord Pleanála & ors* [2017] IESC 10: on the standing of individuals to bring environmental legal proceedings.

*Conway v An Bord Pleanála* [2019] IEHC 525: on the standing of individuals.

*Conway v Ireland, the Attorney General & ors* [2017] IESC 13: reference to the Aarhus Convention Compliance Committee's decisions; reference to a potential requirement for legal aid pursuant to the Aarhus Convention.

*Friends of the Irish Environment v Legal Aid Board* [2020] IEHC 454: whether an environmental NGO that is a company is eligible for legal aid (answer: no). This judgment has been appealed to the Court of Appeal.

*NAMA v CEI* [2013] IEHC 86 and [2013] IEHC 166: definition of public authority for the purposes of the AIE Regulations.

*Minch v Commissioner for Environmental Information* [2017] IECA 223: meaning of environmental information.

*Redmond & Mary Redmond -v- Commissioner for Environmental Information & Coillte Teorantia* IECA [2020] 83: meaning of environmental information.

*Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190: meaning of environmental information.

*An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241: access to cabinet records.

*Right to Know CLG v Department of An Taoiseach* [2018] IEHC 372: access to cabinet documents under access to information on the environment provisions.

Currently there are no specialist administrative or environmental courts in Ireland, and environmental cases are dealt with across the different courts, up to the level of the Supreme Court. However, the Programme for Government (2020) contains a commitment to establish a new Planning and Environmental Law Court managed by specialist judges, and to review and reform the judicial review system while adhering to EU law obligations under the Aarhus Convention.
The Supreme Court has the following functions:
It hears appeals from the Court of Appeal if the Supreme Court is satisfied that:
the decision involves a matter of general public importance, or
in the interests of justice it is necessary that there is an appeal to the Supreme Court.
It hears appeals directly from the High Court (called a "leapfrog appeal") if the Supreme Court is satisfied that there are exceptional circumstances that call for a direct appeal to it. The Supreme Court must be satisfied that:
the decision involves a matter of general public importance, and/or
it is in the interests of justice.
It is a constitutional court, as it is the final decision-maker in interpreting the Constitution of Ireland.
It can end the President's term of office, if five Supreme Court judges or more decide that a President has become permanently incapacitated.
It can check the constitutionality of a legislative Bill passed by both Houses of the Oireachtas where the Bill is referred to the Court by the President in accordance with Article 26 of the Constitution.
In the latter two functions, the Supreme Court has original jurisdiction, rather than appellate jurisdiction. Further information on the Supreme Court is available here.
In Ireland, consistency of jurisprudence is maintained through the doctrine of 'stare decisis', meaning that a court is generally bound by its own previous decisions and that lower courts are bound by the decisions of the higher courts.
The decisions of the Supreme Court (the final court of appeal in all civil and constitutional matters) bind all lower courts, including the High Court and Court of Appeal. In the Supreme Court, the doctrine of stare decisis is not rigidly applied, but the Court will not depart from a previous Supreme Court decision unless there are compelling reasons for doing so (and not simply because the current Supreme Court favours a different conclusion).
The general position is that an order of the Supreme Court is final and conclusive. However, where exceptional circumstances are established, the Supreme Court has jurisdiction to intervene and to interfere with its own order: *Re Greendale Developments (No 3)* [2000] 2 IR 514 and *Abbeydrive Developments Ltd v An Bord Pleanála* [2010] IESC 8.

**5) Can the parties to the administrative procedure directly rely on international environmental agreements, or can only the national and EU transposing legislation be referred to?**

As discussed above, Article 29.6 of the Constitution provides that no international agreement forms part of the domestic law of the State except as may be determined by the Oireachtas. This provision means that legislation must be put in place in order to give effect to international agreements in the domestic legal system.
Given this dualist legal system, it was necessary for Ireland to give effect to all provisions of the Aarhus Convention in national law prior to ratification in 2012. In addition to the transposition of specific provisions, section 8 of the Environment (Miscellaneous Provisions) Act 2011 provides that judicial notice must be taken of the Aarhus Convention.

## 1.2. Jurisdiction of the courts

**1) Number of levels in the court system**

In Ireland, there are five distinct types of court, which operate in a hierarchy: the District Court, the Circuit Court, the High Court, the Court of Appeal and the Supreme Court. Each court deals with specific types of cases. When the Circuit Court deals with criminal matters it is known as the Circuit Criminal Court, and the High Court is known as the Central Criminal Court when it exercises its criminal jurisdiction. There is also a Special Criminal Court that deals with criminal cases that cannot adequately be dealt with by the ordinary courts (e.g. terrorist and organised crime cases). Information on the Irish courts system is accessible via the https://www.citizensinformation.ie/en/justice/courts_system/courts.html Citizens' Information website, as well as on the Courts Service of Ireland's website.

**2) Rules of competence and jurisdiction – how is it determined if there is jurisdiction of the court, cases of conflict between different national tribunals (in different Member States)?**

Articles 34 to 37 of Ireland's Constitution deal with the administration of justice in general and outline the structure of the court system. Article 34.1 states that 'Justice shall be administered in Courts established by law'. The Constitution outlines the structure of the court system as comprising a court of final appeal (the Supreme Court), a Court of Appeal, and courts of first instance which include a High Court (with original full jurisdiction in all criminal and civil matters) and courts of local and limited jurisdiction (the Circuit Court and the District Court) which are organised on a regional basis and deal with both criminal and civil matters.
Matters concerning the constitutionality of laws may only be determined by the High Court, with an appeal to the Court of Appeal and thereafter to the Supreme Court where the Supreme Court is satisfied that the decision involves a matter of general public importance, or in the interests of justice it is necessary that there be an appeal to the Supreme Court. Where the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal, the Supreme Court may grant permission for a "leapfrog" appeal directly to it from the High Court. A precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors: i. the decision involves a matter of general public importance; ii. the interests of justice.
In many cases, the only mechanism by which to challenge the decision of a public authority is by way of judicial review proceedings in the High Court. The High Court does not have regional divisions, though it hears certain types of actions (not judicial review) in several provincial locations at certain times of the year, and sits in provincial venues to hear appeals from the Circuit Court in civil and family law matters.
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 in the High Court 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 the available administrative review procedure is not capable of addressing the particular issue(s) arising, then there is nothing to prevent a litigant from proceeding directly to judicial review.

**3) Specialities as regards court rules in the environmental sector (special environmental tribunals), laymen contributing, expert judges**

Criminal prosecutions in the environmental context are brought in the ordinary courts, in practice usually in the District Court for the area in which the offence was allegedly committed, with more serious offences being tried on indictment in the Circuit Court. The High Court exercising its criminal jurisdiction is known as the Central Criminal Court.

All civil planning and environmental litigation is dealt with by the ordinary courts. As such, there are currently no specialised environmental courts in Ireland, albeit the Programme for Government (2020) contains a commitment to establish a new Planning and Environmental Law Court managed by specialist judges. In order to speed up the hearing of certain planning permission cases, the Commercial Planning and SID (Strategic Infrastructure Development) List of the High Court (the SID List) is responsible for hearing: (a) judicial reviews in relation to development defined as "strategic infrastructure development" or "strategic housing development", and (b) planning cases admitted to the Commercial List. Cases in this SID List are subject to a special case management procedure before a judge who specialises in dealing with this list (Practice Direction HC103). Planning law cases which do not fall within the definition of strategic infrastructure/strategic housing may be admitted to the Commercial List (and hence the SID List) provided that they meet the thresholds and criteria for entry to that List (set out in Order 63A of the Rules of the Superior Courts), including payment of a fee of €5,000. The size of this fee means that planning cases normally enter the Commercial List at a developer's behest rather than at an individual's or NGO's.

Regarding the issue of judicial expertise, the recent Environmental Governance Assessment on Ireland noted that, from a brief review of relevant cases, the level of knowledge on planning issues is high, although there is less evidence of specific knowledge in wider environmental cases. As Ryall (2013) noted, in judicial review proceedings the High Court reviews the legality of decisions, and under Irish law there is very limited judicial review of the substance or merits of planning and environmental decisions: see the discussion of judicial review on the basis of unreasonableness/irrationality in 1.2(4) below. The Governance Assessment cited Ryall's (2013) study to the effect that the Irish courts tend to defer to the expertise of public authorities on environmental issues, and called this a concern, noting that it had seen no evidence to suggest this practice has changed since then. It is worth noting a recent judgment in which the High Court emphasised curial deference but nevertheless concluded that there was no material before An Bord Pleanála (ABP) capable of supporting its planning permission decision, despite ABP having concluded that such material was before it: see *Halpin v An Bord Pleanála* [2020] IEHC 218. ABP sought to appeal this decision to the Court of Appeal on the basis that the High Court is not entitled to "drill down" into its reasoning in this way, but ABP was refused leave by the High Court.

While Ireland does not currently have a specialised environmental court as such, ABP is an administrative appellate body empowered to make binding decisions in planning (i.e. land use) disputes. Significantly, both first parties (i.e. the developer seeking planning permission) and third parties (e.g. members of the public/NGOs) can appeal to ABP. ABP is responsible for the determination of planning appeals as well as the determination of applications for strategic infrastructure development and strategic housing development. It is also responsible for a range of other functions pertaining to land use and planning/environmental law, see here.

ABP is composed of an expert lay decision-making board and a large number of expert professional staff. ABP uses scientific-technical experts as decision-makers, and can hire-in experts to provide advice, and to assist in the evaluation of evidence presented by the parties.

Other specialist decision-making bodies that may be considered environmental tribunals of sorts include the Aquaculture Licences Appeals Board and the Forestry Appeals Committee.

Whilst not tribunals as such, other planning authorities (e.g. local authorities) also have considerable technical expertise in respect of their planning consent functions, which is recognised by the courts (see also the section on curial deference below) and the EPA is another decision-making body with technical expertise which has the power to grant permits and monitor and enforce permit conditions, as well as other broad enforcement powers.

**4) Level of control of judges in case of administrative appeals, concept of own motion, what are its limits? Rules on court action on its own motion.**

*Judicial discretion to raise points of law ex officio*

The general position in Irish law is that the scope of the proceedings is defined or limited by the arguments put forward to the court by the parties to the litigation. The courts have a discretion to raise points of law of their own motion (usually described as raising a point of law *ex officio*), but this occurs relatively rarely in practice. In cases where a court decides to raise a point *ex officio*, the parties will be invited to make submissions on the point.

*Curial deference*

The Irish courts defer to the technical expertise of decision-makers such as planning authorities, ABP and the EPA, since the courts are not experts on planning and environmental matters, while the Oireachtas has often vested the task of making planning and environmental decisions in these expert administrative bodies.

In judicial review proceedings, the High Court reviews the legality of the contested decision. Such review involves a consideration of whether all statutory requirements were met and fair/proper procedures observed. 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.

## 1.3. Organisation of justice at administrative and judicial level

**1) System of the administrative procedure (ministries and/or specific state authorities)**

There are a number of Government Departments responsible for the formation of policy and the development of legislation, including for example the Department of Housing, Local Government and Heritage, and the Department of the Environment, Climate and Communications.

The implementation of planning and environmental law in Ireland is a matter for national bodies which have been established for that purpose. Planning authorities (i.e. local authorities) and An Bord Pleanála (ABP) are responsible for determining planning applications and, in the case of planning authorities, the preparation of development plans and forward planning.

ABP is responsible for the determination of planning appeals as well as the determination of applications for strategic housing development and strategic infrastructure development including major road and railway cases. It is also responsible for a range of other functions, a full list of which can be found here.

The EPA is an independent public body established under the Environmental Protection Agency Act 1992. The EPA is organised across five Offices: the Office of Environmental Sustainability; the Office of Environmental Enforcement; the Office of Evidence and Assessment; the Office of Radiological Protection and the Office of Communications and Corporate Services. On 1 August 2014, the Radiological Protection Institute of Ireland (RPII) merged with the EPA and the Office of Radiological Protection was established. The EPA is responsible for licensing waste facilities, including landfills, incinerators, waste

transfer stations; large scale industrial activities such as pharmaceutical, cement manufacturing, power plants; some forms of intensive agriculture; the contained use and controlled release of Genetically Modified Organisms (GMOs); sources of ionising radiation; large petrol storage facilities; waste water discharges; and dumping at sea activities.
In terms of enforcement, the EPA is responsible for conducting an annual programme of audits and inspections of EPA licensed facilities; overseeing local authorities' environmental protection responsibilities; supervising the supply of drinking water and enforcing urban wastewater licences in plants managed by Irish Water; working with local authorities and other agencies to tackle environmental crime by co-ordinating a national enforcement network (NIECE), targeting offenders and overseeing remediation; prosecuting those who breach certain environmental laws; promoting compliance and enforcing producer responsibility Regulations such as Waste Electrical and Electronic Equipment (WEEE) and batteries; enforcing Regulations such as chemicals (REACH, mercury & detergents), paints, hazardous substances (RoHS, PCBs & POPs), fluorinated greenhouse gases and ozone depleting substances; and coordinating the implementation of the National Hazardous Waste Management Plan.
The Commissioner for Environmental Information determines appeals relating to decisions by public authorities on requests for access to environmental information. The role was established by the European Communities (Access to Information on the Environment) Regulations 2007-2018. Similarly, administrative appellate bodies exist in other fields such as planning (ABP, mentioned above), aquaculture licensing, forestry, and in respect of certain nature conservation decisions - see 1.3(4) below.

**2) How can one appeal an administrative environmental decision before court? When can one expect the final ruling?**

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 applicant from proceeding directly to judicial review.
The European Communities (Access to Information on the Environment) Regulations 2007-2018 allow for an appeal to the High Court but only on a point of law and following an internal review by the public body at first instance and a subsequent appeal to the Commissioner for Environmental Information, which must be initiated no later than one month after the internal review decision (this may be extended in certain circumstances). It may also be possible to judicially review the public body or indeed the Commissioner if there is a breach of fair procedures or the request concerns a point of constitutional or EU law although an objection may be raised that there has been a failure to exhaust remedies: see, for example, *Right to Know CLG v An Taoiseach* [2020] IEHC 228. The Commissioner may refer any question of law arising in an appeal before him to the High Court for determination and must postpone making a decision until after the determination of the court proceedings.
The Wildlife Acts 1976 to 2018 provide that certain administrative decisions of the Minister may be appealed to the District Court. A person aggrieved by a refusal of the Minister to grant or renew a licence to hunt and kill with firearms may appeal the refusal (section 29). A person may appeal a decision of the Minister to refuse to grant or renew a wildlife dealer's licence (section 48). Any person who is aggrieved by a seizure and detention under the Wildlife Act may also make an appeal (section 77).
The timeframe for a final ruling by the court is difficult to define precisely as it will depend on the length of time the court takes before hearing the case and delivering judgment and then whether that judgment is appealed, and if appealed from the High Court whether directly to the Court of Appeal or by way of a "leapfrog" appeal to the Supreme Court. Whether a reference to the Court of Justice of the European Union is made will also be relevant, of course: this adds around 15.5 months on average. 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.

**3) Existence of special environmental courts, main role, competence**

There is no dedicated environmental court in Ireland, although as noted above the Programme for Government (2020) has committed to establish a new Planning and Environmental Law Court managed by specialist judges.
In order to speed up the hearing of certain planning permission cases, the Commercial Planning and SID (Strategic Infrastructure Development) List of the High Court (the SID List) is responsible for hearing: (a) judicial reviews in relation to development defined as "strategic infrastructure development" or "strategic housing development", and (b) planning cases admitted to the Commercial List. Cases in this SID List are subject to a special case management procedure before a judge who specialises in dealing with this list (Practice Direction HC103). Planning law cases which do not fall within the definition of strategic infrastructure/strategic housing may be admitted to the Commercial List (and hence the SID List) provided that they meet the thresholds and criteria for entry to that List (set out in Order 63A of the Rules of the Superior Courts), including payment of a fee of €5,000. The size of this fee means that planning cases normally enter the Commercial List at a developer's behest rather than at an individual's or NGO's.

**4) Appeal against environmental administrative decisions delivered by competent authorities and appeal against Court orders and decisions (levels)**

Many environmental consent regimes in Ireland do not provide for an administrative appeal, such that the only recourse is to challenge a decision by way of judicial review in the High Court.
There is a right of appeal from a local authority's planning permission decision to An Bord Pleanála (ABP) - Ireland's independent Planning Appeals Board - where the decision is a planning decision under the Planning and Development Act 2000 (s.37 PDA 2000).
Decisions on access to environmental information requests may be appealed to the Commissioner for Environmental Information, an independent appellate body at the national level (Article 12 of the European Communities (Access to Information on the Environment) Regulations 2007-2018).
Aquaculture licensing decisions can be appealed to the Aquaculture Licences Appeals Board, an independent national body.
Various consents related to forestry can be appealed to the Forestry Appeals Committee, a body appointed by the Minister for Agriculture (s.14A Agriculture Appeals Act 2001; and the Forestry Appeals Committee Regulations 2020, S.I. 418/2020).
Regulation 37 of the European Communities (Birds and Natural Habitats) Regulations 2011 provides that a person, who has an interest in land that is affected by an order of the Minister to restrict activities that could damage a Natura 2000 site, or by a decision by the Minister not to permit a derogation from such an order, may appeal the decision to an independent Appeals Officer. Further, a person affected by a decision of the Appeals Officer or the Minister may appeal to the High Court on a point of law from the decision within 28 days of receiving the decision of the Appeals Officer.

There is no right of administrative appeal in respect of IED licences granted by the EPA. However, the EPA is required to issue a proposed determination whereby objections may be made followed by a final determination, and the EPA's decision may be judicially reviewed.
In terms of enforcement, decisions of the District Court may be appealed to the Circuit Court for a full de novo hearing and decisions of the Circuit Court may be appealed to the High Court for a full de novo hearing.
While most areas of environmental law attract an automatic right of appeal from the High Court to the Court of Appeal, judicial review decisions of the High Court in respect of planning law matters may only be appealed to the Court of Appeal if the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken (section 50A, PDA 2000). This jurisdiction is strictly construed and both limbs of the test must be satisfied. Since the 33rd amendment to the Constitution, establishing the Court of Appeal in 2014, a "leapfrog appeal" application may be made by a party directly to the Supreme Court after the High Court proceedings. For leave to be granted, the Supreme Court must be satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors: the decision involves a matter of general public importance or the interests of justice. These criteria are determined by a panel of three judges of the Supreme Court based on papers lodged seeking leave to appeal and any notice of response.
As the Supreme Court noted in *Grace and Sweetman v An Bord Pleanála & ors* [2017] IESC 10, it is possible to envisage that there might be a case where the High Court quite correctly refused a certificate to appeal to the Court of Appeal (applying its "and" test) but the Supreme Court, without in any way disagreeing with the High Court, found that the constitutional threshold had been met (applying its "either or both" test). As the Supreme Court noted, the thresholds are not the same and the High Court's certificate threshold is undoubtedly somewhat higher.

**5) Extraordinary ways of appeal. Rules in the environmental area. Rules for introducing preliminary references.**

Some Acts and statutory instruments provide for referring a point of law or for an appeal on a point of law from an administrative body or tribunal to the High Court. For example, section 50(1) of the Planning and Development Act 2000 provides that An Bord Pleanála can refer a question of law to the High Court, and the AIE Regulations provide for an appeal on a point of law to the High Court. In addition, the District Court and Circuit Court may refer issues of law by way of a case stated procedure with, respectively, the High Court and the Court of Appeal.
There are no other extraordinary ways or means of appeal apart from the restriction in s.50A(7) of the Planning and Development Act 2000, which requires - as an exception to the general automatic right of appeal to the Court of Appeal - that leave be obtained for appeals from the High Court in planning judicial review applications.
There are no separate or distinct national rules or practice directions on when the national courts should make preliminary references to the Court of Justice of the European Union (CJEU) under Art. 267 of the Treaty on the Functioning of the European Union. In the past, applicants have sought clarity regarding whether, for example, it is permissible in a planning judicial review for the High Court to decline to make a preliminary reference then decline to grant leave for an appeal.
Ireland's courts have in recent years shown an increasing tendency to refer questions to the CJEU in the area of environmental law. See, for example: *NEPPC* (C-470/16), *Grace & Sweetman v An Bord Pleanála* (C-164/17), *Klohn* (C-167/17), *People Over Wind & Sweetman v Coillte* (C-323/17), *Holohan v An Bord Pleanála* (C-461/17), *Friends of the Irish Environment CLG v An Bord Pleanála* (C-254/19), *Friends of the Irish Environment v Commissioner for Environmental Information* (C-470/19).
In *Holohan & Ors. v An Bord Pleanála* [2017] IEHC 268, it was held by the High Court that if a question of EU law which is not *acte clair* arises, there may be some reasons for considering that it might be more appropriate for it to be referred by the High Court rather than by an appellate court.

**6) Are there out of court solutions in the environmental area as regards solving conflicts (mediation, etc.)?**

There is the option to pursue both mediation and arbitration in Ireland and these may be used as alternative dispute resolution mechanisms for environmental disputes and conflicts. Mediation is regulated by the Mediation Act 2017 and there are court rules for mediation in the District Court, Circuit Court and High Court. The Court may issue an invitation to consider mediation of its own motion in any civil proceedings to which the 2017 Act applies, on any occasion on which such proceedings are before the Court and where, following an invitation by the Court, the parties decide to engage in mediation, the Court may, having heard the parties, make such orders in accordance with section 16(2) of the 2017 Act as it considers appropriate.
Commercial arbitration is regulated under the Arbitration Act 2010 and may arise where there is a commercial agreement such as an asset purchase agreement or share purchase agreement or lease agreement where a covenant, or warranty or indemnity relating to environmental law has been breached.
Mediation and arbitration as options for dispute resolution are generally agreed between the parties and do not involve the court system although court proceedings may be adjourned *sine die* pending the outcome of mediation or arbitration. There is also an option for an arbitrator to state a point of law to the High Court and there is a dedicated High Court judge to deal with arbitration matters.

**7) How can other actors help (ombudsperson (if applicable), public prosecutor), accessible link to the sites?**

The Director of Public Prosecutions (DPP) has a role in prosecuting environmental crime. For example, certain waste offences may be prosecuted on indictment in the Circuit Court by the DPP. The penalty on conviction on indictment is a fine not exceeding €15,000,000 or imprisonment for a term not exceeding ten years, or to both such fine and such imprisonment.
The Commissioner for Environmental Information has a role in determining appeals under the European Communities (Access to Information on the Environment) Regulations 2007-2018. The role of the Commissioner is to carry out independent reviews of decisions made by public authorities on requests for environmental information.
Ireland's Ombudsman can investigate complaints about public service providers. However, its website listing of those it can investigate misses out several relevant bodies (e.g. Bord na Móna (semi-State peat company) and the EPA). The website does however note that the list is not exhaustive; that said, the fact that a body is not listed may make it less likely that this route is used to seek redress in respect of such bodies.

## 1.4. How can one bring a case to court?

**1) Who can challenge an environmental administrative decision (relevance of the concept of concerned public and NGOs)?**

In general terms those with standing are split into two groups. Firstly, those people who made a submission during the administrative process and who have a sufficient interest in the proceedings (participation in the process will undoubtedly confer standing, albeit having made a submission is not always a necessary precondition: see *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10). All persons, irrespective of location or interest or any other qualifying criteria can make a submission. An assessment of whether a particular party has a sufficient interest will depend on the factors present in each case. The courts will look at factors such as the degree of impact on the individual from the proposed development, the degree of involvement they have had in the decision-making process, their motives in seeking to review a decision and the stage in the process in respect of which a decision is sought to be challenged in deciding whether they have standing to challenge the decision.
Secondly, eNGOs whose aims and objectives relate to the promotion of the environment and who have pursued that objective over the previous 12 months have a right of standing in the case of development subject to EIA. Currently there are no rules in terms of the numbers of members or other criteria for eNGOs in order to qualify under this general standing right. There is equally no distinction drawn between eNGOs that are incorporated as a legal entity and those that are unincorporated associations.

**2) Are there different rules applicable in sectoral legislation (nature conservation, water management, waste, EIA, IPPC/IED, etc.)?**

The standing rules outlined above are generally applicable to challenges that involve the EIA, IED, Habitats/Birds and SEA Directives, etc. However, depending on the nature of the activity, all litigation is funnelled through one of two distinct legislative streams: development (planning permission) and non-development activity (i.e. waste, water, IED etc.).

In the case of development (planning permission) challenges, a litigant will only be granted leave if the court is satisfied both that the litigant has a sufficient interest in the matter (which may be deemed in the case of eNGOs, as described above) *and* that there are "substantial grounds" for contending that the decision or act concerned is invalid or ought to be quashed (s.50A PDA 2000). This requirement to demonstrate substantial grounds does not apply outside the field of planning permission.

**3) Standing rules applicable for NGOs and individuals (in administrative procedure and at judicial level, for organisations with legal personality, ad hoc groups of representatives of the public, standing for foreign NGOs, etc.)**

For individuals, as a rule, participating in the administrative procedure will confer standing.

The Supreme Court in *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10 held that a failure to participate in the permission granting process does not of itself exclude a person from having standing but that it may be a factor which can, in an appropriate case, be taken into account.In that context the Court emphasised that participation in the process will undoubtedly confer standing. On the facts, 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 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).

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.

In order to have standing, an individual must demonstrate that they have a sufficient interest in the decision. That interest does not need to relate to a financial or land-based interest but some degree of physical proximity or impact is one of the elements assessed. Equally, a Court will look at the reasons for the individual seeking judicial review of the administrative decision. Courts will generally look to identify either a personal and proximate interest and/or a genuine environmental concern and give standing if those factors are present. If, on the other hand, the proposed development does not engage any personal interest of the individual, they are not directly impacted and the Court perceives that a professed environmental concern is simply a proxy to interfere in the development process, standing may be refused. The absence of any definition of "sufficient interest" makes predicting in advance whether an individual will have standing a difficult exercise, particularly where the individual has not participated in the earlier procedure. As the Supreme Court emphasised in *Grace and Sweetman*, participation in the earlier process will undoubtedly confer standing.

Finally, although not strictly a standing issue, as described above an individual will not pass the initial threshold for judicial review in a planning permission case unless they can demonstrate "substantial grounds" as to why the decision should be set aside. This requires that they demonstrate to the Court on an *ex parte* basis the legal reasons that they say mean that the decision should be set aside. Those legal reasons must satisfy a Court that there is at least a serious prima facie case being made and the applicant should be allowed to litigate the claim at full hearing.

NGOs must also demonstrate substantial grounds to the same standard in planning permission cases, and must generally demonstrate a "sufficient interest" in order to have standing. However, they do not have to demonstrate a sufficient interest in a decision subject to EIA. In other words, in EIA cases they are entitled to participate as of right once they have aims or objectives "which relate to the promotion of environmental protection" and had pursued those aims during the previous 12 months prior to the date of the application for development or a licence. It is unclear whether this 12 month requirement refers to a necessity for constant activity over that period or whether a single intervention or activity by the NGO during the previous 12 months will suffice. This 12 month requirement precludes NGOs from being set up after an application has been submitted in order to function as a litigation vehicle with deemed standing for subsequent proceedings. Provision is made in legislation for the authorities to prescribe additional requirements for NGOs to satisfy in order to be granted standing rights but that power has not been exercised to date.

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 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: see *Friends of the Irish Environment v Government of Ireland & Ors.* [2020] IESC 49.

**4) What are the rules for translation and interpretation if foreign parties are involved?**

The general rules of Court apply. All cases must be in one of the official languages of the State, i.e. English or Irish.

Regarding interpretation, Order 120 of the Rules of the Superior Courts provides that there shall be such number of interpreters as the Chief Justice and the President of the High Court respectively may from time to time, by requisition in writing addressed to the Minister for Justice, request, and such interpreters shall attend the Courts and the Offices of the Superior Courts and be available to attend those Courts as required for the hearing of any cause or matter. The Courts Service's Annual Report 2020 states that funding of €1.5m was provided for interpretation services in the courts in 2019, and contains a table listing the most common languages interpreted in court.

Any foreign language documents to be used in litigation must be translated by a suitably qualified translator into English or Irish. The costs of this exercise must be borne by the party which seeks to rely upon those documents. Affidavits can be sworn in a foreign language once duly sworn and accompanied by a verified translation and an affidavit(s) from the translator and interpreter confirming that the translation is accurate and that the interpreter read accurately to the deponent the contents of the foreign language affidavit (Order 40 of the Rules of the Superior Courts).

**1.5. Evidence and experts in the procedures**

Overview on specific rules in administrative environmental matters, control of judge, calling for an expert in the procedure.

**1) Evaluation of evidence – are there any limits in obtaining or evaluating evidence, can the court request evidence on its own motion?**

Judicial procedures in Ireland are common law adversarial procedures. Generally speaking, outside of injunctive or enforcement proceedings, the primary procedure available in the environmental sphere is judicial review of an administrative decision that has already been made. That involves an assessment by a court of the legality of the decision made. The Irish courts tend to defer to the technical expertise of planning and environmental decision-makers on the basis that the courts are not generally experts on planning and environmental matters, and the relevant legislation has given the task of making decisions to these expert administrative bodies (see Ryall (2013)). The court's review is therefore generally confined to ensuring that the administrative authorities have correctly discharged the legal and administrative requirements – e.g. that any statutory duties have been fulfilled, that public participation has occurred, that proper regard has been had to submissions, that all required environmental assessments have been completed to the necessary standard, and that all the administrative steps have been discharged - and that the body has not acted "unreasonably" or "irrationally" (on which see 1.2(4) above).

That limitation means that once a Court is assessing an administrative decision it is assessing only the evidence that was before (and which was considered by) the administrative body. As the Court has no role in revisiting the merits of the conclusion reached by that body (other than in the limited sense of reviewing the reasonableness or rationality of the decision on *O'Keeffe/Keegan* grounds – see section 1.2(4)), it has no jurisdiction or power to request new evidence.

In a recent judgment in the planning permission context the High Court emphasised its longstanding position on curial deference but nevertheless concluded that there was no material before An Bord Pleanála (ABP) (Ireland's Planning Appeals Board) capable of supporting ABP's decision under challenge, despite ABP having concluded that such material was before it: see *Halpin v An Bord Pleanála* [2020] IEHC 218. ABP sought to appeal this decision to the Court of Appeal on the basis that the High Court is not entitled to "drill down" into its reasoning in this way, but ABP was refused leave by the High Court.

**2) Can one introduce new evidence?**

An individual or NGO is entitled to place whatever expert evidence it wishes before the administrative decision maker.

Once a judicial review procedure has commenced both sides are, in theory at least, entitled to produce any new evidence they wish in sworn form. However, as a Court does not reassess the merits of the substantive conclusions reached by the administrative authority on the evidence that was before it (other than in the limited sense of reviewing the reasonableness or rationality of the decision on *O'Keeffe/Keegan* grounds – see section 1.2(4)) any new evidence is, by definition, unlikely to be relevant to the judicial review process. However, despite this difficulty, both the applicant/objector and the developer will nevertheless sometimes submit new evidence to the Court.

On the applicant/objector side this expert evidence is generally designed to demonstrate that the administrative authorities could not have reached particular conclusions and/or to demonstrate that the scientific basis for those conclusions was erroneous. On the developer side affidavits are frequently sworn by the authors of expert reports that were considered by the administrative authorities. These affidavits generally purport to explain the type and scale of the scientific assessments which were undertaken by the developer with a view to supporting the legality of the decision to grant planning permission.

Finally, the administrative authority that took the decision will, almost invariably, be the primary respondent to any judicial review proceedings. These authorities have a limited role in seeking new evidence prior to any decision on an application for development or a licence. Once a decision has been made the administrative authorities will ordinarily swear affidavits verifying the steps taken in reaching that decision and identifying how and where statutory obligations were discharged. However, those affidavits will not, by definition, be composed of additional evidence that was not considered in advance of the impugned decision having been taken justifying the decision taken.

**3) How can one get expert opinions in the procedures? Publicly available lists and registries of experts.**

The commissioning of expert evidence, notwithstanding the very limited role of any evidence that was not before the administrative body, is a matter entirely at the discretion of the party seeking to rely upon it. It is up to a party seeking expert evidence to approach an individual or organisation with the necessary expertise and agree the scope and terms of that evidence with them.

While Ireland does not have an official accrediting body for expert witnesses, Round Hall (publisher) compiles the *Expert Witness Directory of Ireland*, a reference-checked list of expert witnesses in over 1,000 areas of expertise. To be permitted to use the associated logo "Expert Witness Directory of Ireland Irish Checked", a witness listed in this Directory has to establish that they meet the requirements of the Expert Witness Directory of Ireland Code of Conduct.

There is no statutory listing of requirements (such as qualifications or professional experience) for evidence to be regarded as "expert". However, any such expert evidence will include an attestation as to the author's qualifications, experience and particular expertise. Given the small size of the jurisdiction and the limited number of environmental topics that are ordinarily subject to litigation on a more than occasional basis, in practice the pool of experts is generally familiar to all sides; otherwise, experts may identified by way of the Directory described above or by word of mouth, searching on the internet, etc. Ireland's Law Reform Commission produced a report on *Consolidation and Reform of Aspects of the Law on Evidence* in 2016, which deals extensively with the issue of experts.

**3.1) Is the expert opinion binding on judges, is there a level of discretion?**

Expert evidence (whether from the developer or from the objectors) which was before the administrative body is not binding on that administrative body. These bodies exercise an independent decision-making function and are specifically entrusted to assess and reach independent conclusions in respect of the evidence placed before them.

However, once they have formed that view and made a decision to grant or refuse the application that opinion (and the decision made on foot of it) are regarded as presumptively correct for the purposes of any subsequent judicial review proceedings: *Kelly v An Bord Pleanála (Aldi Laytown)* [2019] IEHC 84. They may only be varied by a Court if they are predicated upon an error of law or an error of jurisdiction made by the administrative authority. In practice it is very difficult to successfully challenge any substantive conclusion reached by an administrative body in respect of the evidence placed before it. A party seeking to do so must demonstrate that the decision is fundamentally at variance with reason and common sense (general test) or that there was no evidence to support the conclusion (the narrower test that 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 1.2(4) above). It does not matter, therefore, if a Court thinks that the decision was inadvisable or that the evidence available inclined to a different conclusion.

This said, in a recent judgment in the planning permission context the High Court emphasised its longstanding position on curial deference but nevertheless concluded that there was no material before An Bord Pleanála (ABP) (Ireland's Planning Appeals Board) capable of supporting ABP's decision under challenge, despite ABP having concluded that such material was before it: see *Halpin v An Bord Pleanála* [2020] IEHC 218. ABP sought to appeal this decision to the Court of Appeal on the basis that the High Court is not entitled to "drill down" into its reasoning in this way, but ABP was refused leave by the High Court.

Curial deference does not apply in relation to the legal requirements which have to be discharged. Those are matters, such as statutory interpretation, which the Court is clearly expert in. This means that, in practice, challenges to grants of permission or licences are overwhelmingly concerned with legal requirements rather than the substance of an application and in respect of which independent expert evidence is generally produced. The scope for expert evidence is therefore much more limited in the Irish system than may be the case in inquisitorial proceedings.

**3.2) Rules for experts being called upon by the court**

In the Irish system there is no scope for experts to be called by the Court on its own motion. The Court can suggest that certain evidence may be useful for it to hear but it has no power to compel the production of that evidence.

**3.3) Rules for experts called upon by the parties**

In the majority of civil actions, but not environmental judicial review, expert evidence is submitted via expert reports, affidavits or letters in a broadly similar standard form. This standard form is to ensure that the expert is independent of the party which commissioned the evidence and includes an express undertaking that the expert's primary obligation is to the Court and not to that party. In general these reports are drafted directly by the experts themselves with minimal intervention by lawyers. These experts may be called to give evidence during the proceedings and may be subjected to cross-examination by lawyers for the opposing parties.

In environmental judicial review proceedings, there is no strict obligation on the expert to attest to that primary obligation to the Court or to the independence of the expert, although as a matter of practice the expert will ordinarily identify their relevant experience. In addition, this evidence tends to be drafted with significant input from lawyers.

Environmental judicial review proceedings are almost always conducted without any expert evidence being given orally in Court and consequently without cross-examination.

**3.4) What are the procedural fees to be paid and when in relation to expert opinions and expert witnessing?**

There are no procedural fees for expert evidence as such. Any expert evidence which is sought to be adduced is in the form of affidavit evidence. There are *de minimis* administrative costs for the swearing (€10 + €2 for each document exhibited) and filing (€20) of these affidavits. However, they are precisely the same costs in respect of all affidavits and no distinction is drawn on the basis that they are expert evidence.

**1.6. Legal professions and possible actors, participants to the procedures**

**1) Role of lawyers, compulsory or not, how to contact, publicly accessible internet link to registry or website of the bar, perhaps of specialised lawyers in the environmental field**

It is not compulsory for litigants to be represented by lawyers. However, litigants would normally be well advised to seek such legal representation in order to ensure an equality of arms.

The legal profession in Ireland is divided between solicitors and barristers. Solicitors are qualified legal professionals who provide expert legal advice and support to clients on contentious and non-contentious business. Barristers do not handle clients' funds, they do not provide safe custody of original documents, nor do they provide the normal non-contentious administrative services which a client would expect from a firm of solicitors. Solicitors seek the expert assistance of barristers on issues that they feel require further opinion and in the preparation and conduct of litigation. Solicitors tend to call on the services of barristers to present their clients' cases in the higher courts, mainly because of barristers' expertise in oral advocacy and court procedure.

Normally a client must have a solicitor in order to access the services of a barrister. Certain professional bodies (and their members), if approved by the Bar of Ireland, may have direct professional access to barristers to seek legal opinion in non-contentious matters. In litigation, a client will typically be represented by a firm of solicitors and two (sometimes three, rarely four) barristers: a junior counsel (rarely two) and a senior counsel (sometimes two).

The Law Society of Ireland maintains a directory of solicitors. This contains basic contact details for individual solicitors and firms and does not enable clients to identify specialized environmental lawyers. Solicitors are however allowed to advertise their services (e.g. on their website), subject to strict rules , which for example prevent solicitors from advertising that they will take cases on a "no win, no fee" basis. For more information about solicitors, see here.

The Bar of Ireland maintains a directory of barristers here. This is searchable by area of specialisation as well as name, allowing one to identify barristers specializing in the fields of planning and environmental law. Again, special advertising rules apply. For more about barristers, see here.

Clients typically contact lawyers by email or phone, and in practice word of mouth tends to operate to inform potential clients of lawyers who specialise in the fields of planning/environmental law, and of those solicitors and barristers who may be willing to take cases on a "no win, no fee" basis.

**1.1. Existence or not of pro bono assistance**

Some non-contentious advisory work is undoubtedly done by many lawyers on a pro bono basis, but this is often ad hoc and often unseen. There are a number of free legal advice centres in Ireland, though they have not tended to do environmental law work. Recently, however, Community Law & Mediation hired an environmental justicelawyer – a first for the free legal advice sector in Ireland. In addition, two large corporate law firms in Dublin hired a lawyer (each) to work full-time on pro bono matters outside the firms' normal areas of practice. In November 2020, the Pro Bono Pledge, an initiative of the Public Interest Law Alliance (PILA) and FLAC (Free Legal Advice Centres), launched in Ireland – signatories commit to a minimum aspirational target of 20 pro bono hours per lawyer per year and there is a mechanism to benchmark progress through annual reporting of anonymous pro bono data. The Bar of Ireland operates a voluntary assistance scheme for NGOs, charities, etc.

Litigation in the field of environmental law does not tend to be done on a pro bono basis by solicitors or barristers. Rather, lawyers may be willing to take cases on a "no win, no fee" basis, meaning the lawyers are not paid if the client's case is unsuccessful but if it is successful then the lawyers would expect to recover their fees (in full or part) from the losing litigant.

**1.2 If pro bono assistance does exist, what are the main elements of the procedure to receive it (perhaps links to forms, court or agency in charge, address, telephone, email, ways to contact, etc.)?**

As mentioned under 1.1, most pro bono assistance in the field of environmental law would be ad hoc, established by the client simply making direct contact with the lawyer(s) in question and the lawyer(s) agreeing to help. Information about how to apply for assistance from the Bar of Ireland's Voluntary Assistance Scheme is available here.

1.3 Who should be addressed by the applicant for pro bono assistance?

Please see answer to 1.2.

**2) Expert registries or publicly available websites of bars or registries that include the contact details of experts**

While Ireland does not have an official accrediting body for expert witnesses, Round Hall (publisher) compiles the *Expert Witness Directory of Ireland*, a reference-checked list of expert witnesses in over 1,000 areas of expertise. This is available in hard copy only.

In terms of online resources, this searchable UK-based directory lists experts in Ireland as well as the UK, but is not comprehensive. A list of expert engineers is available here. Otherwise, experts tend to be identified based on word of mouth, searching on the internet, etc.

**3) List of NGOs who are active in the field, links to sites where these NGOs are accessible**

The websites of the two complementary umbrella organisations for eNGOs – the Irish Environmental Network and the Environmental Pillar – contain lists of their eNGO members with links to websites:

https://ien.ie/our-members/

https://environmentalpillar.ie/our-members/

**4) List of international NGOs, who are active in the Member State**

Friends of the Earth has an Irish branch: Friends of the Earth Ireland. Friends of the Irish Environment recently partnered with ClientEarth to bring a case relating to the Common Fisheries Policy before the Irish High Court. Otherwise, eNGOs in Ireland tend to be national, albeit with links to and/or membership of international networks such as the EEB, BirdLife International, etc.

## 1.7. Guarantees for effective procedures

### 1.7.1. Procedural time limits

**1) Time limit to challenge an administrative environmental decision (not judicial) by an administrative body (either superior or same level).**

The time limit for a statutory appeal will depend on the decision-making regime. In the case of appealing planning decisions to ABP, this is four weeks (s. 37 PDA 2000). In the case of an appeal to the Commissioner for Environmental Information, the appeal must be brought within one month after receipt of the decision following the internal review (or where no decision was notified within one month from the time when the decision was required to be notified) (Article 12 of the European Communities (Access to Information on the Environment) Regulations 2007-2018). In the case of an appeal against an aquaculture licensing decision, the period is one month from the date of publication of the decision (s.40 of the Fisheries (Amendment) Act 1997 (as amended)). In the case of various consents related to forestry, the deadline for appealing to the Forestry Appeals Committee is 28 days from the date of the Minister's decision (Article 5 of the Forestry Appeals Committee Regulations 2020, S.I. 2020/418). The time limit for appeals Regulation 37 of the European Communities (Birds and Natural Habitats) Regulations 2011 (referred to in section 1.3 above) is not later than 28 days after notice of the Direction or the decision was given. Unlike court applications for judicial review, where the court has discretion to extend time, statutory time limits generally cannot be extended.

**2) Time limit to deliver decision by an administrative organ**

Planning authorities must generally issue decisions within eight weeks, though this period can be extended by a further four weeks where further information is requested or by a further eight weeks where further information is requested in a case requiring EIA or an appropriate assessment under the EU Habitats Directive (s.34(8) PDA 2000). An Bord Pleanála has the objective of reaching decisions on appeals within 18 weeks (s.126) and decisions on applications for strategic infrastructure (s.37J), although decisions on strategic housing development applications must be made within 16 weeks where no oral hearing is held (s.9 of the Planning and Development (Housing) and Residential Tenancies Act 2016).

Forestry: the relevant legislation does not record a deadline for the Minister to reach afforestation licensing decisions or for the Forestry Appeals Committee to determine appeals. A review of the afforestation approval process published in 2019 recorded that less than 40% of afforestation applications were decided in less than 70 days in 2019, while almost half of the applications took more than 99 days to decide. In 2018, 26 of the 66 appeals decided by the Forestry Appeals Committee took over 53 weeks to determine – almost 40% of the total.

IED: the EPA must issue its proposed determination within 8 weeks (s.87(3) Environmental Protection Agency Act 1992; and the Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations 2013 (S.I. 137/2013)). There is no administrative appeal mechanism akin to an appeal to ABP in the planning context; however, as set out above, the proposed determination may be objected to, and the EPA's decision may be judicially reviewed before the High Court. The EPA's decision must be given "as expeditiously as may be" (s.85).

Aquaculture licensing: the Minister must endeavour to determine licence applications within four months (Fisheries (Amendment) Act 1997). On appeal, the Aquaculture Licences Appeals Board must endeavour to ensure that appeals are dealt with within four months.

**3) Is it possible to challenge the first level administrative decision directly before court?**

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) Is there a deadline set for the national court to deliver its judgment?**

There is no deadline on national courts to deliver judgments and delays can be an issue in practice, e.g. before the Court of Appeal where there have been lengthy backlogs.

The Courts Service must maintain a register of civil judgments that are outstanding pursuant to section 46 of the Court and Court Officers Act 2002 (as amended). If a judgment is not delivered within 2 months from the date on which it was reserved, the President of the Court will list the proceedings before the judge who reserved judgment, and that judge should then specify the date on which he or she proposes to deliver judgment in the proceedings (s.46(4)). However, the delivery of a judgment is a matter for the trial judge and it is not uncommon for the delivery of judgment to be adjourned on a number of occasions.

In the recent case of *Keaney v Ireland* (Application no. 72060/17), the European Court of Human Rights (ECtHR) found that Ireland had breached Art. 6 of the ECHR because of delays in determining legal proceedings (not relating to environmental law) at the national level. The domestic proceedings in question took more than 11 years in total from first instance to the Supreme Court's judgment. The ECtHR also found that Ireland was in breach of Art. 13 ECHR (right to an effective remedy) because there was no effective remedy provided in Ireland in respect of such delays. Further, in November 2020 the Aarhus Convention's Compliance Committee found in ACCC/C/2016/141 that Ireland fails to comply with the requirement in Article 9(4) of the Aarhus Convention to ensure timely procedures for the review of environmental information requests – this conclusion applies *inter alia* to judicial procedures.

**5) Time limits applicable during the procedure (for parties, submitting evidence, other possible deadlines, etc.)**

*Judicial procedure*

The general rule in environmental judicial review is that the applicant has three months to apply for leave from the date when grounds for the application first arose (Order 84 of the Rules of the Superior Courts). In planning law and IED actions for judicial review, the period is 8 weeks.

Once an action for judicial review has commenced with a grant of leave and service of the applicant's statement of grounds and grounding affidavit (exhibiting evidence), Order 84 of the Rules of the Superior Court then requires respondents to deliver opposition papers (statement of opposition and replying affidavit) in the normal judicial review list within three weeks, but this rarely happens in practice.

Beyond the applicant's exhibition of evidence at leave stage, and the respondent's replying affidavit (exhibiting evidence in reply), which must in principle be filed within 3 weeks (as noted above), there are no time limits in judicial review proceedings for parties to submit additional evidence. Where a party wishes to submit further evidence on affidavit, leave of the court is required (Order 84, rule 23). If a case is admitted to the Commercial Planning and SID (Strategic Infrastructure Development) List in the High Court, directions will be agreed or made by the court.

*Administrative procedure*

The time limit for a statutory administrative appeal will depend on the decision-making regime. In the case of appealing planning decisions to ABP, this is four weeks (s.37 PDA 2000). In the case of an appeal to the Commissioner for Environmental Information, the appeal must be brought within one month after

receipt of the decision following the internal review (or where no decision was notified within one month from the time when the decision was required to be notified) (Article 12 of the European Communities (Access to Information on the Environment) Regulations 2007, S.I. 133 of 2007, as amended), which can be extended by the Commissioner under Article 12(4)(b). In the case of an appeal against an aquaculture licensing decision, the period is one month from the date of publication of the decision (s.40 of the Fisheries (Amendment) Act 1997 (as amended)). In the case of various consents related to forestry, the deadline for appealing to the Forestry Appeals Committee is 28 days from the date of the Minister's decision (Article 5 of the Forestry Appeals Committee Regulations 2020, S.I. 2020/418). Unlike court applications for judicial review, where the court has discretion to extend time, statutory time limits generally cannot be extended.

**1.7.2. Interim and precautionary measures, enforcement of judgments**

**1) When does the appeal challenging an administrative decision have suspensive effect?**

Where a decision is made by a planning authority to grant planning permission, the grant itself may not be made until the period for an appeal expires (s. 34(11) PDA 2000). If the decision is appealed, the grant of permission may not be made until the determination or withdrawal of the appeal. The same situation pertains in respect of aquaculture licences: s.14 of the Fisheries (Amendment) Act 1997. Whether an appeal of a forestry consent decision has suspensive effect is unclear from the legislation.

The initiation of judicial review proceedings in respect of any decision by the appellate body does not have automatic suspensive effect. This early stage is done on an *ex parte* basis (where the administrative authority and the beneficiary of the decision are not on notice or present for the initial hearing). However, an applicant can apply at that stage for an interim Order known as a 'stay'. This is not an injunction but is a temporary judicial order preventing any steps being taken in pursuit of the challenged licence or application until (a) either the first time that the matter is returned to Court and all parties are present or (b) indefinitely until the substantive proceedings are resolved.

In the case of (a) the beneficiary of the decision (i.e. the developer and not the administrative authority) may indicate that it wishes to have the stay removed. If it wishes to do so then it must bring an application by way of notice of motion grounded on an affidavit. That will take the form of a relatively brief subsequent hearing as to whether the stay should be lifted such as to allow the developer to take steps to develop the project pending the determination of the proceedings. In resolving any such application a Court will generally try and balance the degree of prejudice to both sides and/or whether irreversible damage (environmental or otherwise) will occur in the interim.

In the case of (b) the developer will be given the right to seek to have the stay lifted at any time on the basis of the considerations above.

In practice, it is very unusual for developers to seek to proceed with developments which are subject to judicial review and/or to seek to have a stay lifted. A developer in that situation will generally seek to have the matter entered into the Commercial List of the High Court, on payment of a fee of €5,000, which allows for rigorous case management and an expedited hearing as a way to have the matter heard as quickly as possible.

**2) Is there a possibility for an injunctive relief during the administrative appeal by the authority or the superior authority?**

The benefit of a decision to grant planning permission or a licence does not vest in the beneficiary of a decision until an appeal has been determined. There is therefore generally no requirement or scope for any injunctive proceedings at the administrative stage.

It should be noted in the Irish system that the administrative authorities do not themselves institute appeals against first instance decision makers. The model is rather an adversarial one where an applicant applies for permission or to be awarded a licence. That application will be subject to public participation. Whatever decision is reached at first instance can be appealed by the proposed developer or (as explained above) the participants in the application process, provided an administrative appeal exists (this is not always the case – e.g. certain EPA licences can be challenged only by way of judicial review). The same parties can, in turn, seek to institute judicial review proceedings (and, if appropriate, seek injunctive relief) in respect of any decision by the appellate body. Generally neither the first instance nor appellate bodies themselves intervene in order to appeal a decision or to seek injunctive relief. However, very rarely a first instance decision-maker may intervene to challenge by way of judicial review the decision that the appellate body reaches on appeal: for a recent example, see *Dublin City Council v An Bord Pleanála* [2020] IEHC 557.

Furthermore, in general, administrative decision-making authorities in Ireland have no power to grant an injunction. That remedy is only available from the High Court, or in certain limited circumstances the Circuit Court, and is therefore typically only sought (if at all) once the appellate tribunal has made its decision and recourse for an aggrieved party is open for the initiation of court proceedings. It is worth noting that in certain cases the power to seek an injunction is given to the Minister: e.g. Regulation 38 of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. 477/2011, as amended), provides for the relevant Minister to apply to a court of competent jurisdiction for an injunction requiring the taking of action or the refraining from taking of action, for the purposes of ensuring compliance with the Habitats or Birds Directives. A 'court of competent jurisdiction' means either the Circuit Court for the circuit in which the relevant lands or part of the relevant lands are situated or the High Court.

**3) Is there a possibility to introduce a request for such a measure during the procedure and under what conditions? Possible deadline to submit this request?**

For the reasons explained above, there is no possibility of an injunction being either sought or granted during the administrative procedure.

**4) Is there immediate execution of an administrative decision irrespective of the appeal introduced? Under what conditions?**

A decision from a first-instance decision maker automatically does not take effect if there is an appeal by any person (including the applicant in the case that they have been unsuccessful with their application at first instance). If the applicant has been successful and they have been granted permission or the licence requested and there is no appeal then the rights and obligations that accrue from that decision will accrue automatically on the day after the period for an appeal has expired.

In respect of a decision by the appellate body: if the applicant for development consent or a licence has been successful on appeal, the rights pursuant to that decision will accrue automatically on the day after the appropriate period for commencing a challenge has expired, where there is no challenge. Where there is such a challenge by way of judicial review then the rights pursuant to that decision will still accrue on the same day subject to any stay or interim injunctive relief having been granted by the Court in the course of the initial application stage.

If any such stay or application has been sought the Court may grant it on an interim short term basis or until the hearing of the substantive proceedings. Alternatively, the Court may grant no injunctive relief but afford to the applicant for judicial review the opportunity to apply for injunctive relief with representation from all sides. If this is the route taken this hearing is normally convened shortly after the initiation of the judicial review proceedings.

**5) Is the administrative decision suspended once challenged before court at the judicial phase?**

No. An applicant for judicial relief may apply for injunctive relief during the judicial phase. That application is determined on the basis of entirely different criteria from those that are used to assess the legality of the substantive decision.

First, the Court will consider whether it has been established that there is a fair question to be tried. If there is a fair issue to be tried the court will consider how best to strike a balance between the parties pending the hearing of the action, which involves a consideration of the balance of convenience and the balance of justice, including the degree of prejudice to both sides if relief is granted or refused and its assessment of the motivations and conduct of the parties. Both of these elements arise in environmental cases in a similar manner to the circumstances in which they might arise in commercial or general civil disputes.

However, the thirdly assessed factor in commercial disputes is whether damages would be an adequate remedy. That factor does not sit easily in the vast majority of environmental cases that are taken by community groups, private individuals or NGOs that typically do not have the resources to provide an undertaking as to damages in the event that they are unsuccessful – i.e. that the substantive proceedings are lost and loss or damage is caused to the beneficiary of the decision. The issue has not arisen substantively to date and the general practice of the Courts when determining the question of whether to grant injunctive relief is ordinarily determined by reference to the first two issues and to disregard the third in light of the decision of the CJEU in Case C-530/11 *Commission v United Kingdom* and/or by reference to public interest concerns (whether in favour of granting or refusing injunctive relief).

**6) Is there a possibility for the national tribunals to provide injunctive relief (conditional upon a financial deposit)? Is there separate appeal against this order on the injunctive relief or the financial deposit?**

Neither first instance nor appellate bodies may provide injunctive relief as described above. A Court, upon application for judicial review, may do so on whatever conditions it deems fit. This is a discretionary remedy in which the Court has a very broad latitude to grant or refuse.

As described above, there is ordinarily provision for an undertaking to pay any damages that might accrue if an injunction is granted but the proceedings are ultimately unsuccessful but that does not tend to factor in applications for injunctive relief in environmental cases. If applied it would preclude, in almost all cases, the grant of injunctive relief in environmental cases. Apart from that (at the time of writing) theoretical possibility, there is no scope for a deposit or other financial payment by applicants for judicial review.

In the event that an application for injunctive relief is refused or granted in the context of judicial review proceedings it is possible to appeal this decision to the Court of Appeal.

**1.7.3. Costs - Legal aid - Pro bono assistance, other financial assistance mechanisms**

**1) How can one calculate what costs will be involved when one intends to initiate a procedure - administrative costs, judicial costs, costs for filing a case, experts' fees, lawyers' fees, cost of appeal, etc.**

Under section 150 of the Legal Services Regulation Act 2015 legal practitioners must as soon as practicable provide their clients with a notice written in clear language setting out what legal costs will be incurred in relation to the matter. There are specific obligations as to what the notice must contain in respect of litigation, including the likely costs of each stage – see here. Each barrister must provide a section 150 notice to their instructing solicitor.

*Administrative review*

**Administrative fees:** For a member of the public or NGO to participate at first instance before a planning authority costs €20, and to appeal a grant of planning permission to An Bord Pleanála costs €220. There is a reduced fee to appeal of €110 for certain prescribed bodies, including one NGO: An Taisce. To make a submission or observation on appeal (e.g. if you are not an appellant) costs €50 (certain bodies are exempt from this charge, including An Taisce). To request an oral hearing costs €50, and An Bord Pleanála's practise is to retain these €50 request fees even where it decides not to hold an oral hearing.

For a member of the public or NGO to appeal an aquaculture licence decision costs €152, plus €76 if a request is made to hold an oral hearing. Again, the Aquaculture Licences Appeals Board's stated practice is not to refund this request fee even where it decides not to hold an oral hearing.

In the case of forestry applications, to participate at first instance costs €20 plus €200 to appeal.

**Legal fees:** To draft an appeal document (with no oral hearing), the cost of legal representation could range from zero (entirely pro bono - rare) to say €5,000 (ex VAT) or more. The latter figure based on a lawyer with 5 years of post-qualification experience charging say €250 per hour (ex VAT) and spending 20 hours drafting an appeal.

To draft an appeal and represent a party at an oral hearing, the cost of legal representation could range from expenses only (i.e. travel costs, hotel costs, food costs, other outlay – this would be rare) to over €100,000 (see example below). This would depend to some extent on the complexity of the case and the length of the oral hearing. Oral hearings can last from a day to several weeks. A lawyer could easily charge €1,000-1,500 (ex VAT) per day to attend an oral hearing, in addition to preparatory work, expenses, outlays. To attend a seven day oral hearing could therefore give rise to costs of about €10,000 to €15,000 (including VAT) – this would cover fees (for one lawyer) and outlays.

An Bord Pleanála will almost never award any costs to an appellant in a normal (i.e. not strategic infrastructure/housing) planning appeal, despite typically awarding costs to itself and other parties after an oral hearing, and this even where the appellant succeeds with its appeal after a lengthy oral hearing. It is therefore typically not possible for NGOs to find lawyers willing to act on a "no win, no fee" basis at oral hearings at the administrative review stage.

In "strategic infrastructure" cases An Bord Pleanála has in a small number of cases been willing to award some costs to appellants or third parties. Such examples give an idea of the scale of costs involved in oral hearings: e.g. in Case reference PA0003, which related to a planning application for a container terminal in Cork, An Bord Pleanála's oral hearing ran for 15 days. An Bord Pleanála awarded itself costs of €176,272 (the cost of the Inspector's report was €88,309). It ordered that €48,617 be paid to the solicitors for the Cork Harbour Environmental Protection Association, which was successful in securing the refusal of permission for the development, but this was only a fraction of the €129,923 in legal costs that were incurred for the 15-day hearing (see the Inspector's Report 1 and Order 1 in PA0003). As above, this relatively large costs award to an appellant is very much the exception rather than the rule at the administrative review stage.

**Experts' fees**: Depending on the nature of the report, an expert could charge in the range of €1,000 to €3,000 per report. In a complex case, there might be between 3 and 5 reports.

If there is an oral hearing, the NGO's expert(s) will likely have to attend and give evidence, including sitting through the opposing side's expert evidence on the relevant issue. So in addition to the cost of producing a written report, the expert(s) may charge a fee for appearing at the oral hearing and giving evidence. This could be (say) €500-1000 per day plus travel and subsistence expenses.

**Outlay costs:** in particular photocopying, could be from tens of euros to several hundred euros for an oral hearing where the NGO/individual is represented by a lawyer.

*Judicial review*

**Court fees**: are about €350 in each of the High Court, Court of Appeal and Supreme Court (so about €1,150 if a case goes all the way to the Supreme Court). As described above, a fee of €5,000 is payable where a case is admitted to the Commercial List of the High Court; as such, this route is rarely pursued by individuals/NGO applicants.

**Legal fees**: by way of examples: in July 2011, the Taxing Master heard a claim for fees in a case taken by the Usk Residents Association against An Bord Pleanála and the Attorney General. The respondents challenged the costs claimed after they were awarded by the court to the applicant. This is therefore an example of the legal costs of the applicant, which were payable by the losing respondents. The fees included a brief fee of €60,000 for the senior counsel and €40,000 for the junior counsel, plus €4,000 per day in court for the senior and €2,666.66 a day for the junior. The Taxing Master allowed these fees, and allowed a solicitor's instruction fee of €225,000. Garrett Simons (now a High Court judge) highlighted that these judicial review proceedings were very complex and had been at hearing for approximately eight days in the Commercial List of the High Court. He went on to contrast these fees with those

payable in what he described as a “common-or-garden” (i.e. ordinary) judicial review, where an individual - Mr. Klohn - fell liable to pay €86,000 to An Bord Pleanála under the ‘loser pays’ rule, plus his own legal costs of €32,550, giving a total liability of >€118,000. This case ended in a judgment of the CJEU relating to prohibitive expense: C-167/17 *Klohn*.

These levels of legal fees are no doubt an important factor for applicants who seek out “no win, no fee” representation in planning/environmental litigation in Ireland.

**Experts’ fees**: as discussed in section 1.5(2), because the Court does not reassess the merits of the substantive conclusions reached by the administrative authority on the evidence that was before it (other than in the limited sense of reviewing the reasonableness or rationality of the decision on *O’Keeffe/Keegan* grounds – see section 1.2(4)), any new evidence is, by definition, unlikely to be relevant to the judicial review process. However, despite this difficulty, parties will nevertheless sometimes submit new expert evidence to the Court. Depending on the nature of the expert evidence, an expert could charge in the range of €1,000 to €3,000 per report. As mentioned above, environmental judicial review proceedings are almost always conducted without any expert evidence being given orally in court.

**Outlay costs**: thesewould include outlay expenses such as photocopying and stationery for producing documentation for court, serving that documentation on other litigants, couriers, taxis to/from court with boxes of documents, etc. These costs can be considerable and depend on various factors – e.g. the complexity, whether the court will permit electronic exchange of exhibits, etc. For an action for judicial review at first instance (High Court) with one affidavit exhibiting evidence, it is estimated that there would be outlay expenses of about €350 to obtain leave, and about €1,000 (including the earlier €350) by the time ‘books’ (i.e. folders of materials) are produced for the hearing. In a complex action for judicial review the outlay costs could be as high as €5,000 or more before each court (so a multiple of this for cases that go on appeal). Such costs will naturally increase where the case continues on appeal to the Court of Appeal and/or Supreme Court, and will depend in part on the number of parties and the number of judges who require copies of books.

**2) Cost of injunctive relief/interim measure, is a deposit necessary?**

As a condition for granting leave for judicial review in a planning law matter in Ireland, the court may require the applicant to give an undertaking as to damages (s.50A(6) PDA 2000). The considerations to be taken into account in this regard are not specified in the legislation. One might look, by analogy, to cases regarding undertakings required under what is now Order 84, rule 20(7) of the Rules of the Superior Courts, which remains the applicable rule in judicial review contexts other than planning law. As Ryall (2013) notes, the key consideration under that case law is whether the proceedings in question demonstrate a clear public law dimension which would preclude the court from granting an undertaking. Thus, an applicant in a planning/environmental case should generally not be required to give an undertaking as a condition for the grant of leave where the case raises public law issues and not private law interests, at least where the case is not one of a series of unsuccessful challenges by an applicant to stop a particular development (see *Coll v Donegal County Council* [2007] IEHC 110).

Separately there is the question of undertakings as to damages where an applicant seeks an interim/interlocutory injunction. Clearly any requirement to provide such an undertaking could amount to a prohibitively expensive barrier to pursuing injunctive relief, depending on the applicant’s means and the level of the required undertaking. Since judicial notice must be taken of the Aarhus Convention, and given the general position described above regarding cross-undertakings in public law cases, in practice an applicant should not be required to provide a cross-undertaking in damages in an environmental case. This is borne out by the authors’ experience in practice.

**3) Is there legal aid available for natural persons?**

There is legal aid available for natural persons but in practice not for environmental cases. As Clarke J commented in the Supreme Court at para 2.30 of *Conway v Ireland, the Attorney General & Ors* [2017] IESC 13, the evidence suggests that, at a very minimum, the grant of legal aid in environmental cases is an extreme rarity.

**4) Is there legal aid available for associations, legal persons, NGOs with legal personality and without legal personality? If yes, how to request legal aid? Is there pro bono assistance?**

Legal aid is available only to natural persons and not legal persons (or those who do not have legal personality but are not “natural persons”): see *Friends of the Irish Environment v Legal Aid Board* [2020] IEHC 454. In that case an eNGO was not eligible to apply for legal aid on the basis that it is a company – the judgment has been appealed to the Court of Appeal.

Legal aid is not available to a group or to an individual member of a group, where the individual is acting on behalf of the group. Legal aid is not available in respect of proceedings before an administrative tribunal (e.g. An Bord Pleanála): see Ryall (2013).

Please see answer under 1.6 above regarding pro bono assistance.

**5) Are there other financial mechanisms available to provide financial assistance?**

There are no other financial mechanisms available to provide financial assistance.

**6) Does the ‘loser party pays’ principle apply? How is it applied by courts, are there exceptions?**

The general rule for costs in respect of civil litigation in Ireland is that costs follow the event (i.e. the loser pays) (Order 99 of the Rules of the Superior Courts). This rule has been displaced in the case of certain environmental actions by special costs rules pursuant to the Aarhus Convention and EU law which provide that:

(a) as a starting principle, each side bears its own costs; and

(b) the court has discretion to award a winning *applicant* its costs or part thereof (see section 50B PDA 2000[1] and Part 2 of the Environment (Miscellaneous Provisions) Act 2011; EMPA 2011). (Under these rules a losing party may be awarded its costs in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.)

The result in both scenarios (i.e. ‘loser pays’ or the special cost protection rules) is that applicants in environmental cases can in some cases find lawyers willing to act on a “no win, no fee” basis. In such cases, the applicant will not pay its lawyers for their time, unless and until the applicant’s action is successful, at which point there may, at the court’s discretion, be an award of costs in the applicant’s favour, which will serve to pay the applicant’s lawyers for at least part of (and perhaps all of) their time.

The courts may award a winning applicant its costs under the special rules “to the extent that the applicant succeeds in obtaining relief” (see s.50B(2A) PDA 2000). In other words, if the applicant makes arguments alleging, say, three separate breaches of the EIA Directive by An Bord Pleanála in granting planning permission, and the court finds in favour of the applicant in respect of two of the arguments but against the applicant on one, the court may make a deduction in its award of costs on the basis that a certain amount of court time was spent arguing a losing point. Thus, in a successful EIA case taken against An Bord Pleanála regarding Edenderry power station, the eNGO An Taisce was awarded 65% of its costs for this reason.

While these special costs rules have certainly improved access to justice, there has been considerable uncertainty regarding their scope of application, and this has resulted in a significant volume of “satellite litigation” over the past decade. In brief, s.50B PDA 2000 appears aimed at giving effect to Article 9(2) and (4) of the Aarhus Convention (and related EU law), while EMPA 2011 appears aimed at giving effect to Article 9(1), (3) and (4) of the Convention (and related EU law). Since s.50B specifically lists provisions of certain EU directives – namely the EIA, SEA, and IPPC (IED) Directives and, since 2018, Art. 6(3)/(4) of the Habitats Directive – it appeared that cost protection under s.50B would apply only where and to the extent that a case raised issues relating to one

or more of these Directives/provisions. Further to the CJEU's judgment in Case C-470/16 *NEPPC*, in *Heather Hill Management Company CLG v An Bord Pleanála* [2019] IEHC 186 the High Court held that the special costs rules under s. 50B apply to the entirety of proceedings, i.e. to all grounds of challenge and not just those relating to the above-named directives. 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.

The cost protection provided under Part 2 EMPA 2011 has similarly resulted in satellite litigation. The CJEU's judgment in Case C-470/16 *NEPPC* confirmed that the requirement in s.4 EMPA 2011 to demonstrate a link with existing or likely damage to the environment before cost protection would apply is unlawful. This requirement has not yet (as at February 2021) been removed from Ireland's legislation. Most recently, in *O'Connor v Offaly County Council* [2020] IECA 72 the Court of Appeal appears to have limited the scope of cost protection under the EMPA 2011 by holding that the scope of proceedings within the meaning of s.4(1)(a), insofar as it relates to an applicant seeking to ensure compliance with or enforcement of a statutory requirement, is limited to cases in which the applicant seeks to ensure compliance with or enforce *into the future* an identified statutory requirement. In contrast, where the applicant is seeking to ensure compliance with a statutory requirement by arguing that that requirement was breached in a *past* decision, cost protection will not apply. The Court noted that whether this represents a breach of EU law as explained in C-470/16 *NEPPC* can only be properly determined in a case in which the issue arises.

As the Environmental Governance Assessment on Ireland concludes, Ireland's special cost protection rules do not apply to all environmental litigation. Gaps and uncertainties remain. For example, environmental litigation raising constitutional and/or human rights – e.g. the right to life in the context of climate change; or judicial review outside the planning context, where it is unclear whether a rule akin to the one established by the High Court in the *Heather Hill* case would apply.

It should be noted that the courts have very broad residual discretion under Order 99 of the Rules of the Superior Courts as regards costs orders. This has proven important given remaining uncertainties re Ireland's cost protection legislation and the CJEU's judgment in C-470/16 *NEPPC* to the effect 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. See the High Court's discussion in *Heather Hill* of the use of the court's discretion under Order 99 in such circumstances.

Finally, it should be noted that outlay costs (photocopying, couriers, etc.) remain payable by the applicant in cases taken on a "no win, no fee" basis – these costs cannot be eliminated and can be relatively significant, as described above.

**7) Can the court provide an exemption from procedural costs, duties, filing fees, taxation of costs, etc.? Any other national characteristics linked to this topic?**

The court cannot provide such an exemption other than as set out in legislation. There is an exemption from court fees for cases brought under the cost protection rules in Part 2 of EMPA 2011 (art. 8 of S.I. 492/2014), but not for cases under the cost protection rules in s.50B PDA 2000. It is unclear why there is this difference between s50B cases and Part 2 EMPA 2011 cases.

Information on court fees and exemptions can be found here.

**1.7.4. Access to information on access to justice - provisions related to Directive 2003/4/EC**

**1) Where are the national rules on environmental access to justice available? Internet link to be provided. Are there other forms of structured dissemination?**

As the Department responsible nationally for the Aarhus Convention, the Department of the Environment, Climate and Communications provides this general information on access to justice. The Citizens' Information website also provides general information on the Aarhus Convention and specific information about planning/environmental judicial review.

**2) During different environmental procedures how is this information provided? From whom should the applicant request information?**

Normally the information is provided by way of a statement in a notice publicising the relevant competent authority's licensing decision (more on these notices in (4) below). For example, a planning authority must publish a notice stating inter alia that a person may question the validity of any decision of the planning authority by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986, as amended), in accordance with section 50 of the Planning and Development Act 2000.

These statutorily-required notices normally contain the above-mentioned basic information regarding access to justice; they do not, for example, provide information regarding whom an applicant should contact for further information on access to justice. It is then for an applicant to seek out further information themselves, for example by looking on the internet, where they may find the Citizens' Information webpage on planning/environmental judicial review, or perhaps by consulting a lawyer.

**3) What are the sectoral rules (EIA, IPPC/IED, regarding plans and programmes, etc.)?**

In reaching administrative decisions (e.g. on licences/permits in different sectoral areas), many consent regimes in Ireland require the inclusion of specific wording relating to access to justice. More in section (4) immediately below.

**4) Is it obligatory to provide access to justice information in the administrative decision and in the judgment?**

Where a public authority refuses a request for access to environmental information, either in whole or in part, it must comply with certain obligations under Article 7(4) of the AIE Regulations, including an obligation to specify the reasons for the refusal and to inform the applicant of their rights of internal review and appeal, including the time limits within which such rights may be exercised.

Under the AIE Regulations, where a request is refused, or where an applicant believes that their request has been wrongfully/inadequately answered, two administrative remedies are available in the first instance: internal review and an appeal to the Commissioner for Environmental Information.

Where the decision on internal review affirms the original decision, or varies it in a way that results in the request being refused, either in whole or in part, the public authority must specify the reasons for the decision and must inform the applicant of the right to appeal to the Commissioner for Environmental Information and the time limit within which this right may be exercised. If no decision is made on an applicant's internal review request within one month, this non-reply is deemed to be a refusal and the applicant may proceed with an appeal to the Commissioner.

The Regulations set out that following receipt of an appeal, the Commissioner shall (a) review the decision of the public authority, (b) affirm, vary or annul the decision concerned, specifying the reasons for the decision, and (c) where appropriate, require the public authority to make available environmental information to the applicant.

Thereafter, there is the possibility of an appeal on a point of law to the High Court from a decision of the Commissioner. Judicial review of the Commissioner's decision is also an option.

Beyond access to information on the environment, various pieces of domestic legislation require that access to justice information be provided alongside a permitting decision. For example, in EIA cases a planning authority must publish notice of its permission decision, which notice must state *inter alia* that a person may question the validity of any decision of the planning authority by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. 15 of 1986), in accordance with section 50 of the PDA 2000 (see section 34(1A) PDA 2000). The same is true in respect of strategic housing development, where the applicant for permission must give notice that judicial review lies as a remedy against the decision of ABP (see the Planning and Development (Strategic Housing Development) Regulations 2017, S.I. 271/2017). The same is also true in respect of IED and IPC licensing

decisions by the EPA, where the EPA must give notice of its licensing decisions, including giving notice that a person shall not question the validity of the EPA's decision other than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (see the Environmental Protection Agency (Integrated Pollution Control) (Licensing) Regulations 2013 (S.I. 283/2013) and the Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations 2013 (S.I. 137/2013)). This is also the case in respect of aquaculture licensing decisions by the Aquaculture Licenses Appeals Board, which must publish notices of its appeal decisions, including a statement that a person may question the validity of the determination or decision by way of an application for judicial review (see the Aquaculture (Licence Application) (Amendment) (No. 2) Regulations 2010 (S.I. 369/2010). More generally, the European Communities (Public Participation) Regulations 2010 (S.I. 352/2010) inserted a requirement for such notice to be given in a range of other consent regimes in Ireland.

**5) Is translation, interpretation provided to foreign participants? What are the rules applicable?**

Public authorities have an obligation under the AIE Regulations (Articles 7(7) and 7(8)) to provide assistance to applicants to make valid access to information requests and to provide applicants with information regarding the rights of internal review and appeal (Articles 7(4)(d) and 11(4)(b)). There is nothing in the Regulations relating specifically to foreign participants.

## 1.8. Special procedural rules

### 1.8.1. Environmental Impact Assessment (EIA) - provisions related to Directive 2003/35/EC

Country-specific EIA rules related to access to justice

**1) Rules on standing and access to justice relating to screening (conditions, timeframe, public concerned)**

In Ireland, EIA is governed by different statutory regimes depending on the subject matter. It is possible to judicially review an EIA screening decision. The time limits are the same as with challenging any decision by way of judicial review: generally three months to apply for leave, but 8 weeks in the case of planning/IED.

**Planning/development:** an application for leave to apply for judicial review of any planning decision is required to demonstrate that the applicant has a sufficient interest. Under section 50A of the Planning and Development Act 2000 (PDA 2000), environmental NGOs are deemed to have standing for EIA purposes where they (I) are 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 and (II) have, during the period of 12 months preceding the date of the application, pursued those aims or objectives.

**Other consent regimes:** for non-planning judicial review in the area of environmental law, the standing threshold is generally a sufficient interest: see Order 84, r.21 of the Rules of the Superior Courts and S.I. No. 352/2014 (more below).

In some cases, eNGOs are deemed to have standing – see e.g. S.I. No. 352/2014. By way of example, s.43(5)(ba) of the Waste Management Act 1996, as inserted by the European Union (Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 2014 (S.I. No. 352 of 2014), provides that the High Court shall not grant leave for judicial review unless it is satisfied that— (i) the applicant has a sufficient interest in the matter which is the subject of the application, or (ii) the applicant— (I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection, and (II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives

These 2014 Regulations similarly define the standing threshold as a sufficient interest, with deemed standing for eNGOs that meet the above-mentioned conditions, for challenges under:

s.7 of the Arterial Drainage Act 1945

s.87(10) of the Environmental Protection Agency Act 1992: IED licensing

reg.29 of the European Communities (Assessment and Management of Flood Risks) Regulations 2010 (S.I. No. 122 of 2010)

s.73 of the Fisheries (Amendment) Act 1997

s.13A and s.21B of the Foreshore Act 1933

s.40A of the Gas Act 1976

s.14E of the National Monuments Act 1930

s.13A of the Petroleum and Other Minerals Development Act 1960

s.47A of the Transport (Railway Infrastructure) Act 2001.

Separately:

reg 17 of the Forestry Regulations 2017 provides standing to challenge forestry decisions by way to judicial review to (a) those who have a sufficient interest, (b) "consultation bodies" (which includes various State bodies and one eNGO: An Taisce), or (c) bodies or organisations (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, that have, during the period of 12 months preceding the date of the application, pursued those aims or objectives;

reg 15 of the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (S.I. No. 456 of 2011, as amended) creates a similar standing rule (minus the consultation bodies) in respect of decisions relating to various agricultural activities;

s.205 of the Minerals Development Act 2017 creates a similar standing rule (minus the consultation bodies) in respect of consents under that Act;

reg. 7G of the European Union (Environmental Impact Assessment) (Arterial Drainage) Regulations 2019 creates a similar standing rule (minus the consultation bodies) in respect of decisions relating to EIA drainage schemes.

**2) Rules on standing relating to scoping (conditions, timeframe, public concerned)**

The standing rules relating to scoping are the same as are described under 1) for screening.

**3) At what stage(s) can the public challenge the administrative decisions on environmental projects? Deadline to challenge decisions?**

In principle, the public is entitled to challenge screening and scoping decisions on administrative appeal or in court. In consent regimes with an administrative appeal (such as planning permission, forestry licensing, aquaculture licensing), such a challenge could be raised on appeal. An example of a court challenge is *An Taisce v Minister for the Environment, Community and Local Government & Ors* 2012 No. 1048 JR, in which the applicant commenced judicial review proceedings relating to the grant of a licence to test-drill for oil off the coast of Dublin, in circumstances where the respondent had unlawfully "screened out" the need for EIA. The case settled with a voluntary surrender of the licence by Providence Oil.

As above, deadlines for judicial review of screening and scoping decisions are the same as the standard judicial review deadlines: three months to apply for leave in most environmental law cases; 8 weeks in planning law/IED cases.

**4) Can one challenge the final authorisation? Under what conditions, if one is an individual, an NGO, a foreign NGO?**

It is possible for anyone to challenge a final authorisation, provided they are held to have a sufficient interest or deemed to have standing. Also see the paragraphs on standing under 1) above.

For individuals, as a rule, participating in the administrative procedure will confer standing.

In the planning context, the Supreme Court in *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10 held that a failure to participate in the permission granting process does not of itself exclude a person from having standing but that it may be a factor which can, in an appropriate case, be taken into account. In that context the Court emphasised that participation in the process will undoubtedly confer standing. On the facts, 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 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).

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.

**5) Scope of judicial review – control on substantive/procedural legality. Can the court act on its own motion?**

In *Sweetman v An Bord Pleanála* [2008] 1 IR 277, the High Court held that the EIA Directive allows persons to challenge "the substantive or procedural legality of decisions" and that, while it is clear that Irish judicial review law allows an extensive review of the procedural legality of decisions, the Directive does not require that there must be a judicial review of the substance of the decision itself but rather the "substantive legality" of the decision, i.e. the Directive does not require a complete appeal on the merits but rather requires a review of the procedures followed, to determine whether they were in accordance with law, as well as a review of the "substantive legality" of the decision. The High Court concluded that current Irish judicial review law goes a long way towards (and indeed may well meet) that requirement.

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.

Regarding whether the court can act of its own motion, the general position in Irish law is that the scope of the proceedings is defined or limited by the arguments put forward to the court by the parties to the litigation. The courts have a discretion to raise points of law of their own motion (usually described as raising a point of law *ex officio*), but this occurs relatively rarely in practice. In cases where a court decides to raise a point *ex officio*, the parties will be invited to make submissions on the point.

**6) At what stage are decisions, acts or omissions challengeable?**

The general rule in judicial review is set out in Order 84 of the Rules of the Superior Courts, to the effect that an application for leave to apply for judicial review must be made within three months from the date when grounds for the application first arose. Thus, as a general rule a decision, act or omission may be challenged by way of judicial review within three months.

Section 50(2) of the PDA 2000 provides that a person shall not question the validity of any decision made or other act done by a planning authority, a local authority or ABP in the performance or purported performance of a function otherwise than by way of an application for judicial review. This means that, in principle, any decision made or act done by a local authority, planning authority or An Bord Pleanála may be challenged by way of judicial review, within the required deadline, which is 8 weeks for planning permission decisions and acts (s.50).

In *North East Pylon Pressure Campaign Ltd. v An Bord Pleanála* [2016] IEHC 300, it was held by the High Court that section 50 PDA 2000 must be interpreted as meaning that substantive and determinative acts and decisions of a local or planning authority or the Board which are not capable of being substantively revisited in the final decision are the type of acts and decisions to which the section applies. Administrative, subordinate, minor, tentative, provisional, instrumental or secondary steps taken are not acts or decisions to which s.50 applies. In general, the date on which time begins to run must be taken to be the date of the final decision complained of, although there may be exceptional cases where an interim decision is so substantive and determines rights and liabilities irreversibly and to such an extent as to warrant its being regarded as a decision to which s.50 applies. Thus only a formal decision having irreversible effects triggers the start of the running of time for the purposes of s.50.

For example, it was held that s.50 has no relevance to decisions such as steps in the pre-statutory process or decisions to accept and process an application, or to convene or conduct an oral hearing. The occurrence of a matter, an applicant's knowledge of it, or the taking of a formal step, does not trigger the running of time, unless the decision is crystallised by being embodied in a substantive decision having irreversible effect, normally the final

decision. In addition, it was held that time for the purposes of a challenge to such a public law measure of general application does not therefore commence to run until the impact of the measure on an applicant has been crystallised in the form of an ultimate decision. Time does not run from the adoption of the measure, or the applicant's knowledge of it, or any interim step in the process.

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

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.

**8) 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., not meaning the requirement determined under point 12?**

The courts will not grant leave to bring judicial review proceedings unless they are satisfied that the applicant has a *"sufficient interest"* in the matter to which the application relates (the special standing rules applicable to eNGOs in this context have already been discussed, namely eNGOs don't have to show "sufficient interest" where certain conditions are met).

In the planning permission context, in *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10, the issue of standing arose in circumstances where neither applicant had not participated in the planning permission process at all before bringing judicial review proceedings. The Supreme Court held that as a matter of national law, a failure to participate in the permission granting process does not of itself exclude a person from having standing but that it may be a factor which can, in an appropriate case, be taken into account. The Court added that participation in the process will undoubtedly confer standing.

Subsequently, the High Court held in *Conway v An Bord Pleanála* [2019] IEHC 525that 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.

**9) 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.

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

The meaning of "timely" for EIA purposes has not been specifically transposed into Irish law for administrative review or judicial review purposes. Nor does guidance cover the point.

*Administrative review*

Planning permission: An Bord Pleanála has a statutory objective to reach decisions on appeals within 18 weeks (s.126 PDA 2000).

Forestry: the relevant legislation does not record a deadline for the Forestry Appeals Committee to determine appeals. A review of the afforestation approval process recorded that, in 2018, 26 of the 66 appeals decided by the Forestry Appeals Committee took over 53 weeks to determine – almost 40% of the total.

IED: the EPA must issue its proposed determination within 8 weeks (s.87(3) Environmental Protection Agency Act 1992; and the Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations 2013 (S.I. 137/2013)). There is no administrative appeal mechanism akin to an appeal to ABP in the planning context; however, as set out above, the proposed determination may be objected to, and the EPA's decision may be judicially reviewed before the High Court. The EPA's decision must be given "as expeditiously as may be" (s.85).

Aquaculture licensing: on appeal, the Aquaculture Licences Appeals Board must endeavour to ensure that appeals are dealt with within four months.

*Judicial review*

The general time limit for judicial review applications in environmental law matters is three months (Order 84 of the Rules of the Superior Courts). The time limit for judicial review applications in planning law matters and in cases relating to IED decisions is eight weeks (s.50 PDA 2000 and s.87(10) of the Environmental Protection Agency Act 1992). In *Irish Skydiving Club Ltd. v An Bord Pleanála* [2016] IEHC 448 Baker J. noted that, in planning judicial review, the time limit is strict, and one in respect of which the power to grant an extension is also to be strictly construed. The time for challenging a planning decision runs from the date of the decision and not from the date on which the applicant first becomes aware of or fully understands the substance of the relevant decision: see *SC SYM Fotovoltaic Energy Srl -v- Mayo County Council & Ors (No.1)* [2018] IEHC 20 at para.72.

There is no statutory requirement that judicial review procedures, once commenced, must be timely 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 Directive.

In the planning law context, encompassing EIA (development projects) and SEA (development plans), amongst other things, 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). Similar provisions are included in a range of other environmental legislation: e.g. see the Forestry Regulations 2017 and the European Union (Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 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.

**11) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to this 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 EIA 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:

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,

the nature of the persons and bodies against whom relief may be granted by way of such order, and

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:

grant such interim relief as could be granted in an action begun by plenary summons,

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.

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.

A similar enforcement power is available under s.99H of the Environmental Protection Agency Act 1992, where, on application by *any person* to the High Court or the Circuit Court, the Court is satisfied that an activity is being carried on in contravention of the requirements of this Act. In such circumstances the Court may by order require the person in charge of the activity to do, refrain from or cease doing any specified act (including to refrain from or cease making any specified emission), and make such other provision, including provision in relation to the payment of costs, as the Court considers appropriate. The High Court or the Circuit Court when considering the matter may make such interim or interlocutory order as it considers appropriate.

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:

the court should first determine whether the applicant had established an arguable case; if not the application must be refused, but if so, then;

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;

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

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.

**1.8.2. Integrated Pollution Prevention and Control (IPPC)/Industrial Emissions Directive (IED) - provisions related to Directive 2003/35/EC**

**1) Country-specific IPPC/IED rules related to access to justice**

Decisions on applications for IED licences are made by the EPA. Sections 87(2) and (3) of the Environmental Protection Agency Act 1992 (as amended) require the EPA to notify the public of its proposed determination of a licence application within 8 weeks from the date of receipt of the application. The EPA's final decision, following any objections and any oral hearing, must be given "as expeditiously as may be" (s.85).

Regulation 20 of the Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations 2013 requires the notice to inform the public of the proposed determination and where and how an objection can be lodged.
Any person or body (including the applicant for a licence or a licensee) can make an objection within 28 days of the proposed determination being issued on payment of a fee of €126 (reduced to €63 for certain bodies). A person making a valid objection can request an oral hearing. A request must include the €100 fee and be received within the 28-day objection period. The EPA has absolute discretion to hold (or not) an oral hearing, whether or not a request has been made.
Regulation 37(2) and (3) of the Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations 2013 (S.I. No. 137 of 2013) requires the EPA to publish its final decision and the reasons for its decision. Under regulation 37(3)(l), the notice of the final decision published by the EPA must state that leave for judicial review has to be instituted within 8 weeks of the date the final decision is made, in accordance with section 87(10) of the Environmental Protection Agency Act 1992 (as amended).
Under section 87(10) of the Environmental Protection Agency Act 1992 a person may question the validity of a decision of the EPA to grant or refuse a licence or revised licence by instituting proceedings within 8 weeks beginning on the date on which the licence or revised licence is granted or the date on which the decision to refuse or not to grant the licence or revised licence is made.
Section 87(10)(c) and (d) go on to provide the relevant standing rules: the High Court will not grant leave for judicial review unless it is satisfied that either the applicant has a sufficient interest in the matter (this is not limited to an interest in land or other financial interest) or, in the case of an environmental NGO, that the NGO has pursued environmental protection aims or objectives during the period of 12 months preceding the date of the application for leave.
Separately, section 99H of the Environmental Protection Agency Act 1992 provides a broad third party enforcement power in respect of IED/IPC licences, enabling *"any person"* to apply to the High Court or the Circuit Court where an activity is being carried on in contravention of the requirements of the Act, seeking an order—
requiring the person in charge of the activity to do, refrain from or cease doing any specified act (including to refrain from or cease making any specified emission),
making such other provision, including provision in relation to the payment of costs, as the Court considers appropriate.
The High Court or the Circuit Court when considering the matter may make such interim or interlocutory order as it considers appropriate. The effect is that anyone may at any time after a permit has been issued challenge the activity if it contravenes the rules contained in the Act.
The special costs rules set out in Part 2 of the Environment (Miscellaneous Provisions) Act 2011 (and also arguably section 50B PDA 2000) will in principle apply to proceedings under section 87 or 99H of the Environmental Protection Agency Act 1992 (see section 1.7.3(6) above).

**2) Standing rules, at what stages can one challenge decisions (if one is an NGO, a foreign NGO, a citizen)? Is the final decision challengeable?**

There is no administrative appeal available in respect of IED decisions in Ireland. Rather, judicial review is the only means of challenge.
No specific definition of "the public" or "the public concerned" has been included in Ireland's legislation. Any person (individuals, NGOs, other legal entities, ad hoc groups, as well as (it would seem) non-resident individuals and NGOs) may make submissions to the EPA on an application for an IED licence (or a review of a licence). Any person may also challenge the validity of an EPA licensing decision by way of judicial review within 8 weeks, provided they have a "sufficient interest" (cf. the Supreme Court's decision in the *Grace and Sweetman* case in the planning context, discussed in 1.1(4) above). However, as described above, environmental NGOs that have been active over the previous 12 months are effectively deemed to have such an interest by statute for the purposes of certain consent regimes. Further, "any person" - without any standing requirement - may seek to enforce the requirements of the Environmental Protection Agency Act 1992 in court under section 99H, e.g. where an activity is ongoing without an IED/IPC licence or in breach of the conditions of such a licence.

**3) Rules on standing and access to justice relating to screening (conditions, timeframe, public concerned)**

There is no administrative appeal available in respect of IED decisions in Ireland. Rather, judicial review is the only means of challenge.
The European Union (Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 2014 (S.I. No. 352 of 2014) define the standing threshold for IED licensing purposes as a sufficient interest, with deemed standing for eNGOs whose aims and objectives relate to the promotion of the environment and who have pursued that objective over the previous 12 months. This relates to challenges by way of judicial review pursuant to s.87(10) of the Environmental Protection Agency Act 1992, which covers a decision of the EPA to grant or refuse an IED licence or revised licence; challenges must be brought within 8 weeks. Thus, this is the standing rule where a decision relating to screening is challenged as part of a challenge to decision to grant or refuse an IED licence.
Where a screening decision is challenged outside the scope of a challenge to a decision to grant or refuse an IED licence, the standing test would be sufficient interest under Order 84 of the Rules of the Superior Courts, and as a general rule an application for leave to apply for judicial review must be made within three months from the date when grounds for the application first arose.

**4) Rules on standing relating to scoping (conditions, timeframe, public concerned)**

The same rules apply as are described immediately above in the context of screening challenges.

**5) At what stage(s) can the public challenge the administrative decisions on environmental projects? Is there a deadline to challenge decisions?**

Any person or body can make an objection within 28 days of the proposed determination on the IED licence being issued by the EPA, on payment of a fee of €126 (reduced to €63 for certain bodies). A person making a valid objection can request an oral hearing. A request must include the €100 fee and be received within the 28-day objection period. This period commences on the date of notification of the proposed determination by the EPA. The EPA has absolute discretion to hold (or not) an oral hearing, whether or not a request has been made.
In arriving at its final determination the EPA will consider the application and all objections, submissions received and, where an oral hearing has been held, the report and recommendation of the person/s who conducted the hearing.
No provision is made in the legislation for an administrative appeal in respect of the EPA's decisions (also known as the "final determination") on IED licence applications. Such decisions may however be challenged by way of judicial review within 8 weeks under section 87(10) of the Environmental Protection Agency Act 1992, as described above.

**6) Can the public challenge the final authorisation?**

No provision is made in the relevant legislation for an administrative appeal in respect of EPA decisions on IED licence applications. As described above, such decisions may however be challenged by way of judicial review. Special statutory rules apply to such challenges. An application for judicial review challenging the validity of a decision of the EPA to grant, or to refuse to grant, an IED licence, must be instituted within the period of eight weeks from the date on which the licence is granted or the date on which the decision to refuse to grant the licence is made: Environmental Protection Agency Act 1992 (as amended), section 87(10). The High Court may, on application to it, extend the eight-week period where it considers, in the particular circumstances, that there is "good and sufficient reason" for extending the time limit.

As regards standing, the High Court must not grant leave to bring judicial review proceedings unless it is satisfied that the applicant has a "sufficient interest" in the matter to which the application relates: section 87(10) of the Environmental Protection Agency Act 1992. As discussed above, environmental NGOs that have been active over the previous 12 months are effectively deemed by section 87(10) to have such an interest.

**7) Scope of judicial review – control on substantive/procedural legality. Can the court act on its own motion? Is it possible to challenge decisions, acts or omissions?**

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.

Regarding whether the court can act of its own motion, the general position in Irish law is that the scope of the proceedings is defined or limited by the arguments put forward to the court by the parties to the litigation. The courts have a discretion to raise points of law of their own motion (usually described as raising a point of law *ex officio*), but this occurs relatively rarely in practice. In cases where a court decides to raise a point *ex officio*, the parties will be invited to make submissions on the point.

**8) At what stage are these challengeable?**

The usual remedy where an administrative decision of the EPA is believed to be unlawful would be for the court to quash the invalid decision in judicial review proceedings. Under section 87(10) of the Environmental Protection Agency Act 1992, proceedings to challenge a decision to grant or refuse a licence or revised licence must be instituted within the period of 8 weeks beginning on the date on which the licence or revised licence is granted or the date on which the decision to refuse or not to grant the licence or revised licence is made.

In terms of other acts or omissions, the court has inherent jurisdiction in judicial review matters under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986, as amended), and as a general rule an application for leave to apply for judicial review must be made within three months from the date when grounds for the application first arose.

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

Not applicable: there is no provision for an administrative review/appeal in the case of EPA decisions on IED/IPC licence applications.

**10) 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., not meaning the requirement determined under point 12?**

As discussed, the courts will not grant leave to bring judicial review proceedings unless they are satisfied that the applicant has a *"sufficient interest"* in the matter to which the application relates (NGOs are deemed to have automatic standing if they meet the statutory criteria: namely that the NGO's aims or objectives relate to the promotion of environmental protection and it has, during the 12 months preceding the date of the application, pursued those aims or objectives): see section 87(10) of the Environmental Protection Agency Act 1992.

In the planning permission context by way of parallel, in *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10 the issue of standing arose in circumstances where neither applicant had participated in the planning permission process at all before bringing judicial review proceedings. The Supreme Court held that as a matter of national law, a failure to participate in the permission granting process does not of itself exclude a person from having standing but that it may be a factor which can, in an appropriate case, be taken into account. In that context the Court emphasised that participation in the process will undoubtedly confer standing. On the facts, the Court emphasised that participation in the process will undoubtedly confer standing. On the facts, 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 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). 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.

**11) 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.

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

The meaning of "timely" for IED purposes has not been specifically transposed into Irish law for administrative review or judicial review purposes. Nor does guidance cover the point.

*Administrative review*

The EPA must issue its proposed determination within 8 weeks (s.87(3) Environmental Protection Agency Act 1992; and the Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations 2013 (S.I. 137/2013)). There is no administrative appeal mechanism akin to an appeal to ABP in the planning context; however, as set out above, the proposed determination may be objected to, and the EPA's decision may be judicially reviewed before the High Court.

*Judicial review*

There is no statutory requirement that judicial review procedures must be timely 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 IED Directive.

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.

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

An applicant seeking leave to bring judicial review proceedings to challenge a decision of the EPA to grant, or to refuse to grant, an IED licence, may seek interim or interlocutory relief from the High Court. The Rules of the Superior Courts provide that where leave for judicial review is granted, the court, where it considers it just and convenient to do so, may grant interim relief on such terms as it thinks fit: Order 84, rule 20(8).

Separately, section 99H of the Environmental Protection Agency Act 1992 provides a broad third party enforcement power in respect of IED/IPC licences, enabling *"any person"* to apply to the High Court or the Circuit Court where an activity is being carried on in contravention of the requirements of the Act, seeking an order—

(a) requiring the person in charge of the activity to do, refrain from or cease doing any specified act (including to refrain from or cease making any specified emission),

(b) making such other provision, including provision in relation to the payment of costs, as the Court considers appropriate.

The High Court or the Circuit Court when considering the matter may make such interim or interlocutory order as it considers appropriate.

**14) Is information on access to justice provided to the public in a structured and accessible manner?**

The EPA provides information regarding judicial review of its decisions on its website - Licensing Process Explained.

**1.8.3. Environmental liability[2]**

Country-specific legal rules relating to the application of the Environmental Liability Directive 2004/35/EC, Articles 12 and 13

**1) Which requirements need to be fulfilled for natural or legal persons (including environmental NGOs) to have the decision taken on environmental remediation by the competent authority reviewed by a court or another independent and impartial body in accordance with Article 13(1) ELD?**

Regulation 16 of the European Communities (Environmental Liability) Regulations 2008 (S.I. 547/2008) ("the ELD Regulations") provides that a person shall not question the validity of a decision of the EPA relating to—

(a) existence of environmental damage or whether Regulation 15 (2)(a) or (b) applies to a person (i.e. whether the person is affected or likely to be affected by the instance of environmental damage, or has a sufficient interest in the decisions relating to the environment made by the EPA or any other person), or

(b) whether or not to perform its functions under the Regulations pursuant to Regulation 15(6), unless the proceedings are instituted within the period of 8 weeks beginning on the date on which the decision is made.

Where, on application to the High Court, the Court considers that in the particular circumstances there is good and sufficient reason for doing so, the Court may extend this period.

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 an applicant to have 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.

**2) In what deadline does one need to introduce appeals?**

There is no administrative appeal/review mechanism in Ireland in this context. Judicial review is the only method of recourse. As noted under 1) above, the deadline for instituting judicial review in respect of ELD decisions by the EPA is generally 8 weeks, with the court having discretion to extend this period.

**3) Are there requirements for observations accompanying the request for action pursuant to Article 12(2) ELD and if yes, which ones?**

Under regulation 15(4) of the ELD Regulations, where a person submits observations and requests the performance by the EPA of its functions, he or she shall also furnish a report to the EPA containing "all information and data relevant to the environmental damage."

**4) Are there specific requirements regarding 'plausibility' for showing that environmental damage occurred, and if yes, which ones?**

There are no specific requirements regarding 'plausibility', though as noted above the person requesting action must furnish a report containing all information and data relevant to the environmental damage.

**5) Is a certain manner required and/or time limits set, and if yes, which ones, as regards the notification of the decision by the competent authority to the entitled natural or legal persons (including the entitled environmental NGOs)?**

The decision must be notified in writing, giving reasons and advising the person of the period for bringing review or other legal proceedings in relation thereto pursuant to Regulation 16. No time limit is set for the EPA to notify its decision.

**6) Does the MS apply an extension of the entitlement to request action by competent authority from damage to the environment in cases of imminent threat of such damage?**

Ireland's ELD Regulations provide in Regulation 15(1) for the possibility of a request for action to be made in cases of imminent threat. In other words, Ireland has not exercised the option in Art 12(5) ELD to exclude cases of imminent threat from the scope of the national ELD regime in this regard.

**7) Which are the competent authorities designated by the MS?**

The EPA is the competent authority.

**8) Does the MS require that the administrative review procedure be exhausted prior to recourse to judicial proceedings?**

There is no administrative review procedure in Ireland in the ELD context.

**1.8.4. Cross-border rules of procedures in environmental cases**

**1) Rules on involving other countries? At which stage of the procedure is there a possibility to challenge environmental decisions?**

It should be noted that because of Ireland's location and industrial/infrastructural profile the number of projects that involve transboundary consultation is very small. The jurisprudence around the questions raised under this heading 1.8.4 is therefore notably underdeveloped by comparison with continental Member States.

Ireland's Planning and Development Regulations 2001 (as amended) ("PDR 2001") provide for a process by which any transboundary State (EU Member State or other party to the Espoo Convention) is informed of a proposed development project (Art 124 et seq) or a development plan (Art 13F), local area plan (Art 14F) or regional planning guidelines (Art 15E) likely to have significant transboundary impacts on that State, before the consent decision is taken. (For simplicity, the remainder of this section discusses the case of development plans as representative of the rules for local area plans and regional planning guidelines.) If a submission is made by a person, NGO or other interested party in a transboundary State to the planning authorities in Ireland those submissions are treated in exactly the same way as if they had been made by a person living or based in Ireland.

In the IED regime reg. 15 of the Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations 2013 (S.I. 137/2013, as amended)("the IED Regulations") provides for transboundary consultation where required.

Generally speaking all procedural rights which accrue apply equally to participants in the consent process that are based in a potentially affected transboundary State. Thus, the possibility to challenge environmental decisions arises as soon as the relevant decision is taken.

**2) Notion of public concerned?**

Insofar as consent for a development project is concerned the PDR 2001 frames the participation exercise in terms of the "views of the transboundary State" (art. 126(2)(e)) rather than the views of the public concerned.

In the context of development plans, Art 13F PDR 2001 cross-refers to the public referred to in Art 6(4) of the SEA Directive; that is, "Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned."

The IED Regulations use the (undefined) expression "the public concerned" to define those who may wish to participate.

**3) Do NGOs of the affected country have standing? When and to what court should they submit their appeals? What procedural assistance are they eligible for (legal aid, request for injunctive relief, interim measures, pro bono)?**

The standing rules for an NGO in an affected country are the same as for an NGO based in Ireland. These are that any such NGO with aims and objectives relating to the promotion of the environment *and* who have pursued those aims over the previous 12 months have a right of standing in the case of development subject to EIA. There is no requirement, for example, that the NGO has to be incorporated in Ireland, and the standing rules are identical. Such an NGO would be in precisely the same position as an Irish NGO and could appeal or institute judicial review proceedings within the statutory time-limit. An NGO would not be eligible for legal aid on the basis that only natural persons are eligible: see *Friends of the Irish Environment v Legal Aid Board* [2020] IEHC 454. In that case an eNGO was not eligible to apply for legal aid on the basis that it is a company – the judgment has been appealed to the Court of Appeal.

An NGO in an affected country would be in precisely the same position as an Irish NGO in seeking injunctive relief and/or a stay on any development or other actions taking place in furtherance of the grant of development consent or licence. There is no reason in principle why such an NGO would not equally be entitled to seek *pro bono* assistance or "no win, no fee" representation from solicitors and barristers.

**4) Do individuals of the affected country have standing? What procedural assistance are they eligible for (legal aid, request for injunctive relief, interim measures, pro bono)?**

The standing rules for an individual in an affected country are the same as for an individual based in Ireland – in each case, the test is sufficient interest. As a rule, participating in the administrative procedure will confer standing.

The Supreme Court in *Grace and Sweetman v An Bord Pleanála* [2017] IESC 10 held that a failure to participate in the permission granting process does not of itself exclude a person from having standing but that it may be a factor which can, in an appropriate case, be taken into account.In that context the Court emphasised that participation in the process will undoubtedly confer standing. On the facts, 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. (This aspect could pose difficulties for an individual in an affected country.) The

decision of the 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).

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 noted above, in order to have standing an individual must demonstrate that they have a sufficient interest in the decision. That interest does not need to relate to a financial or land-based interest but some degree of physical proximity or impact is one of the elements assessed, as described above. Equally, a Court will look at the reasons for the individual seeking judicial review of the administrative decision. Courts will generally look to identify either a personal and proximate interest and/or a genuine environmental concern and give standing if those factors are present. If, on the other hand, the proposed development does not engage any personal interest of the individual, they are not directly impacted and the Court perceives that a professed environmental concern is simply a proxy to interfere in the development process, standing may be refused. The absence of any definition of "sufficient interest" makes predicting in advance whether an individual will have standing a difficult exercise at times, and particularly so in the context of an individual in another country. However, as the Supreme Court emphasised in *Grace and Sweetman*, participation in the earlier process will undoubtedly confer standing.

To the authors' knowledge, no cases have been brought by individuals overseas in this context so it is not possible to provide any definitive information from practical experience in relation to the standing of such persons.

Any individual in an affected country accorded standing would, however, be in exactly the same position as an individual in Ireland in relation to their entitlement to apply for injunctive relief and to seek to access, for example, pro bono or "no win, no fee" representation. Individuals based outside Ireland are eligible to apply for legal aid – see here. That said, as Clarke J commented in the Supreme Court at para 2.30 of *Conway v Ireland, the Attorney General & Ors* [2017] IESC 13, the evidence suggests that, at a very minimum, the grant of legal aid in environmental cases is an extreme rarity in Ireland.

**5) At what stage is the information provided to the public concerned (including the above parties)?**

In the case of consent for development projects, the PDR 2001 treats the transboundary State rather than the public concerned as the Irish authorities' interlocutor. The relevant planning authority or An Bord Pleanála as appropriate must provide information on a proposed development referred to in articles 124 or 125 to the transboundary State concerned and shall enter into consultations with that State in relation to the potential transboundary effects of the proposed development: (a) at the same time as notifying the Minister under article 124(1) that, in its opinion, the proposed development would be likely to have significant effects on the environment in a transboundary State (this obligation arises "as soon as may be after receipt of a planning application"), or (b) upon request for such information by the transboundary State under article 125.

In the case of a development plan, a planning authority must, following consultation with the Minister, forward a copy of the draft development plan and associated environmental report to a Member State—(a) where the planning authority considers that implementation of the plan is likely to have significant effects on the environment of such Member State, or (b) where a Member State, likely to be significantly affected, so requests.

In the case of IED licensing, the EPA must, "as soon as may be after receipt of the application or request," notify the appropriate competent authority in the Member State concerned.

**6) What are the timeframes for public involvement including access to justice?**

In the case of development projects, the PDR 2001 (reg 130) specify that a planning authority shall, notwithstanding the 8 week deadline for a decision specified section 34(8) of the PDA 2000, not decide to grant or refuse permission in respect of a planning application to which transboundary consultation applies, or An Bord Pleanála shall not determine an appeal, an application for approval to which transboundary consultation applies or an application for strategic infrastructure development, until after (a) the views, if any, of any relevant transboundary State have been received in response to consultations under article 126(1), or (b) the consultations are otherwise completed.

In the case of development plans, the PDR 2001 (reg 13F) require that the authority must agree with the other State (i) a reasonable timeframe for the completion of the consultations and (ii) detailed arrangements to ensure that the environmental authorities and the public likely to be affected in the other Member State are informed and given an opportunity to forward their opinion within a reasonable timeframe.

In the case of IED licensing, where a Member State indicates that it intends to participate, the EPA must, before giving any notification indicating the manner in which it proposes to determine the IED application, consult with the Member State for the purposes inter alia of making arrangements, including the establishment of time-frames for consultations to inter alia enable the members of the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedure (reg. 15 of the IED Regulations, as amended).

**7) How is information on access to justice provided to the parties?**

As regards development projects, reg 131 of the PDR 2001 requires any relevant transboundary State to be sent various notices issued by planning authorities where they have approved development. How the transboundary State communicates this information onwards to the public concerned in that State is not addressed. In the case of planning permission granted by a planning authority, reg 31(k) PDR 2001 requires the notice to specify *inter alia* that an appeal against the decision may be made to An Bord Pleanála within the period of 4 weeks beginning on the date of the decision of the planning authority. In the case of An Bord Pleanála's decisions on ordinary planning appeals, reg 74 does **not** require the notice to mention the possibility of judicial review. However, in the case of its decisions relating to strategic infrastructure (art. 220 PDR 2001) and strategic housing (s.10(2) of the Planning and Development (Housing) and Residential Tenancies Act 2016, the relevant notices are required to mention the possibility of questioning the validity of the decision by way of judicial review.

As regards development plans, following any transboundary consultations, reg 13I(2) PDR 2001 requires that any Member State consulted must be sent the plan and a statement summarising *inter alia* how any transboundary consultations have been taken into account in the making of the plan. However, there is no requirement to provide information on access to justice – e.g. how the decision may be challenged.

As regards IED licensing, under reg 21(1) of the IED Regulations the EPA must notify the competent authority of a potentially affected Member State of its proposed determination within 3 working days of the giving of the notification of the proposed determination. The notification must state that objections can be made and must specify the timeframe. Thereafter, once the EPA finally determines the application the EPA must notify the competent authority in the potentially affected Member State and this notice must mention the possibility of challenging the decision by way of judicial review (reg 37).

**8) Is translation, interpretation provided to foreign participants? What are the rules applicable?**

The detailed rules in relation to *how* transboundary consultation will take place are not prescribed in the PDR 2001 or as regards IED licensing. There is therefore no *prima facie* requirement that the notices informing the potentially affected country and the substantive underlying documentation are provided in the national language(s) of the potentially affected Member State.

This issue may however be less proximate in Ireland owing to its geographic position and the common language as between Ireland and the United Kingdom. The authors are unaware of any transboundary consultation that has been undertaken further afield in respect of an Irish project or plan. It is worth noting in this regard that the use of nuclear fission for electricity generation is effectively prohibited in Ireland by section 18 of the Electricity Regulation Act 1999.

**9) Any other relevant rules?**

There are no other relevant rules.

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[1] Cost protection via s50B has been specifically applied to two consent regimes outside the planning law context: judicial review of forestry development involving EIA (cost protection under s50B 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. Whether this was necessary is unclear given that s50B appears to apply to any statutory provision that gives effect to the relevant provision(s) of one of the listed Directives.

[2] See also case C-529/15.

Last update: 18/01/2024



## 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:

the court should first determine whether the applicant had established an arguable case; if not the application must be refused, but if so, then;
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;
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
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:

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,

the nature of the persons and bodies against whom relief may be granted by way of such order, and

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:

grant such interim relief as could be granted in an action begun by plenary summons,

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.

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[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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## Other relevant rules on appeals, remedies and access to justice in environmental matters

There are no rules in relation to what is termed "administrative passivity". There is no mechanism by which the Courts (or any other administrative body) can of their own motion impose penalties on State parties that frustrate access to justice or fail to take the necessary steps to facilitate access to justice. The only way for that to occur is for individual litigants to bring an action that alleges a failure to vindicate access to justice rights. These types of action are relatively

commonplace – i.e. that notice of a potential development was not provided or that submissions were not considered as part of litigation impugning the validity of a grant of a licence or development consent.

However, this type of litigation tends to focus on the failure to provide access to justice in particular instances or as regards particular cases and not in relation to systemic failures to vindicate access to justice requests. That means that access to justice points are used tactically by litigants seeking to quash the development consent or licence, but without any mechanism to guard against administrative passivity on a national or macro scale. There is no other State watchdog or body with a remit to ensure that access to justice measures are enacted and applied.

While there are no specific rules or penalties which the Courts can impose for breaches of the principle of access to justice, the High Court can, in an action for judicial review, grant damages in addition to, or in lieu of, certiorari or prohibition, or a declaration or an injunction (Order 84 r.24, Rules of the Superior Courts). The courts also have coercive powers to attach and commit for breaches of court orders.

Non-compliance with a court judgment amounts to civil contempt of court. This can result in the party in default being open to punitive sanctions for being in contempt. The court can commit the party to prison for an indefinite, as opposed to a definite (as occurs in criminal contempt of court), period, which will end when the person agrees to comply with the court order/judgment. It is worth noting that public bodies are subject to liability for civil wrong in the same way as private companies and individuals and are also responsible for the acts and omissions of their employees and agents under principles of vicarious liability. To the extent that a public body deliberately breached a court judgment, it is possible that persons such as its CEOs, directors, board members (depending on how that particular body is constituted), could be held liable for contempt of court. Where a public body is a company, the procedure in s.53 of the Companies Act 2014 could potentially be used to enforce a judgment against the company and its officers – remedies include sequestration and attachment (i.e. bringing the directors/officers before the High Court to answer their contempt).

The purpose of imprisonment in civil contempt is not punitive but rather coercive. However, in practice the boundary between civil and criminal contempt has become blurred in the Irish courts. Currently, the law appears to provide the broadest possible range of sanctions for civil contempt. These stretch from punitive sanctions imposed on the basis of the public interest (as set out in *Laois County Council v. Hanrahan,* SC No. 411 of 2013) to unlimited powers of coercive imprisonment.

Hogan, Morgan and Daly comment in *Administrative Law* (5th Ed., 2019) that “in principle, a Minister can be found guilty of contempt of court, although there is (to our knowledge) no recorded instance of this having occurred.”

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