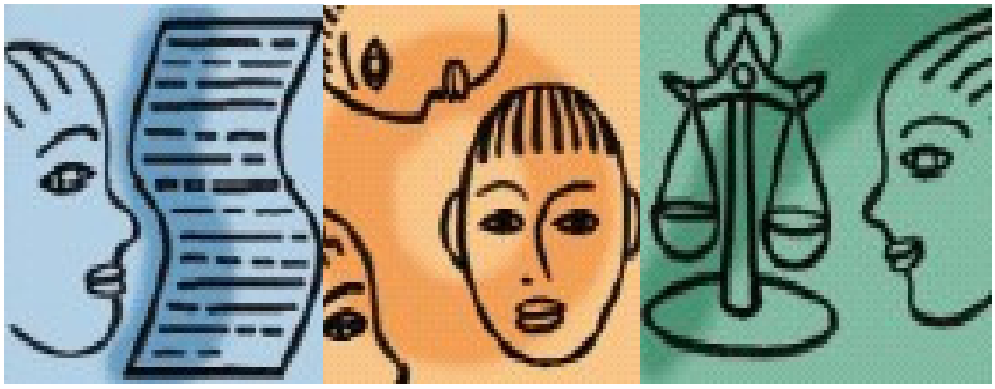
Environmental Pillar
WORKING FOR A SUSTAINABLE FUTURE

Environmental Pillar Submission to the Public Consultation on Access to Justice and Implementation of Article 9 of the Aarhus Convention



Measures to further the implementation of the Access to Justice Provisions of the Aarhus Convention

26th Sept 2014

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Introduction

The Environmental Pillar welcomes the opportunity presented by this public consultation. We share and endorse Dr Aine Ryall's view that "We lack a vision for the future of environmental justice in Ireland. With new legislation on the horizon, now is the time to articulate such a vision and to explore new approaches to deliver an integrated system of environmental justice. Piecemeal tinkering with costs rules is no longer an option. More fundamental change, driven by a clear vision of what we want to achieve as a democratic society in terms of environmental justice, is long overdue."[1]

Central to this vision in Ireland must be full compliance with the access to justice parts of the Aarhus Convention, which mandate access to procedures which provide adequate and effective remedies, including injunctive relief as appropriate, and which are fair, equitable, timely and not prohibitively expensive. Meeting this obligation will empower Irish citizens to vindicate critically important environmental rights, for the benefit of this generation and those to come.

SECTION 1 - Article 9(1)

Question 1	Does Ireland's legislation implementing Article 9(1) fully comply with the requirements of the Convention? If not, why not?
Answer	Ireland's current legislative framework falls short of what is required under Article 9(1) of the Aarhus Convention. In particular, Ireland's legislative framework does not provide for a review procedure in respect of access to information decisions that is either "free of charge or inexpensive" or "expeditious". **Appeals to the Commissioner for Environmental Information** **A. Free of charge or inexpensive** Article 9(1) provides (bold/underline added): *"Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.* *In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure*

[1] http://www.irishtimes.com/news/crime-and-law/time-for-a-clearer-vision-of-justice-rights-and-the-environment-1.1774101

	*established by law that is **free of charge or inexpensive** for reconsideration by a public authority or review by an independent and impartial body other than a court of law.* *Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph."* Pursuant to regulation 15 of the European Communities (Access to Information on the Environment) Regulations 2007 to 2011 (hereafter "**the AIE Regulations**"), there is a standard fee of €150 to bring an appeal before the Commissioner for Environmental Information (**CEI**). A reduced fee of €50 applies in certain cases, and these fees may be waived or refunded in certain limited circumstances. It is our view that the appeals system before the CEI is not "free of charge or inexpensive" and as such violates Article 9(1) of the Aarhus Convention. Note that the government has recently committed to reducing the fee for appeals of FOI decisions to the Information Commissioner from a standard fee of €150 (current) to €50 (proposed), and from a reduced fee of €50 (current) to €30 (proposed). In light of this fact there is no justification for maintaining the current fee structure for appeals before the CEI. At the very least the current fees for bringing appeals before the CEI should be reduced in line with the amendments to the FOI regime, or ideally abolished altogether given the significant barrier such fees create in respect of access to information and in turn access to justice in Ireland. It is worth noting that the former CEI Emily O'Reilly was highly critical of the level of the appeal fee because of its deterrent effect for potential appellants. She repeatedly highlighted this issue in her Annual Reports.[2] In a 2008 speech to the Irish Environmental Lawyers Assocation, [3] the then CEI stated that she was "particularly concerned that the Regulations do not provide the kind of framework within which the overall purpose of the AIE regime is likely to be fulfilled. Specifically, the imposition of a €150 external appeal fee is very likely to discourage appeals." As recently as the 2011 Annual Report, the former Commissioner maintained that "I consider that the level of the fee for making an appeal to my Office (normally €150) is discouraging potential appellants."[4] In short the current appeal fee system - as transposed in Irish legislation - discourages potential appellants from bringing appeals, undermines the objective pursued by the Access to Information on the Environment Directive (cf. Case C-216/05) and puts Ireland in breach of Article 9(1) of the Aarhus Convention because

[2] http://www.ocei.gov.ie/en/Publications/Annual-Reports/
[3] http://www.ocei.gov.ie/en/News/Access-to-Information-on-the-Environment-Regulations-2007-.html
[4] http://www.ocei.gov.ie/en/publications/annual-reports/annualreport2011/media/information_commissioner_ar_english_web.pdf

	the current appeal fees do not create an "inexpensive" (or free of charge) review procedure. **B. Expeditious** The requirement for an "expeditious" review procedure in respect of access to information on the environment (AIE) decisions has not been transposed into Irish law (i.e. Irish legislation is silent on the question of a deadline for determining appeals). Article 3(1) of the Aarhus Convention requires each Party "*to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.*" The failure to specifically transpose the requirement for an "expeditious" review procedure under Article 9(1) is in breach of this Article 3(1) requirement. There are also major problems in practice in terms of expedition, as detailed below. Contrast this with the situation in respect of FOI appeals; in his 2013 Annual Report the CEI and Information Commissioner commented: "I am expressly required under the FOI Act to complete reviews within four months of the receipt of the application in so far as practicable, an obligation I must have regard to in relation to any decision on the distribution of resources within my Vote."[5] In other words, the absence of a specific legislative requirement to deal with AIE appeals within a certain period, and the contrasting presence of such a requirement in respect of FOI appeals, has a direct impact on the distribution of resources within the Commissioner's office. In simple terms, the Commissioner prioritises tackling FOI appeals within the statutory time limit, at the expense of AIE appeals (in respect of which there is no statutory time limit). There ought to be at least parity between the two regimes in this regard, although four months is in any event much too long a delay in the context of accessing environmental information – particularly where the deadline for actions for judicial review is in many cases as short as 8 weeks (more below). **Court actions in respect of access to information decisions** In addition to the possibility of appealing an access to information decision to the CEI, it is possible to appeal decisions of the CEI on a point of law to the High Court, pursuant to regulation 13 of the AIE Regulations. Section 5(1) of the Environment (Miscellaneous Provisions) Act 2011 (**EMP Act 2011**) provides that a special costs rule applies to such appeals (in general each side bears its own costs, and the court has the discretion to award a winning appellant its costs). Indeed, section 5(1) applies this special cost rule to any "civil proceedings, other than

[5] http://www.ocei.gov.ie/en/publications/annual-reports/annualreport2013/media/ocei_ar_2013_english.pdf. The four month FOI deadline is in section 34(3) of the Freedom of Information Acts 1997 and 2003: http://foi.gov.ie/wp/files/2010/09/gd-final-reworked-sept-for-printers.pdf

	proceedings referred to in subsection (2) [proceedings instituted by the CEI or a public authority], instituted by a person relating to a request referred to in Regulation 6 of the Information Regulations". It would therefore seem that this special cost rule will extend to cover actions for judicial review in respect of access to information decisions as well as appeals on a point of law, albeit that only the latter procedure is mentioned specifically in the AIE Regulations. We would be grateful for clarification/confirmation of this point. We note that page 2 of the present consultation refers only to appeals being covered by the section 5 cost protection: "Section 5 of the Environment (Miscellaneous Provisions) Act 2011 ensures that appeals to the High Court on a point of law from a decision of the Commissioner are not prohibitively expensive."[6] By virtue of Article 9(4) of the Aarhus Convention, any such court actions (whether an appeal or a judicial review) must "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive." For the reasons detailed elsewhere below, timeliness is likely to be an issue in practice for any such court action. In respect of actions for judicial review, rule 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 which, where appropriate, may include...[see full text for more]". However, this is clearly a *discretionary* ('may') power, and in practice judicial review is not typically expeditious, as detailed further below. The failure to specifically transpose the *requirement* for a "timely" review procedure under Article 9(1) is in breach of this Article 3(1) Aarhus requirement to establish and maintain a clear, transparent and consistent framework to implement the Convention. Please see detailed comments below under Article 9(4) Aarhus relating to the issue of prohibitive expense.

Question 2	Does the implementation of the existing legislation fully comply with the Convention in practice? If not, how do you think implementation fails to comply?

[6] http://www.environ.ie/en/Publications/Environment/Miscellaneous/FileDownLoad,38541,en.pdf

Answer	**Appeals to the Commissioner for Environmental Information** No, implementation of the existing legislation does not fully comply with the Convention in practice. Article 9(1) of the Convention requires an "expeditious" review procedure in respect of access to information decisions. However, the lengthy delays in processing appeals before the Commissioner for Environmental Information (CEI) are well documented by this stage.[7] Note that the delays appear to be getting worse as time goes on, as evidenced in the table below. It is noteworthy that for appeals lodged in 2007 the average delay for a decision to be issued by the CEI was 9 months. The delay for a decision from the CEI for appeals lodged in 2012 averages 18.5 months. As Dr Aine Ryall of UCC noted in 2007, "environmental information usually has a very short shelf-life and the Commissioner must be provided with resources to enable her to deal with appeals in a timely fashion."[8] While we understand that four new administrative officers are due to join (or have perhaps now joined) the Office of the Information Commissioner, it remains unclear as to whether the additional staff resources will help to tackle the backlog of decisions pending before the CEI. It seems more likely that these personnel will be working alongside the Information Commissioner on FOI matters, rather than assisting the CEI (in particularly given the statutory time limit in respect of FOI appeals, as described above). Indeed, in his Annual Report 2013 the CEI once again highlighted the sparse resources made available to his office. [9] It is worth quoting this section of the Annual Report in full ("OIC" = Office of the Information Commissioner, which deals with FOI matters; "OCEI" = Officer of the Commissioner for Environmental Information, which deals with AIE matters; the same individual performs both functions, supported by a small number of staff): *"The OCEI has historically been inadequately resourced. Although it is legally independent from the OIC, the OCEI does not receive a separate funding allocation from the State. Rather, Article 12(10) of the AIE Regulations provides that the Commissioner for Environmental Information shall be assisted by the staff of the OIC and "by such other resources as may, from time to time, be available to that office".* *Ireland, through the Department of the Environment, Community, and Local Government, submitted its first National Implementation Report on the implementation of the Aarhus Convention in Ireland to the secretariat of the Aarhus Convention on 31 December 2013. The Department had prepared two preliminary draft reports and invited comments from stakeholders, members of the public and*

[7] See, for example, http://www.friendsoftheirishenvironment.org/cmsfiles/Library/Full-text-of-systemic-complaint-re-access-to-information-in-Ireland---5-October-2012---Final.pdf

[8] Ryall, A. (2007) Access to Information on the Environment Regulations 2007. Irish Planning and Environmental Law Journal 2: 57-63.

[9] http://www.ocei.gov.ie/en/publications/annual-reports/annualreport2013/media/ocei_ar_2013_english.pdf

	other interested parties, but this Office was not among the parties that were expressly invited to comment. However, specific issues that were reportedly raised in the context of the submissions received by the Department included the lack of resources of the OCEI and the time taken for appeals to be heard (with the average length of time for an appeal being calculated at 12.3 months). *The Implementation Report correctly notes that "the OCEI is funded through the general government allocation to the Office of the Ombudsman and that it is a matter for that Office to allocate the funding to the various bodies under its remit as it deems appropriate".* *Nevertheless, I wish to clarify that, following correspondence with the Department on the matter, this Office wrote directly to the Department of Public Expenditure and Reform in February 2012 to request a specific financial allocation for the OCEI, particularly in relation to the legal costs that are incurred in the performance of the Commissioner's functions under the AIE Regulations. To date, no such financial provision for the OCEI has been made, which leaves me in a difficult position given the number of complex or novel legal issues that continually arise in applying the AIE Regulations. However, as the Implementation Report acknowledges: "the significant economic challenges facing the State arising from the financial crisis have presented significant funding difficulties for all public service organisations, including the Office of the Ombudsman".* *I am pleased that, at the time of writing, four new Administrative Officers are due to join the OIC shortly. The additional staff resources, together with the implementation of reforms arising from the organisational review recently carried out, should significantly improve case turnaround and throughput overall. As the OIC and the OCEI share staff resources, the two Offices necessarily employ similar structures and processes; thus, the OIC organisational review is likely to impact both directly and indirectly on the processing of AIE appeals.* *Nevertheless, the OIC still has very few resources to spare for the time being. I am expressly required under the FOI Act to complete reviews within four months of the receipt of the application in so far as practicable, an obligation I must have regard to in relation to any decision on the distribution of resources within my Vote. The number of new FOI cases is rising, with a further significant increase in demand expected when the FOI Bill is enacted into law. Moreover, many FOI reviews and the majority of AIE appeals are of a time-consuming nature due to such factors as the volume of records involved, the complexities of the subject matter and/or the legal issues arising, delays in the receipt of required information from the bodies concerned, the need for third party consultation, and the expectations of the applicants. The organisational review is likely to have only a limited impact on the individual turnaround times for these types of cases.*

However, the number of AIE appeals is also rising, with the result that the backlog has grown despite an increase in the closure rate. The consequent delays in bringing AIE appeals to completion are certainly regrettable, though, as my predecessor acknowledged, the delays will be difficult to overcome given the demands of the AIE regime as it currently operates in Ireland on the one hand and the dearth of available resources on the other. Nevertheless, in my Strategic Plan, I am committed to striving to provide a high quality and timely service to members of the public in the performance of my functions under both the FOI Act and the AIE Regulations. Accordingly, measures have already been taken to increase staff resources in the OCEI, and it is hoped that new structures, processes, training programmes and knowledge management systems will be in place in the near future that will ultimately improve output and reduce the backlog in both Offices."

The significant delays in reaching decisions on AIE appeals place Ireland in breach of Article 9(1) of the Aarhus Convention. Lengthy delays in reaching appeal decisions can serve to create an insuperable obstacle in respect of access to justice in practice in Ireland. Under Irish law, potential claimants face tight and strict deadlines (8 weeks) for making an application for judicial review in respect of planning matters. Delays in CEI appeal decisions are detrimental in this regard because timely access to information is often indispensable in deciding whether or not to proceed with a judicial review application. In our view, the government should urgently provide adequate resources to the CEI.

The table below records the delays in determining access to information on the environment appeal cases – the cases are presented chronologically below, by the date of decision.

	Case	**Appeal lodged**	**Decision reached by the Commissioner**	**Gap between appeal being lodged and decision being reached by the Commissioner**
1.	CEI/07/0006 - Open Focus & Sligo County Council	28 November 2007	28 May 2008	6 months
2.	CEI/08/0001 - HoA Action Group & Kildare County Council	17 January 2008	22 September 2008	8 months
3.	CEI/07/0005 - Mr Gary Fitzgerald BL	2 October	10 October	12 months

	& Department of the Taoiseach	2007	2008	
4.	CEI/08/0005 – Peter Sweetman & Associates & Courts Services	3 March 2008	5 December 2008	9 months
5.	CEI/08/0012 – Cllr Cullen & Department of Environment, Heritage & Local Government	4 November 2008	27 October 2009	11 months
6.	CEI/09/0004 – Mr Pat Geoghegan & Environmental Protection Agency	22 February 2009	28 October 2009	8 months
7.	CEI/09/0007 - Ms. Una Caulfield, Director, Residents for Realignment Ltd. & Bord Pleanála	14 April 2009	24 February 2010	10 months
8.	CEI/09/0005 Peter Sweetman & Associates and An Bórd Pleanála	30 April 2009	24 February 2010	10 months
9.	CEI/08/0006 - Mr. John Colgan & Kildare County Council	29 April 2009	15 March 2010	11 months
10.	CEI/09/0006 - Percy Podger and Associates obo Hands Across the Corrib Ltd. & Bord Pleanála	17 April 2009	30 March 2010	11 months
11.	CEI/09/0015 - Mr Pat Swords & RTE	31 October 2009	10 May 2010	6 months
12.	CEI/10/0003 - Mr Pat Swords, 10 Hillcourt Road Glenageary, Co Dublin & IDA Ireland	1 February 2010	2 june 2010	3 months

13.	CEI/10/0004 - Mr. Pat Swords, 10 Hillcourt Road Glenageary, Co Dublin & Eirgrid PLC	16 February 2010	14 June 2010	3 months	
14.	CEI/10/0008 - Mr. Pat Swords, 10 Hillcourt Road Glenageary, Co Dublin & University College Dublin	Unspecified date prior to 7 May 2010	2 July 2010	c. 2-3 months	
15.	CEI/10/0002 - Mr. Pat Swords, 10 Hillcourt Road Glenageary, Co Dublin & Bord Pleanala	Unspecified date after 20 January 2010	16 July 2010	c. 6 months	
16.	CEI/09/0016 - Mr Pat Swords & Department of Communications, Energy and Natural Resources	17 February 2010	27 Septmeber 2010	7 months	
17.	CEI/10/0018 - Mr. Cian Ginty & Irish Rai	2 Septmeber 2010	24 June 2011	9 months	
18.	Case CEI/10/0016 - Mr Pat Swords & Department of Environment, Heritage and Local Government	30 August 2010	29 July 2011	11 months	
19.	CEI/10/0005 - Mr Gavin Sheridan & NAMA	19 March 2010	13 September 2011	18 months	
20.	Case CEI/10/0007- Mr Gavin Sheridan & Anglo Irish Bank	1 April 2010	September 2011	17 months	
21.	Case CEI/11/0003 - Mr Pat Swords and Department of	30 January 2011	28 October 2011	9 months	

	Communications, Energy and Natural Resources			
22.	CEI/11/0001 - Mr. Gavin Sheridan and Central Bank of Ireland	10 January 2011	26 March 2012	13 months
23.	Case CEI/09/0014 - Mr. Tony Lowes, Friends of the Irish Environment, Kilcatherine, Eyeries, Co. Cork and the Office of the Attorney General	10 September 2009	3 May 2012	33 months "Regrettably, a long delay then arose in making further progress with the appeal due to staff shortages and personnel changes in this Office. "
24.	CEI.11/0009 – Ms Rita Canney and Waterford City Council	9 February 2011	7 June 2012	16 months
25.	CEI/10/0017- Ms Rita Canney and Waterford City Council	7 April 2010	16 October 2012	29 months
26.	CEI/10/0015- Ms Rita Canney and Waterford City Council	13 April 2010	23 October 2012	29 months
27.	CEI/11/0007- Mr Pat Swords and the Department of Environment, Community and Local Government	8 April 2011	20 February 2013	22 months
28.	CEI/12/0008 Ms Attracta Uí Bhroin and Department of Arts, Heritage and the Gaeltacht	14 March 2012	13 March 2013	12 months
29.	CEI/12/0005 Mr Pat Swords and the Department of Environment, Community and Local Government	7 March 2012	20 Septmeber 2013	19 months

30.	CEI/12/0003- Mr Andrew Jackson and Bord na Móna	13 January 2012	23 September 2013	21 months
31.	CEI/12/0004 Mr Gavin Sheridan and Dublin City Council	22 February 2012	20 December 2013	22 months

To put these delays in further context, if one adds the (minimum) one month period specified for a public authority to respond to an access to information request (reg 7 of the AIE Regulations), and then add an additional month for the required internal review as a precursor to appealing to the CEI (regulation 12 of the AIE Regulations), one can add (*at least*) two months to each of the above cases. Therefore of the 31 access to information requests listed above, only 12 would have been through the process in less than 12 months from start to finish (and this is before any subsequent court process). In the context of environmental information and the underlying environmental imperatives behind the requests – this renders the process entirely unfit for purpose.

Court actions in respect of access to information decisions

The practice of enforcing judicial review deadlines strictly against claimants but thereafter granting (public authority) respondents adjournment after adjournment to file their statement of opposition – as detailed below – means that in most cases court action in Ireland will not provide a timely remedy, in breach of Article 9(4) Aarhus as applied to Article 9(1) Aarhus.

Need for wider complementary measures addressing general provisions of the Convention

The question here focuses on implementation, and this of course goes much wider than the functioning of review mechanisms. Art 3(1) of the Aarhus Convention specifically requires Parties to take the necessary "other measures" to establish and maintain a clear, transparent and consistent framework to implement the Convention:

"Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."

In this regard we would highlight that there is no systematic monitoring of public authorities' fulfilment of their access to information obligations under the Aarhus Convention (nor indeed of compliance with access to justice obligations in respect of access to information or otherwise), including responding to information requests

	and internal review requests. While some improvements have certainly been made (e.g. certain public authority websites contain information explaining the access to information process), many gaps still exist. Problematically there remain substantial issues in practice, with evidence of officials not supporting the public and seemingly not understanding their obligations under Aarhus, and not providing the requested information. Recent initiatives to address training for public authorities are most welcome (similarly, further initiatives including training aimed at raising public awareness of Aarhus rights would be very welcome). For example, we were recently informed that, pursuant to a commitment in Ireland's first National Action Plan under the Open Government Partnership process,[10] "A training event on Access to Information on the Environment for the staff of public authorities was delivered on 16th September 2014 in the Tullamore Court Hotel. Over 120 public authority staff attended this event. This included representatives of 26 local authorities; six Government Departments and 16 other public authorities. A resource pack, including materials from all speakers, was developed and circulated to all attendees. This has also been made available to all public authority staff."[11] Such training is an excellent development, and should be repeated at regular intervals, with the effects of the training monitored and evaluated. The training pack and materials mentioned above should be made available on DEC G's website so that it can be freely accessed by all. The commitment in the OGP National Action Plan (see footnote 10 above) to provide training for public authorities covering proactive dissemination of information in addition to responding to information requests is very welcome. Again, such training should be regularly repeated and its effects monitored. The active dissemination obligations under Art 5 of the Aarhus Convention are key, we believe, to establishing a framework whereby public authorities fully understand their obligations. Moreover, full compliance with the Convention's active dissemination obligations would obviate the need in many cases to request information and thereafter pursue it via the various review mechanisms discussed above.

Question 3	If the answer to either of the above questions is "No", what changes would you suggest to the existing legislation to improve Ireland's compliance?

[10] In Action 2.2.2 of the draft National Action Plan, DECLG committed to the "Development and delivery of a training module to train staff in public bodies on access to environmental information as provided for in the Aarhus Convention. This module will cover both responding to AIE requests (Article 4 of the Aarhus Convention) and proactive dissemination of environmental information (Article 5). It will also provide information on the requirements of both European and national implementing legislation and on case law."
[11] Email from DECLG dated 22 September 2014.

Answer	**Appeals to the Commissioner for Environmental Information** **Legislative changes** The standard fee of €150 and the reduced fee of €50 associated with bringing an appeal before the CEI should be abolished altogether, or at least brought into line with the government's recent decision to reduce fees for FOI appeals to €50 (standard) and €30 (reduced). The government should specify in legislation a deadline for reaching decisions on AIE appeals. The effect of the current situation, whereby there is a four month deadline for deciding FOI appeals[12] but no equivalent deadline for AIE appeals results in FOI being prioritised in terms of resources within the Office of the Information Commissioner and the Office of the Commissioner for Environmental Information. A shorter deadline than four months should be set for determining AIE appeals, in particular in light of the very short deadlines for bringing applications for leave for judicial review. The government might also consider amending these short deadlines for bringing actions for judicial review (to provide for more time), not least in recognition of the significant delays in respect of appeal decisions from the CEI. **Practice** Additional staff resources should be made available to the office of the CEI to allow appeals to be handled expeditiously. **Court actions** Please see comments below under Q2 of Section 2 regarding potential legislative and practice reforms in respect of Irish court processes. **Effective Implementation of complementary measures and obligations** As highlighted above, in our view there is a need for a systematic approach to addressing Art 5 Aarhus requirements in respect of proactive dissemination of information, and also for an ongoing systematic evaluation of public authorities' compliance with their obligations under Arts 4 (information requests), 5 (active dissemination) and 9 (access to justice, including in respect of access to information obligations) of the Aarhus Convention, and associated enforcement. This would require on an ongoing basis: training, monitoring, evaluation, and (where appropriate) the making of recommendations and the taking of enforcement action.

[12] In section 34(3) of the Freedom of Information Acts 1997 to 2003.

	Further consideration of the existing legislative provisions may be needed in light of this. In terms of a legislative change, in our view the AIE Regulations should be amended to provide for complaints to the CEI about failures to implement active dissemination obligations (e.g. under regulation 5 of the AIE Regulations). At the moment the CEI's remit is effectively limited to appeals relating to access to information requests.

SECTION 2 - Article 9(2)

Question 1	In Ireland, Judicial Review is the review procedure required by Article 9(2). Are there alternative review procedures that could be used to implement this Aarhus review requirement? For example, is it appropriate that the review procedure be before a court or should it be before an independent and impartial body established by law such as a tribunal? Please give reasons for your preference.
Answer	Article 9(2) requires that access be provided to (bold/underlining added) "a review procedure before a court of law **and/or another independent and impartial body established by law**". In the Irish context, this would arguably include An Bord Pleanala, the Aquaculture Licences Appeals Board (ALAB) and so on, were it not for the statement in the final paragraph of Article 9(2) to the effect that: "The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law." In other words, it would seem that Article 9(2) seeks to draw a distinction between "a review procedure" and "a preliminary review procedure"; in the Irish context, it would seem that judicial review before the courts in Ireland would be the "review procedure" and appeals before An Bord Pleanala, ALAB etc would be the "preliminary review procedure". In our view, the effect of the wording of Article 9(4) (i.e. "the procedures referred to in [Article 9(1), 9(2) and 9(3)]") is that **both** the "review procedures" and "preliminary review procedures" envisaged by Article 9(2) Aarhus must "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive." This interpretation is supported by the wording of Article 11(4) of the EIA Directive. (The alternative would be that it would be possible for a preliminary review procedure to be prohibitively expensive (say), and this would act as a barrier to accessing justice in circumstances where there was a requirement to exhaust administrative review procedures prior to recourse to judicial review. In other words, one could be forced to engage with a prohibitively expensive preliminary review process in order to access an Aarhus-compliant review process.) Rather than considering alternative review procedures to judicial review for Article 9(2) purposes, Ireland should instead consider creating a comprehensive tier of *preliminary review*. To explain: at present only a small number of decisions, acts or omissions subject to the provisions of Article 6 Aarhus (cf. Article 9(2)) benefit from a two-tier review system in Ireland – that is, a preliminary review procedure (e.g. An Bord Pleanala in respect of many planning matters, and ALAB in respect of aquaculture licensing decisions), and thereafter the possibility of judicial review

	before the courts. In contrast, a preliminary review process is not available in respect of many decisions, acts or omissions covered by Article 6 Aarhus, with judicial review instead being the sole review possibility in Article 9(2) terms. We would suggest that the government should consider creating a body responsible for preliminary review across a comprehensive range of consent regimes and decisions (i.e. capturing "any decision, act or omission subject to the provisions of article 6" of the Aarhus Convention). This could be in the form of a Planning and Environmental Tribunal[13] which would subsume the functions of existing preliminary review bodies such as An Bord Pleanala, but whose remit would extend much wider to capture, for example, consent regimes which do not currently provide for the possibility of preliminary review, such as IPC licensing, afforestation consents, etc. Decisions of this Tribunal would then be judicially reviewable before the courts in the normal way, providing a two-tier system of review. A Planning and Environmental Tribunal with a comprehensive preliminary review function would potentially decrease pressure on the current judicial review regime (albeit judicial review is not a very widely used remedy in environmental cases owing to issues such as prohibitive expense – more below).[14] Notably, Professor Richard Macrory highlighted that an Environmental Tribunal is likely to provide a "more appropriate basis for meeting the aspirations of Aarhus."[15] Indeed, a preliminary review procedure offering comprehensive coverage, established by way of an increased number of preliminary review bodies or via a one-stop-shop Planning and Environmental Tribunal, would arguably provide significantly better access to a review of substantive legality than is presently the case. That is, Article 9(2) Aarhus requires Parties to provide access to a review procedure to challenge the "substantive and procedural legality of any decision, act or omission...". Whilst it is arguable that judicial review does not in Ireland provide for a review of substantive legality (more below), the same argument cannot be made with such force in respect of preliminary review bodies such as An Bord Pleanala, which consider the decision under appeal *de novo*/on the facts. While we would support the creation of additional preliminary review bodies (along the lines of An Bord Pleanala) to cover a more comprehensive range of decisions, acts or omissions, or better still the establishment a one-stop-shop Planning and Environmental Tribunal to provide for preliminary review of procedural and

[13] For information regarding the Environmental Tribunal in England and Wales, which has a rather limited (albeit expanding) remit, see Macrory, R. (2011), "*Consistency and Effectiveness: Strengthening the New Environmental Tribunal*": http://www.ucl.ac.uk/laws/environment/content/Consistency&Effectiveness_webfinal.pdf

[14] Macrory, R. and Woods, M. (2003) "*Modernising Environmental Justice : Regulation and the Role of An Environmental Tribunal":* http://www.ucl.ac.uk/laws/environment/tribunals/docs/full_report.pdf

[15] *Ibid.*

	substantive legality, any such body or bodies should not replace or exclude recourse to judicial review in the High Court[16]. Rather, what would be created would a comprehensive two-tier system of review: first before a preliminary review body, whose decisions would in turn be challengeable before the High Court. As noted above, both the preliminary review procedure and the review procedure before the courts would need to comply with the access to justice requirements of Aarhus (cf. Article 9(4), not prohibitively expensive, etc).

Question 2	If before a court, should it be before the High Court or before the Circuit Court or a newly established specialist Environmental Court or a Regulatory appeal/review Court at either High Court level or Circuit Court level? Please give reasons for your preference.
Answer	In our view, judicial review should remain the jurisdiction of the High Court. Given the importance of the judicial review mechanism as a check and balance on the exercise of public functions, it would be appropriate for this role to remain a function of one of Ireland's superior courts. It would not seem necessary to establish a dedicated Environmental Court to deal specifically with environmental judicial review. However, as outlined above, consideration should be given to the creation of a Planning and Environmental Tribunal to provide for a preliminary review across a comprehensive range of decisions, acts or omissions subject to the provisions of Article 6 of the Aarhus Convention. Indeed, rather than creating a new specialist Environmental Court reforms in existing practices and better resourcing of the courts and the Courts Service would have scope to provide considerable improvements in access to justice in environmental matters. For example, one result of there being too few judges in the superior courts in Ireland is that there is a considerable backlog and delay in the processing of cases (e.g. actions for judicial review). Judges in the High Court are often overloaded with work and as a result often do not have the opportunity to prepare properly in advance of hearings, in the sense of reading into the case and materials. The result is that in actions for judicial review (including in planning and environmental matters), a huge amount of court time – costing claimants and the State vast sums in terms of lawyers' fees – can be wasted reading out documents, line by line, for the judge's benefit. This experience is not replicated in the courts in England and Wales (our nearest common law neighbour), for example, where judges typically have the time to prepare in advance, and hearings instead focus in on skeleton arguments, resulting in shorter hearings overall.

16. Indeed, given the position of the High Court in the Constitution, excluding recourse to judicial review in the High Court could not in any event be straightforwardly achieved.

	It cannot be overemphasised how many days of court time are taken up in this way in Ireland, and how much unnecessary expense this generates, contributing significantly to the prohibitive expense experienced by many in Ireland in seeking to access justice. In brief, Ireland could make strides in terms of Aarhus compliance by adequately resourcing the courts and giving judges sufficient time to prepare in advance of each case. This would of course cost the State money, but the alternative is that claimants (e.g. citizens, NGOs, companies) and the State face significant unnecessary legal cost burdens as a result of hearings lasting many more days than would otherwise be the case. We would also like to highlight the following article by Dr Seth Barrett Tillmann of NUI Maynooth, published in the Irish Times on 28 July 2014, '*Court of Appeal just a new version of Supreme Court – only more costly*'.[17] While we would have concerns about dispensing with oral argument on appeal in a sweeping manner (e.g. we have experience of cases being dismissed on the papers and subsequently being allowed to proceed following oral renewal), we are nevertheless of the view that Dr Tillmann highlights many important issues regarding legal practices in Ireland and their impact on accessing justice. In our view the government should consider Dr Tillmann's arguments carefully in the context of this consultation.

Question 3	Should the legislation be amended to provide expressly that the judicial review system is the review system required by the Aarhus Convention? If not, why not?
Answer	As noted above, Article 3(1) of the Aarhus Convention states that "Each Party shall take the necessary legislative, regulatory and other Measures....to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention." With this in mind, in respect of Article 9(2) it is our view that the legislation should be amended to provide expressly: • That the judicial review system is the review procedure envisaged by the first paragraph of Article 9(2); • (in the absence of a one-stop-shop preliminary review tier, as discussed above) that Bord Pleanala, ALAB, etc, are preliminary review procedures envisaged by the final paragraph of Article 9(2); and • that these review and preliminary review procedures are each intended to provide access to procedures to challenge the substantive and procedural legality of any decision, act or omission, etc; and that each is intended to provide adequate and effective remedies, including injunctive relief as appropriate, and to be fair, equitable, timely and not prohibitively expensive

[17] http://www.irishtimes.com/news/crime-and-law/court-of-appeal-just-a-new-version-of-supreme-court-only-more-costly-1.1874746

(in Article 9(4) Aarhus terms).

In respect of the final bullet point above: in actions for judicial review in Ireland, generally the court is not concerned with the merits of the decision but rather with the lawfulness of the decision-making process. The mechanism of judicial review as it operates in Ireland therefore fulfils the requirement to provide access to procedural legality review (setting the issue of prohibitive expense to one side for a moment). However, in our view the present model for environmental judicial review in Ireland does not fully meet the standard of review required by the Aarhus Convention as regards substantive legality. As such changes are needed to judicial review in Ireland in order to bring that mechanism into compliance with the Aarhus Convention.

Transposing into Irish legislation (as above) an explicit statement that judicial review is a review procedure for Article 9(2) Aarhus purposes, and that judicial review is intended to provide access to a procedure to review substantive and procedural legality, could assist in terms of Aarhus compliance. That is, such legislative provisions could have the effect of encouraging judges in Ireland to move the law of judicial review incrementally in a direction that provides for a review of substantive legality in environmental cases.

The current judicial review System in Ireland

The standard for judicial review in Ireland on the ground of irrationality was set down by the Supreme Court in *O'Keeffe v. An Bord Pleanala*[18] in 1992, in which Finlay CJ held: *"[T]he circumstances under which the courts can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare*." A court could not interfere just because it would have come to different conclusions or because "*the case against the decision made by the authority was much stronger than the case for it*." For the court to intervene, "*it is necessary [to establish] ... that the decision-making authority had before it no relevant material which would support its decision*."

While the *O'Keeffe* test has been applied in a myriad of cases, it has come in for substantial criticism. Daly highlights his concern about the *O'Keeffe* test, commenting, "victory on an unreasonableness ground, as Irish law currently stands, is virtually impossible."[19] Interestingly, the *lower* standard set by the *Wednesbury* test[20] in England and Wales has also been heavily criticised for providing too limited a

[18] *O'Keeffe v. An Bord Pleanala & Others* [1993] 1 I. R. 39
[19] P. Daly "*Deference and Redefining Reasonableness"* (2007) 12 Bar Review 216.
[20] In the Wednesbury case, Lord Greene MR articulated that the decision of a public body would be unreasonable where the decision maker "*came to a conclusion so unreasonable that no reasonable authority could ever have come to it*" *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

	standard of review in judicial review cases. The *Wednesbury* test was also criticised by the European Court of Human Rights, in *Smith and Grady v. the United Kingdom*,[21] because: *"[T]he threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention."* Human rights law as well as EU law in general have had the effect of introducing the principle of proportionality into English law. The English courts now regularly adopt a proportionality test in assessing whether to grant leave for judicial review in human rights cases, which approach permits an appropriate review of the substance of the case. A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake. Biehler writes "proportionality is a more effective tool for review of the exercise of administrative discretion than modified unreasonableness, particularly where rights are at stake as it is more context sensitive."[22] In Ireland, in the case of *Meadows v Minister for Justice, Equality and Law Reform*[22] a majority of the Supreme Court endorsed the use of proportionality in administrative cases where fundamental rights are at issue.[23] However, this proportionality approach has not to date been extended beyond fundamental rights cases to cover, for example, environmental and planning judicial review actions. (Interestingly in this regard, the preamble to the Aarhus Convention explicitly links environmental protection and human rights: "adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.") In our view the proportionality approach should clearly apply in respect of such actions (NB. this is not to say that such a development would negate the need for other changes to provide for improved review of substantive considerations). **The requisite review system under the Aarhus Convention** This question of the appropriate standard of review to be applied has arisen in the

[21] *Smith & Grady v. UK* (2000) 29 EHRR 493

[22] Biehler, H. "*The Curial Deference in the Context of Judicial Review of Administrative Action Post-Meadows"* 2013 The Irish Jurist.

[23] 'Fundamental rights' in the judgment is used to refer to both Constitutional rights and ECHR rights.

	context of cases governed by Article 11 of the EIA Directive (Directive 2011/92/EU). In *Sweetman v An Bord Pléanala*[24], Clarke J, having referred to the greater level of scrutiny which has been applied in the human rights context, noted that "[t]o the extent that it may be argued successfully that there are substantial grounds to the effect that a greater level of scrutiny is mandated by the [EIA] Directive in relation to environmental judicial review applications, then such greater level of scrutiny can, by analogy with the position adopted in respect of fundamental human rights cases, be accommodated within the existing judicial review regime." However, he stated that he was satisfied to the extent it might be necessary to allow for a review in certain circumstances so as to meet the test of "manifest error" which goes beyond existing parameters of Irish Judicial Review law, the latter was more than capable of being adapted to accommodate such a requirement. In *Klohn v An Bord Pléanala*[25] McMahon J highlighted concerns about the correct standard to be applied in case of environmental judicial review in Ireland, but commented that "whether the *O'Keeffe* standard will have to be reviewed and/or recalibrated in future to satisfy EU requirements must wait for future consideration in an appropriate case." In the context of the Aarhus Convention, the English judicial review system was considered by the Aarhus Compliance Committee in its findings on communication ACCC/C/2008/33 concerning compliance by the UK. In its findings the Aarhus Compliance Committee acknowledged that the current system allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraphs 2 and 3, of the Convention, for material error of fact; error of law; regard to irrelevant considerations and failure to have regard to relevant considerations; jurisdictional error; and on the grounds of *Wednesbury* unreasonableness. However, the Compliance Committee was not convinced that this met the standards for review required by the Convention as regards substantive legality and considered that the application of a "proportionality principle" by the courts in England and Wales could provide an adequate standard of review in cases within the scope of the Aarhus Convention. Ireland should pay heed to the aforementioned findings of the Aarhus Compliance Committee and adopt the principle of proportionality as a ground for judicial review for cases within the scope of the Aarhus Convention. This would be in addition to the idea of setting up a Planning and Environmental Tribunal to provide for preliminary review of the substantive and procedural legality of a comprehensive range of decisions, acts and omissions.

[24] [2007] 2 ILRM 328.
[25] [2008] IEHC 111.

Question 4	Are there other legislative amendments that the Irish authorities should consider to improve clarity for members of the public on the appropriate methods of review of environmental decision-making?
Answer	Legislation could usefully be drafted requiring all public authority decision-makers to provide information publicly which meets certain basic criteria regarding: methods of review; how these can be accessed; and how rights to review can be exercised in practice (including legal cost aspects). This information could be provided on public authority websites and could accompany all relevant decisions. New legislation on this subject could provide a power enabling the publication of Ministerial guidance on such matters. The information which accompanies (for example) IPC licensing decisions of the EPA at present is scant, and is wholly inadequate in terms of informing the public of their rights and what to do next. Here is a recent example: "A person shall not question the validity of the decision of the Agency other than by way of an application for judicial review under Order 84 of the rules of the Superior Courts (S.I. No. 15 of 1986) and any such application or any other legal proceedings must, in accordance with Section 87(10) of the EPA Act 1992 as amended, be instituted within the period of eight weeks beginning on the date of the giving of the decision."[26] As well as being of little practical help to a member of the public, the information provided by the EPA refers to SI No 15 of 1986, but neglects to mention that this has been very substantially amended in the context of Order 84 (the provision in question) by SI No 691 of 2011. This problem is replicated on the website of the Courts Service – when one opens the main page relating to Order 84 (http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/a53b0f76ffc6c5b780256d2b0046b3dc?OpenDocument) one might expect to find there the up to date text of the relevant legislation. In fact, it is necessary to read the original text and each of the four statutory instruments in the hyperlinks at the top of the page to work out what is in fact the current position. In other words, the legislative text which one finds on opening the link pasted above is totally out of date, and could easily lead a member of the public to miss important deadlines. Consider, for example, that rule 22(3) of SI No 15 of 1986 gave applicants for judicial review 14 days to serve the other side with the notice of motion or summons (as the case may be). A member of the public opening the above link might satisfy themselves that this is the current position. However, on opening the third hyperlink down from the top on the page above, one discovers that in 2011 rule 22(3) was replaced and now provides for a deadline of 7 days rather than 14 days! This again highlights the necessity of providing consolidated texts of legislation, or at the very least the need

[26] http://www.epa.ie/licences/lic_eDMS/090151b2804f5db7.pdf

	to make it very clear in respect of actions for judicial review that members of the public (and lawyers) should not rely on the bare text of the Rules of the Superior Courts published on the Courts Service's website. It is often necessary to delve into several statutory instruments to establish the current position. There is also a need for the government to provide practical guidance in lay persons' terms on the steps involved in seeking a review (including judicial review), the processes, the possible scenarios and most particularly regarding the effect of the costs rules and how people can engage with lawyers, including by way of Conditional Fee Arrangements. Separately, there should be an obligation (assuming such does not already exist) on solicitors and barristers to ensure prospective clients are briefed in an accessible manner on such matters and options. Legal professionals can themselves at times be confused regarding (for example) the final dates for making an application for judicial review. An Bord Pleanála provides a most useful tool (their 'Calendar') whereby if you select the date of a decision, it automatically computes the closing date for making an appeal, taking into account any exempt days. A similar mechanism could prove very helpful if provided by the Courts Service and other tribunals etc established to deliver review mechanisms. In considering methods of review, the issue of standing and how the courts will determine sufficiency of interest for non eNGO applicants remains a concern. Further, the requirement raised in certain cases for applicants to have first personally raised points before they can pursue them by way of judicial review is arguably a test without any basis in the Aarhus Convention. Such a requirement is particularly inappropriate given, for example, that An Bord Pleanála will not entertain certain (e.g. legal) points given its understanding of its remit. Finally, the requirements in Irish law which may be considered at the stage of leave for judicial review – such as that the arguments be weighty – should be considered carefully given that some would appear to have no basis in the Aarhus Convention.

Question 5	Is the requirement for exhaustion of administrative review procedures prior to recourse to judicial review procedures appropriate? If so, please outline your reasons and identify the advantages of the existing or proposed approach.
Answer	Litigants in Ireland are not always in practice required to exhaust administrative review procedures prior to recourse to judicial review. This is illustrated (for example) by the relatively recent case of *Brook and Kochman v Sligo County Council*[27] (the successful judicial review of a grant of permission for a runway extension at Sligo airport) where the applicants judicially reviewed Sligo County Council's planning permission decision rather than first appealing the decision to An Bord Pléanala. In our view potential litigants should be free to choose the most suitable review procedure for any given decision. In other words, it should not be necessary to exhaust administrative review procedures before recourse to judicial review.

[27] 2009 No 1016 JR.

This is particularly important given the significant expense often involved in appealing cases to An Bord Pléanala, which can serve to create a barrier to accessing justice. Currently a two track system is in operation before An Bord Pleanala: Strategic Infrastructure Development (SID) decisions under the Planning and Development (Strategic Infrastructure) Act 2006 go directly to Bord Pleanala for decision instead of first going via a local authority. The result is that SID decisions are currently challengeable only by way of an action for judicial review. In other words, the Bord Pleanala decision in an SID case is the first instance decision and the review (in Aarhus terms) is before the courts.

In contrast, in non-SID cases – i.e. the vast majority of planning cases - where the decision is made for example by a local authority, there can in the first instance be an appeal to An Bord Pleanála. So in these (non-SID) cases there are two opportunities for review in Art. 9(2) Aarhus terms: before Bord Pleanala (preliminary review) and thereafter before the courts (review). But in these non-SID cases the costs rules under s.50B of the Planning and Development Act 2000 (as amended) do not apply to an appeal to An Bord Pleanala in (say) an EIA case, even though the costs rules would apply were the case an action for judicial review. Indeed, the matter of costs in an appeal is entirely at Bord Pleanala's discretion in non-SID cases, pursuant to s.145 of the Planning and Development Act 2000 (section 37H of the same Act covers costs in SID cases). Frequently, successful appellants are awarded only a fraction of their incurred costs. Indeed, with very rare exceptions, Bord Pleanala has shown a marked reticence to grant appellants their full costs/expenses, particularly in non-SID cases. The stark reality for many who wish to have a local authority decision overturned by Bord Pleanala is that they must frequently deal with repeat applications for planning permission and personally bear the cost of multiple appeals in respect of the same development.

In addition to the fee payable to Bord Pleanala to lodge an appeal and the non-refundable fee to request an oral hearing,[28] one of most costly elements of the Bord Pleanala review procedure is the oral hearing. While under SID appeals some costs may be recovered in practice by an appellant,[29] in an oral hearing for a standard planning case appellants can find themselves giving up several weeks of their (and their advisers') time at a hearing, often with no realistic prospect of recovering monies in respect of the costs for their own time or the costs of engaging legal advisers and experts. Indeed, we are aware of only one non-SID case before Bord Pleanala in which an appellant was successful in recovering any costs.[30] This in itself creates a serious equality of arms issue, and a serious prohibitive expense problem. It is worth briefly examining some examples of the costs associated with the oral

[28] http://www.pleanala.ie/news/newfees.htm
[29] Under section 37H of the Planning and Development Act 2000 (as amended).
[30] See http://www.antaisce.org/articles/bord-plean%C3%A1la-grants-expenses.

hearing procedure before An Bord Pléanala, in both SID and non-SID cases.

1. **Meath Nobber Incinerator - Strategic Infrastructure Development case**

Case reference PA0005[31] involved the withdrawal of a planning application by College Proteins for a proposed meat and bonemeal incinerator when it emerged at the opening of the oral hearing that a portion of the proposed site did not belong to the company. The local residents who objected to the proposed incinerator did not recover their costs. Deputy Shane McEntree argued that Bord Pleanala had essentially awarded themselves €100,000 by deciding to hold onto this sum lodged by the developer when the original application was made.[32] Local residents were not awarded any compensation for the costs or loss of earnings incurred.

Case reference PA0013 involved a second oral hearing for a subsequent planning application for the College Protein, Nobber incinerator. The oral hearing was held from 13 October to 12 November 2009. The inspector's report and recommendations regarding the case were completed over a year later on 5th May 2010. An Bord Pléanala granted permission on 28th February 2013. Here, An Bord Pléanala awarded itself costs of €112,411 in respect of its work for determining the application. It required that €17,398 be paid to Meath County Council as a contribution towards the reasonable costs incurred in the consideration of the application. Nothing was awarded to the North East Against Incineration campaign group or any of the other objectors for the costs incurred for their involvement.[33]

2. **Port of Cork – Strategic Infrastructure Development case[34]**

Case reference PA0003 related to a planning application for a container terminal at Ringaskiddy, Cork. The Bord Pleanala oral hearing began on 2nd April 2008 and ran for 15 days. An Bord Pléanala 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 solicitor for the Cork Harbour Environmental Protection Association, which was vindicated by the refusal of permission for the development but was awarded only a fraction of the €129,923 in legal costs that were incurred for the 15 day hearing.[35]

3. **Indaver Ireland Incinerator at Ringaskiddy – Strategic Infrastructure Development case[36]**

Case reference PA0010 involved planning refusal for a waste to energy facility and

[31] http://www.pleanala.ie/casenum/PA0005.htm
[32] http://www.meathchronicle.ie/news/meathnorth/articles/2009/02/11/35965-no-costs-for-nobber-incinerator-objectors/
[33] http://www.pleanala.ie/documents/orders/PA0/DPA0013.pdf
[34] http://www.pleanala.ie/casenum/PA0003.htm
[35] See http://www.pleanala.ie/documents/orders/PA0/DPA0003.pdf and http://www.pleanala.ie/documents/reports/PA0/RPA0003.pdf
[36] http://www.pleanala.ie/casenum/PA0010.htm

	transfer station at Ringaskiddy, Cork. The oral hearing was held over a five week period in two separate blocks (27th April-14th May and 8th June-18th June 2010) with a three week adjournment to allow examination of additional information provided during the first half of the hearing. A total of €487,955 was ultimately awarded in costs: €382,341 to An Bord Pléanala; €43,714 to Cork County Council; and a mere €69,000 divided amongst various public interest applicants (some of whom were legally represented), again no doubt a fraction of the costs incurred for a 5 week oral hearing.[37] **4. Araglin, Fermoy, Co Cork- Ordinary planning appeal[38]** Case reference 218581 related to planning refusal of a combined waste and power facility that would use anaerobic digestion to treat non-hazardous organic wastes. Despite the fact that the appeal by the Valley Residents' Association was successful following an oral hearing from 21-24 November 2006, there was no reimbursement of the Association's costs. **5. Kildorrery, Co Cork - Ordinary planning appeal[39]** Case reference 216725 concerned a refusal planning for the construction of a biodiesel production facility. The oral hearing was held from 12-15 September 2006.[40] Despite the fact that the appeal was successful there was no reimbursement of costs. **Injunctive relief** An additional important issue in the context of a potential need to exhaust administrative remedies is the availability (or otherwise) of injunctive relief. That is, if a member of the public must first pass through an administrative review process before (potentially) accessing a court review process, it is very important to ensure that access to injunctive relief is provided as part of the administrative review (in compliance with Art 9(4) Aarhus, including 'not prohibitively expensive' and so on). Otherwise, irreversible environmental damage could be done while the administrative review process runs its course.

[37] See http://www.pleanala.ie/documents/reports/PA0/RPA0010.pdf and http://www.pleanala.ie/documents/orders/PA0/DPA0010.pdf
[38] http://www.pleanala.ie/casenum/218581.htm
[39] http://www.pleanala.ie/casenum/216725.htm
[40] http://www.pleanala.ie/documents/reports/216/R216725.pdf

SECTION 3 - Article 9(3)

Question 1	Is it appropriate / useful to define and / or list what is covered by the term "national law relating to the environment"?
Answer	In our view the government should not attempt to define "national law relating to the environment" exhaustively in Irish legislation. A better approach would be for a definition to provide that "'National law relating to the environment' shall include but shall not be limited to....X, Y, Z". Thereafter, it would be a matter for the courts to determine the issue on a case by case basis (ideally with the possibility of an upfront determination of the issue – more below under Q3 of this section). An alternative approach would be for the legislature to provide an extra-statutory indicative list of legislation. This could be modelled on the indicative list of public authorities published by the government in the context of access to information on the environment: http://www.environ.ie/en/Environment/AccesstoInformationontheEnvironment/. However, it is our view that a legislative definition with the fall back of case by case determinations by the courts would be the preferable option.

Question 2	Should a list of specified legislation be set down in law or is it preferable to leave it to the judiciary to decide in individual cases whether the law in question falls under Article 9(3)?
Answer	Please see answer immediately above. By way of addition to the above, it could be a useful practice to require that each new piece of primary and secondary legislation should contain a statement regarding whether, in the legislature's view, the legislation constitutes "national law relating to the environment" for the purposes of the Aarhus Convention. This would simply be an indication of the legislature's intention, and could be subject to later judicial determination to the contrary. (A parallel precedent for this sort of thing would be statements of compatibility in legislation regarding compatibility with human rights law.)

Question 3	Or should it be a combination of a list of environmental legislation with a fall back mechanism of judicial decision should the need arise?
Answer	A non-exhaustive list of environmental legislation with a fall back mechanism of judicial determination of the point would be an appropriate approach.

	Legislation could usefully provide potential litigants with the option of an upfront determination of whether a provision falls within the ambit of "national law relating to the environment." Such upfront determination could be modelled on section 7 of the Environment (Miscellaneous Provisions) Act 2011. It would be important to ensure that litigants are given cost protection in respect of the costs of the hearing to determine whether the legislation at stake falls within the ambit of "national law relating to the environment".
Question 4	Why do you favour one or other approach?
Answer	This combined approach of a non exhaustive list with a back up option of judicial determination of the issue (with the option of having the issue determined at the outset of proceedings) would provide legal certainty for potential litigants, who would know at the earliest stage possible whether they will (at least in principle) be afforded protection under Article 9(4) of the Aarhus Convention.

SECTION 4 - Article 9(4)

Question 1	Are the remedies provided under Irish legislation sufficient to meet the requirements of the Aarhus Convention? If not, how do the remedies fail to meet the requirements?
Answer	**Third Party Enforcement** Third party enforcement powers are available in Ireland in respect of only a narrow range of environmental law breaches; they certainly do not cover all "acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment" in Art. 9(3) Aarhus terms. Section 4 of the Environment (Miscellaneous Provisions) Act 2011 (**EMP Act 2011**) lists a number of licences, permits and leases in respect of which third party enforcement powers exist in Ireland. However, there remain many acts/omissions of private persons and public authorities which contravene provisions of Irish environmental law which are not open to third party enforcement action using an administrative or judicial procedure. The Glenamaddy sewage case is a case in point: there is a third party enforcement power in respect of unlicensed discharges of sewage (see sections 4 and 11 of the Local Government (Water Pollution) Act 1977; and see section 4(4)(c) of the EMP Act 2011), but local authority discharges have been carved out of the scope of this enforcement power (see section 4(2)(b) of the 1977 Act). The unpermitted discharge of sewage in the Glenamaddy case therefore falls through the net: a public interest litigant cannot challenge Galway County Council's unlicensed discharge of sewage into a priority habitat SAC turlough either by way of judicial review (there is no 'decision' to challenge) or third party enforcement. Ironically, the Holly Hunter No 1 judgment appears to have established that the special costs rules in Part 2 EMP Act 2011 in principle apply to any civil proceedings instituted by a person to ensure compliance with or the enforcement of *any* statutory requirement where the breach has caused, is causing, or is likely to cause environmental damage. The irony is that this broad application of the costs rules is not matched by a similarly broad third party enforcement power, such that there may be lots of breaches of statutory requirements causing or likely to cause environmental damage which cannot be gone after by public interest litigants (in breach of Art. 9(3) of the Aarhus Convention). The government should consider introducing a generic third party enforcement power in respect of breaches of environmental law in Ireland. This could track the existing language of s.4 EMP Act 2011: "for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement under a law of the State that relates to the environment". The existing cost protection set out in the EMP Act 2011 (as clarified in the Holly Hunter No 1 judgment) could then latch onto this enforcement power.

	Given the court's clarification of the meaning of the E P Act 2011 in the Holly Hunter No 1 judgement, it would be helpful to rephrase section 4 of that Act to reflect the court's judgment, which judgment has contributed to improved compliance with the Aarhus Convention. **Interim injunctions** As the UK's Sullivan report ('Ensuring access to environmental justice in England and Wales')[41] explains, "in many environmental cases, the consent being challenged allows the beneficiary of the consent to undertake some irreversible or significantly damaging process – for example, destroying the natural habitat or species that the challenge seeks to protect. Unless prevented from doing so until the judicial review is completed, success in the judicial review can be entirely academic. Being able to obtain an injunction (or, alternatively, access to court procedures so speedy that the case can be determined before the damaging process is commenced) is key to that." However, in general the giving of a cross undertaking as to damages is a prerequisite for the granting of an interim injunction (in other words, the claimant is required to undertake to compensate for the damage which could result from interim relief (e.g. injunction) if the right which the relief was intended to protect is not finally recognised as being well founded) – this can create a potential liability of thousands or even hundreds of thousands of euro in the hands of a public interest claimant, albeit the courts retain relatively broad discretion in this field (i.e. they could decide not to require a cross undertaking). In a recent case before the Aarhus Compliance Committee (communication ACCC/C/2008/33), the communicants highlighted that the courts in England and Wales similarly require claimants seeking an interim injunction to provide a cross-undertaking in damages before an injunction will be granted. The Compliance Committee noted the Sullivan Report's comment that cross undertakings in damages can entail a potential liability of "several thousand, if not several hundreds of thousands of pounds". "This leads to the situation" the Compliance Committee continued, "where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4."[42] More recently, in February 2014, the Court of Justice of the European Union found against the UK in Case C-530/11, holding that "the system of cross-undertakings in respect of the grant of interim relief constitutes an additional element of uncertainty and imprecision so far as concerns compliance with the requirement that

[41] http://www.ucl.ac.uk/laws/environment/docs/working_party_report_access_to_justice_2008.pdf; also see the update report http://adam1cor.files.wordpress.com/2010/09/access-to-environment6.pdf
[42] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf

	proceedings not be prohibitively expensive." The Environmental Pillar would endorse the conclusion of the Sullivan Report on this issue: "The normal requirement that a claimant for an interim injunction provides a cross-undertaking in damages should no longer apply to an Aarhus case where the injunction is necessary to prevent significant environmental damage taking place before the full case is heard. In such cases, it is incumbent on the court and its administration to ensure that the full case is heard as quickly as possible to reduce potential unfairness to third parties, and is consistent with the requirements for timeliness under Aarhus." **Judicial Review** On the issue of prohibitive expense, please see the detailed separate answers below. On the issue of timeliness and fairness/equity: pursuant to rule 21(1) of Order 84 of the Rules of the Superior Courts (as inserted by SI No 691 of 2011), the general rule is that an application for leave to apply for judicial review must be made within 3 months from the date when grounds for the application first arose. A special rule applies in respect of judicial review in planning cases: here, section 50(4)(a)(i) of the Planning and Development Act 2000 (as amended) requires an application for leave to apply for judicial review to be made within 8 weeks. These deadlines are strictly enforced against prospective claimants. That is, if a prospective claimant misses the deadline by even a single day there is a good chance that the case will not be entertained by the court. In contrast, a respondent who intends to oppose an application for judicial review must, under rule 22(4) of Order 84 of the Rules of the Superior Courts, file its grounds of opposition "within three weeks of service of the notice on the respondent concerned or such other period as the Court may direct". However, this three week deadline is routinely ignored by respondents (who are of course public bodies in the case of judicial review), and the courts typically overlook this fact and grant adjournment after adjournment, in many cases giving respondents several months beyond the three week deadline to work on their statements of opposition. This results in judicial review being neither "fair", "equitable" nor "timely" in Art. 9(4) Aarhus terms. Note that respondents tend simply to miss the three week deadline specified under rule 22(4); that is to say, they do not first approach the court and ask for extra time; instead they simply miss the deadline and assume that extra time will be granted (based on past experience). Significant progress could be made in terms of timeliness and fairness/equity in actions for judicial review by the simply expedient of the courts taking deadlines set for respondents in the Rules of the Superior Courts seriously, and enforcing them accordingly against both parties. Even a rule which gave the parties equal time – say 8 weeks for a claimant to bring a planning judicial review, and 8 weeks for the respondent to file its statement of opposition - would be an improvement on the

	current situation in the majority of cases. In other words, an 8 week deadline strictly enforced against respondents would be an improvement on a 3 week statutory deadline which is in practice allowed to stretch into several months. Lack of pre-trial preparation: as noted above, the fact that there are too few judges in the superior courts in Ireland, coupled with inefficiencies in the way the courts do business,[43] results in hearings lasting longer than need otherwise be the case, because affidavits and so on are often read out line by line in court for the judge's benefit, because the judges have not had the opportunity to prepare fully in advance. This of course creates timeliness issues but also contributes to the prohibitive expense issue further detailed below. That is, litigants are faced with footing the bill for lawyers' fees incurred reading evidence out line by line in court, when the same result could be achieved at much reduced cost to litigants by judges simply being given adequate time to prepare for each case before them.

Question 2	Are the Irish court procedures fair, timely and effective? If your view is that they are not, what are your reasons for that opinion?
Answer	Please see answer to Q1 immediately above.

Question 3	Are there specific legislative or procedural changes that could be made to improve these elements with respect to environmental cases? If yes, please specify.
Answer	Please see answer to Q1 above.

[43] Cf. http://www.irishtimes.com/news/crime-and-law/court-of-appeal-just-a-new-version-of-supreme-court-only-more-costly-1.1874746

SECTION 5 - Timely

Question 1	Are there any issues with regard to timeliness of access to justice in Ireland?
Answer	Please see answer to Q1 under section 4 above.

Question 2	Could these be addressed through legislative amendments and/or changes to the rules of procedure?
Answer	Please see answer to Q1 under section 4 above.

SECTION 6 - Not prohibitively expensive

Question 1	Is it appropriate to make further changes to the cost rules in respect of challenges to environmental proceedings? If so, why?
Answer	Yes, further changes are required to bring Ireland into compliance with the Aarhus Convention. Please see ELIG's detailed discussion document here.

Question 2	Could changes be made to the list of legislation to which the cost rules apply? If so, what kind of changes would be beneficial?
Answer	Again, please see ELIG's detailed discussion document here. In respect of judicial review, the critical priority is for the actions for judicial review covered by section 50B of the Planning and Development Act 2000 to be extended, such that the provision covers judicial review of all decisions, acts and omissions pursuant to **all** "provisions of [Irish] law relating to the environment" rather than simply pursuant to three EU directives. One option would be to amend section 50B(1) of the Planning and Development Act 2000 (as amended) by removing the reference to the EIA, IPPC and SEA Directives, and replacing this with a 'copy out' approach to Article 9(3) of the Aarhus Convention: e.g. "pursuant to a law of the State that relates to the environment." While we do not share Dodd's view that section 50B "only extends to decisions, acts or a failure to take action under the Planning Acts or perhaps even more narrowly, to decisions, acts or a failure to take action of a planning authority, An Bord Pleanála or a local authority, within s.50 of the [Planning and Development] Act,"[44] to put the issue beyond doubt there may be a case for creating a new, dedicated piece of Irish legislation covering the cost/prohibitive expense aspects of Article 9 of the Aarhus Convention. In other words, take the rule out of the Planning Acts and into a new, dedicated piece of legislation. In respect of third party enforcement: a generic third party enforcement power in respect of breaches of environmental legislation could be introduced into Irish law.

[44] Dodd, S. Costs in environmental cases. Irish Planning and Environmental Law 2014, 1, 23-31.

	This could track the existing language of s.4 EMP Act 2011: "for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement under a law of the State that relates to the environment". The existing cost protection set out in the EMP Act 2011 (as clarified in the Holly Hunter No 1 judgment) could then latch onto this.

Question 3	Could changes be made to the procedural rules of court in respect of the cost rules set out in the legislation? If so what kind of changes would be beneficial?
Answer	We are not sure precisely what is being asked here. However, regarding the procedural aspects of the EMP Act 2011 process whereby litigants can seek an upfront determination of the application (or otherwise) of the special costs rules, please see our earlier discussion document here.

Question 4	Could changes be made to how the cost rules are set out?
Answer	The cost rules could certainly be set out more clearly, in one place, and consistently (e.g. note the differences between s50B and Part 2 of the EMP Act 2011 – the latter provides for the possibility of an upfront determination of whether the special costs rules apply, while the former does not). The costs rules would therefore benefit from consolidation into a single dedicated piece of legislation. It is confusing to the public as well as to lawyers to have similar (yet slightly different) cost rules spread across various pieces of legislation, with their uncertain interpretation relying at present on various decisions of the courts.

Question 5	Are changes to how it is determined that cost rules apply appropriate e.g. should the parties to proceedings determine this in advance? In writing? In court proceedings? What effect would such changes have?

Answer	The explicit possibility envisaged by Part 2 of the EMP Act 2011 of the parties to litigation agreeing in advance that the special costs rules apply, or of the court determining the point upfront, is welcome, and should ideally be replicated in respect of section 50B of the Planning and Development Act 2000 (as amended), where this possibility does not exist at present. The result of the current legislative position is that claimants in respect of litigation under s50B may be reluctant to seek to have this issue determined upfront - particularly where the possibility is not foreseen by the legislation - for fear of being seen to be doubtful about the point. The main practical issue regarding this welcome concept of a court determining upfront that a given case is in principle covered by the special costs rules is how to ensure that a litigant is protected from the costs incurred at the hearing to find out if it will in turn be protected from the costs of the main proceedings! At present, uncertainty regarding this issue is almost certainly putting some litigants off going to court to have this important issue determined upfront.

Question 6	It has been suggested that the cost rules in section 50B should be repealed and that there should be one set of general cost rules re-drafted to include both those currently provided for in section 50B (i.e. those relevant to the EIA, IPPC and SEA directives) and the Environment (Miscellaneous Provisions) Act 2011. Others have suggested that 50B be retained, but limited to planning decisions with other EIA, IPPC and SEA cases covered under another general cost rule. Which approach would you support? Why?
Answer	The costs rules would benefit from consolidation into a single dedicated piece of legislation. It is confusing to the public as well as to lawyers to have similar (yet slightly different) cost rules spread across various pieces of legislation, with their uncertain interpretation relying at present on various decisions of the courts. This said, in our view the general thrust of the section 50B and Part 2 EMP Act 2011 solution is good, and has certainly led to better access to justice in practice than the previous position: i.e. now each side bears its own costs as a first principle, with the court having the discretion to award a winning applicant its costs. That said, the ability particularly of private individuals to engage with a legal team on the basis of these rules may still be limited. Such limitations could be mitigated by creating greater public awareness of the cost arrangements potentially available to prospective applicants with their legal teams. Nevertheless, the complex construction of the section 50B PDA and Part 2 EMP Act 2011 costs provisions has caused serious difficulties in interpretation, even within legal circles – not to mention lay people seeking to understand their rights. We would encourage a focus on simplification and clarity in any re-drafting or amendment of the rules. This should be possible given the straightforward construction of Article 9(3) of the Aarhus Convention.

Question 7	What guidance should be made available to the court to ensure that the cost rules only apply to Aarhus cases? How best can it be ensured that only Aarhus cases are so protected?
Answer	This should be possible via appropriate legislative drafting, without the need to rely on guidance.

Question 8	Should developers be excluded from the protection provided by the cost rules? Should State bodies continued to be excluded from this protection? If so, why? If not, why not?
Answer	Article 9 of the Aarhus Convention applies (variously) to "any person" (Art 9(1)), "members of the public concerned" (Art 9(2)) and "members of the public" (Art 9(3)). Given the definitions of these phrases in the Convention, it is hard to see how developers could lawfully be excluded from the protection provided by the cost rules aimed at avoiding prohibitive expense, even if this were desirable in principle. Nonetheless, the effect of so enabling developers to pursue reviews of decisions (with Aarhus cost protection) should be considered in the light of what this entails for members of the public and NGOs, who then may wish to become "notice parties" to the proceedings. Such notice parties must often incur significant expenditure with (at present) little or no prospect of recovering those costs. This inevitably leads some to avoid participating in the proceedings as notice parties in the first place. The fundamental objective of the Aarhus Convention is probably the best and most appropriate source of guidance regarding what was intended by the Convention in this respect: "Article 1. In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention." In our view, the right of a developer to pursue a review with cost protection should not be at the cost of or to the detriment of members of the public and NGOs being also able to participate in the review with similar cost protection as part of a fair and equitable review. The fact that a developer stands a chance of winning and recovering its costs means the developer's ability to engage a legal team is enhanced, whereas a notice party which cannot recover costs will most likely be unable to engage a legal team on a 'no win no fee' basis, thereby creating an inherent inequality inconsistent with the fundamental objective of the Convention, in providing for the right to defend your environmental rights. Before expressing a view on the position of State bodies, we would like to understand from the government the rationale for excluding State bodies from cost protection in the first place.

SECTION 7 - Publicly accessible decisions

Question 1	Are there problems in practice with public access to court decisions? If yes, please specify. How could access to court decisions be improved?
Answer	In some cases written judgments are not provided at all in Ireland. Just one example would be the judicial review action in respect of Sligo Airport's plan to extend its runway into two Natura 2000 sites [2009 No 1016 JR]. Sligo County Council's decision to grant planning permission for the project was successfully judicially reviewed on 4 June 2010, and McKechnie J's decision raised interesting points regarding the ambit of the duty to give reasons. The applicants in the case were promised a written judgment by McKechnie J, but more than four years on, no judgment has been forthcoming, and McKechnie J has since been promoted to the Supreme Court, so it seems highly unlikely that a written judgment will ever emerge. As Dr Aine Ryall of UCC commented in 2012, "Apart from the fact that the current legislative framework is not fit for purpose, there is also a serious problem with the accessibility of court judgments..... In certain categories of cases.....a judgment may be delivered ex tempore and no written judgment is ever produced for publication. This is quite often the case in practice with rulings on liability for costs in the High Court and the Supreme Court. As a result, there is a general lack of transparency around costs matters in planning and environmental cases and it is difficult to gather reliable data and to track trends on this important practical issue. Given the recent very significant changes to the rules governing costs liability in certain categories of planning and environmental litigation, it is more important than ever that reasoned costs rulings are prepared by the judiciary and are published on the Courts Service website without undue delay.....Beyond the Superior Courts, judgments of the Circuit Court and the District Court are rarely published on the Courts Service website. Important developments in planning and environmental law take place at Circuit Court and District Court level on a regular basis; in particular, proceedings (both civil and criminal) to enforce planning and environmental law. Written judgments are usually rare in such cases and this state of affairs leads to a lack of transparency and a deep lack of awareness about how planning and environmental laws are enforced in practice. Generally speaking, it is only where such cases are reported in the media that the details of the proceedings enter the public domain. A notable exception is the database of prosecutions published on the Environmental Protection Agency (EPA) website which contains comprehensive, up to date information on the outcome of all prosecutions taken by the Agency. In the interests of transparency and consistency, it is vital that planning and environmental decisions taken in the Circuit Court and the District Court are recorded in an accessible format that is publicly available online in a timely manner."[45]

[45] Ryall, A. Environmental Law in Crisis. Irish Planning and Environmental Law Journal [2012] 2: 70-76.

	As a related issue, please note Dr Seth Tillmann's important argument regarding the fact that parties' court submissions are not generally publicly available in Ireland, in contrast to the position in many other jurisdictions: http://www.independent.ie/opinion/analysis/seth-barrett-tillman-time-to-open-up-courts-and-let-justice-be-seen-26889857.html This issue should also be addressed as part of the current exercise. While we understand that the position on this issue may have changed relatively recently, we cannot find any public information regarding this.

SECTION 8 - Article 9(5)

Question 1	What other barriers to access to justice in relation to environmental decision-making do you consider might exist in Ireland?
Answer	While the section 50B and Part 2 EMP Act 2011 solution on costs has certainly improved access to justice in circumstances where solicitors and barristers can be found to act for a claimant on a 'no win no fee' basis, there of course remains a barrier in circumstances where solicitors/barristers are not willing to take the case on this basis. Indeed, the entire issue of an applicant's 'own costs' remains a significant issue in practice – cf. the number of lay litigants who are beginning to appear before the Irish courts seeking protective costs (PCO)-type orders. Whilst Art. 9(5) of the Aarhus Convention provides "In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice," there is no evidence that the government has in fact considered such appropriate assistance mechanisms (e.g. legal aid). In this regard it is interesting to note that the present access to justice consultation omits the words "consider the establishment of appropriate assistance mechanisms" from its summary of the requirements of Art. 9(5) Aarhus (at page 9 of the consultation paper):[46] "Article 9(5) requires that the public is informed of the access to justice provisions of the Convention and that consideration is given to removing or reducing financial or other barriers to access to justice".

Question 2	How can these be addressed?
Answer	The government should consider the creation of a legal aid scheme for public interest environmental litigation within the scope of the Aarhus Convention. In the same way that a public health service is typically seen as a common good, a public legal service to deliver a healthy (or healthier) environment for citizens should come in time to be viewed in a similar light. In this regard, we note Advocate General Kokott's remarks regarding legal aid in her Opinion in the Edwards case (C-260/11): "Individual capacity to pay is also relevant with respect to the principle of effective legal protection for the purposes of Article 47 of the Charter of Fundamental Rights. Under the third paragraph of Article 47, legal aid must be made available to those

[46] http://www.environ.ie/en/Publications/Environment/Miscellaneous/FileDownLoad,38541,en.pdf

	who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. Admittedly, the Convention does not absolutely require, under Article 9(5), the introduction of assistance mechanisms such as legal aid, but only consideration of the 'establishment of appropriate assistance mechanisms'. However, legal aid makes it possible to prevent risks in terms of prohibitive costs in certain cases. In so far as the enforcement of provisions of EU law is concerned, legal aid may even be absolutely necessary if the risks in terms of costs, which are acceptable in principle, constitute an insurmountable obstacle to access to justice on account of the limited capacity to pay of the person concerned."

General Comments	Please provide any additional comments on this Consultation
	While this consultation focuses on the access to justice provisions of the Aarhus Convention and their implementation in Ireland, it is important to recognise the importance of the underlying decisions (and acts and omissions) which fuel the challenge to deliver access to justice. Justice is best served by sound, robust and transparent decisions in the first instance. Yet issues remain in Ireland regarding, for example, failures to require reasoned decisions, non-transparent decision-making in certain cases, and failures to provide in certain cases for participation at the earliest opportunity as required by the Convention. In conclusion, the challenge of meeting the Aarhus Convention's access to justice obligations could be greatly offset by improved environmental decision-making in the first instance. We should not lose sight of this necessary complementary aspect of access to justice in Ireland.

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This submission was developed using the Environmental Pillar processes but is not necessarily the policy of each member group in the pillar.

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