



IRELAND: ALL-ISLAND



FINDING COMMON GROUND

# Synthesis Report: All-island Implementation of the Aarhus Convention

## ABSTRACT:

This report summarises the research carried out for the project 'Finding Common Ground: Towards All-island implementation of the Aarhus Convention'. This project set out to explore issues with all-island implementation of the Aarhus Convention and what role if any an all-island 'Aarhus Centre' might play in this. This was done through the preparation of draft desk-based reports on Aarhus Convention implementation in Ireland and Northern Ireland which were put out to consultation. Stakeholder consultations were held in each jurisdiction, supported by survey collection. This study shows that there are significant issues with implementation of the Convention across all areas and in both jurisdictions, but that the Aarhus Convention holds immense potential as a tool for enhancing the coherence of all-island environmental governance. An Aarhus Centre could provide a potential focal point for cross-border policy coordination as well as addressing gaps in implementation and capacity building.

# SYNTHESIS REPORT: ALL-ISLAND IMPLEMENTATION OF THE AARHUS CONVENTION

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This report is produced as part of the Irish Research Council funded project 'Finding Common Ground: Towards all-island implementation of the Aarhus Convention', and any comments/feedback on this report should be sent to [ahough@tus.ie](mailto:ahough@tus.ie).

The Principal Investigator for the project is Alison Hough, Technological University of the Shannon. Co-Investigators are Dr. Peter Doran of Queens University Belfast, and Dr. Ciara Brennan of EJNI (and Newcastle University).

The project involved collaboration with Friends of the Irish Environment (FIE), an NGO dedicated to environmental protection and access to justice. The project also partnered with Environmental Justice Network Ireland (EJNI) and Friends of the Earth Northern Ireland (FOE-NI). Assistance from NGO umbrella bodies, The Environmental Pillar/IEN and NIEL (Northern Ireland Environment Link) is gratefully acknowledged.

This project sought to carry out a preliminary assessment of all-island implementation of the Aarhus Convention through a mix of desk-based research and consultation with the NGO community. It also explored the possibility for an all-island 'Aarhus Centre'.



Two detailed separate reports ‘Aarhus Implementation in Ireland’ and, ‘Aarhus Implementation in Northern Ireland’ have also been prepared as part of this project, and are available on the project website [www.findingcommonground.ie](http://www.findingcommonground.ie). This is the overall project report, titled ‘Synthesis Report: All-island Implementation of the Aarhus Convention’, also available on the website.

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# Executive Summary

The Aarhus Convention is an environmental human rights treaty (Barritt, 2020) (Boyle, 2012) enshrining in international law the principles of environmental democracy (Ebbesson, Gaugitsch, Jendroska, Marshall, & Stec, 2014). It represented a radical shift in environmental governance and democracy in most of its contracting Parties, one that most of those Parties are still struggling to come to grips with (Barritt, 2020) (Caranta, Gerbrandy, & Mueller, 2018) (Ryall, 2018). The Convention's aspirations towards environmental human rights and a better world (Barritt, 2020) (Kelleher, 2021) are supported by complex practical measures that required definitive action by the contracting Parties, such as environmental impact assessment, public participation in plans, programs and projects, access to environmental information, and access to justice. It is also established a compliance mechanism that monitors compliance of the Parties and investigates complaints from the public and Parties regarding non-compliance.

The Convention has potential to be very influential in maintaining coherence of environmental governance post-Brexit (Brennan, et al., 2022), operating synergistically with a range of other international instruments that the EU, UK, and Ireland are all party to, such as the Good Friday/Belfast Agreement (GF/BA), the European Convention on Human Rights (ECHR), the Espoo Convention, the Basel Convention among others (Brennan, et al., 2022). In this regard, an all-island approach to implementation could buffer against the worst effects of Brexit divergence. However, there is a long way to go to achieve full implementation of the Convention's provisions in both Ireland and Northern Ireland. Similar issues arise in both jurisdictions with access to justice, such as own costs, standing, standard of review, and courts dysfunction/delay. There are also problems in both jurisdictions in the area of access to information (Ryall A. , 2016c), with problems in the legislative framework and evidence of 'culture' problems in public service bodies, as well as a need for greater capacity building. In the area of public participation, the particular issue of lack of equal rights of appeal in Northern Ireland bears serious consideration, with citizens and NGOs not allowed the right to appeal planning

decisions to the higher level of the planning tribunal. The result is that their only recourse is through judicial review, which brings them face to face with the issues with access to justice described above, in turn increasing pressure on the courts system. Finally, protection of environmental defenders stands out as particular issue in Ireland (although it is also an issue in Northern Ireland, the issues are more pronounced in Ireland). There is a need to address “applicant shaming”, lack of whistle-blower protection, and SLAPP litigation, among other issues. An all-island Aarhus Centre carries the potential to address these issues through a mix of awareness raising, capacity building and advocacy activities (Brennan, Hough, & Doran, 2020).

Some core recommendations from this research include the need for:

- Reforms to protect environmental defenders including guidelines for those in public office and the media, whistle-blower protections, and anti-SLAPP measures.
- Removal of cost barriers to access to information and public participation, and research on to ways to improve the legislative framework in these areas.
- Research (including empirical data) on access to justice, costs, volume of cases, capacity issues, and the impact of judicial review on administrative decision making.
- Establishment of a mechanism to ensure coherence of cross-border environmental governance, possibly under Strand 2 of the GF/BA.
- Establishment of an all-island NGO led Aarhus Centre to facilitate capacity, building, monitoring and advocacy.



# 1. Introduction to the Aarhus Convention

1.1 The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters ('the Aarhus Convention') was adopted at the Fourth 'Environment for Europe' Ministerial Conference in 1998 (UNECE, 2017). It entered into force on the 30 October 2001 (UNECE, 2021), and has since been signed and ratified by 47 State Parties worldwide. It embodies a key principle of international environmental law, that environmental decisions are best handled with the participation of those concerned.<sup>1</sup>

1.2 The Convention marked a departure from previous international environmental law approaches (UN, 2014) in several respects: involving NGOs in the design; creating rights for NGOs and individuals in both the Conventions fora and through the rights at Party level; creating a complaints mechanism open to individuals and NGOs as well as State Parties; and importing ambitious concepts of environmental democracy and stewardship (Barritt, 2020) into the legal systems of the contracting Parties. Many of the State Parties have struggled with the far-reaching nature of the changes required by the Aarhus Convention to their systems of environmental governance and justice,<sup>2</sup> and their cultures of State transparency (or lack thereof) (Grashof, 2018) (Caranta, Gerbrandy, & Mueller, 2018). Ryall states that the Aarhus Convention heralded a new and dynamic era of EU environmental law enforcement in the jurisprudence of CJEU (Ryall, 2016b), but also that perhaps the changes imported by the Convention, and the impact of the Aarhus Convention Compliance Committee (ACCC) were unanticipated (Ryall, 2013). The Convention is complex and at times ambiguous, and contains a combination of high-level aspirations (e.g., right to a clean and healthy environment, participatory democracy) backed up by practical measures that must be implemented (like lists of projects that must be subject to environmental impact assessment in the annexes and mandating the information that must be provided to the participating public through the EIA process). Several academics argue for a purposive approach to interpretation of the Convention (Barritt, 2020) (Kelleher, 2021). The CJEU have adopted a far-reaching approach to the Convention's effect at Member State level in EU law, through its case law on Art 9 of the Convention (finding that even where the provisions of Art 9 have not been specifically implemented, domestic law must be interpreted in light of the provisions of the Convention and in a manner compatible with it).

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<sup>1</sup> Principle 10 of the Rio Declaration 1992 A/CONF.151/26/Vol.I: [Rio Declaration on Environment and Development \(un.org\)](https://www.un.org/en/development/desa/press/2012/09/20120910rio.html) which also expressed what would become Aarhus Convention's three pillars of access to information, access to public participation and access to justice in environmental matters.

<sup>2</sup> For some examples see the findings of the ACCC on foot of complaints from the public available at <https://unece.org/env/pp/cc/communications-from-the-public>.

- 1.3 The Convention’s participatory democratic rights are considered important pieces in maintaining the rule of law<sup>3</sup> (Hough, 2022), which is increasingly coming under threat (Pech & Bárd, 2022) (Helsinki Rule of Law Forum, 2022) from populist influences in Europe and elsewhere.

*“Access to information, public participation and access to justice are fundamental elements of good governance at all levels and essential for sustainability. They are necessary for the functioning of modern democracies that are responsive to the needs of the public and respectful of human rights and the rule of law. These elements underpin and support representative democracy.”*

Lucca Declaration, 2002

- 1.4 The procedural rights in the Convention underpin strategic litigation by the public/eNGOs which are being used increasingly to tackle red line issues such as climate policy failings (Kelleher, 2021). The Convention’s environmental governance provisions have potential to improve environmental protection across the island (Brennan, et al., 2022).
- 1.5 The potential for Brexit to create divergence in environmental rules on either side of the border presents a huge challenge to environmental protection on the island (Hough, 2019) (Brennan, Dobbs, Gravey, & Ui Bhroin, 2018) (Burns, et al., 2018). Treaties like the Aarhus Convention hold potential to shield against these threats to environmental integrity, by enforcing similar regulatory requirements in both jurisdictions. However, the Aarhus Convention’s implementation is widely considered to be unsatisfactory (e.g., (Ryall, 2018) in both jurisdictions and has been the subject of multiple EU infringements (e.g., in the area of EIA) as well as complaints to the Aarhus Convention Compliance Committee (e.g., in the area of access to information, public participation and costs). If the Aarhus Convention is to fulfil this potential law makers in both jurisdictions will have to commit to engaging in good faith with the Convention’s principles.

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<sup>3</sup> Para 2, [the Lucca Declaration](#), 2002, First Meeting of the Parties to the Aarhus Convention.

## 2. Status and Ratification in the EU

2.1 The EU ratified the Aarhus Convention in 2005 (EU, 2019).<sup>4</sup> The EU implemented the Convention through a series of directives and regulations, both at Member State level, and also at EU level (creating rights in theory exercisable against the EU institutions and bodies).

2.2 The Member State level directives covered two of the three pillars of the Convention: access to environmental information and public participation. Directive 2003/4/EC provided for Access to Environmental Information, and 2003/35/EC provided for public participation in environmental decision making, which brought about amendments to the EIA Directive 85/337/EEC facilitating public participation in Environmental Impact Assessment, as well as the IPPC. The EU had also introduced public participation in plans and programs relating to the environment (Directive 2001/42/EC, ‘the SEA Directive’) and in the management of water bodies and river basins (Directive 2000/60/EC ‘the Water Framework Directive’), which are now interpreted in light of the Aarhus Convention. Attempts to introduce an [access to justice directive](#) were controversial and ultimately failed (Ryall, 2016b) (Hough, 2022) The more recent approach has been to adopt non-binding guidance documents on access to justice at Member State level<sup>5</sup> and to encourage the inclusion of access to justice provisions in sectoral level directives. The access to justice principles are also supported through the principle of effective judicial protection in [Article 47](#) of the [Charter of Fundamental Rights](#), principle of effectiveness, and the doctrine of consistency (Hough, 2022), which has led to CJEU to adopt the approach that Member State courts must interpret domestic law in a manner compatible with the access to justice principles of the Aarhus Convention<sup>6</sup> (Nagy, 2018).

2.3 The net effect of the EU activity in this area is that the Aarhus Convention has largely been implemented through similar routes in both jurisdictions through transposition of the EU Directives mentioned above. However, differences in transposition approaches introduced nuances of implementation that render the

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<sup>4</sup> Decision 2005/370/EC, making it part of EU law as per Art 216 TFEU.

<sup>5</sup> This approach was one of four options considered in the ‘Communication on access to justice at national level related to measures implementing EU environmental law’, 21 July 2016 [http://ec.europa.eu/smart-regulation/roadmaps/docs/2013\\_env\\_013\\_access\\_to\\_justice\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2013_env_013_access_to_justice_en.pdf). The implementation of this approach can be seen in the recent guidance in COM(643) 2020 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0643>

<sup>6</sup> e.g., see Case C-470/16, ‘NEPP’ 15<sup>th</sup> March 2018, Case C-240/09 ‘Slovak Brown Bears’, 8<sup>th</sup> March 2011.

legal implementation of the Convention similar but slightly different in specific ways in both jurisdictions.

2.4 Also, as a result of Brexit, the transposing instruments in Northern Ireland are now vulnerable to change and divergence by the domestic legislature, the Northern Ireland Executive, or (should the political crisis ongoing at the time of writing continue in Northern Ireland) the UK parliament.

### 3. Status and Ratification in Ireland

- 3.1 Ireland was one of the last countries to ratify the Aarhus Convention in 2012 (Nagy, 2018). Ireland has given effect to the EU law implementing measures, which carry the Aarhus obligations into Irish law through a complex, piecemeal set of amendments to various pieces of legislation, which have been the subject of infringement actions<sup>7</sup> brought by the Commission against Ireland.
- 3.2 Ireland has not fully implemented the provisions of the Convention<sup>8</sup>, and the EU implementing measures such as those contained in the EIA directive have arguably never been fully applied as required in order to bring all environmental decision-making into compliance with the Convention (particularly in areas such as water abstraction and extractive industries). Ongoing issues remain with access to environmental information, costs in all areas from access to information, public participation and access to justice, and the timeliness of access to justice is open to question, as is the fairness and equitability of the current cost shifting measures in place. More information on Irish implementation can be seen in the '[Report on Aarhus Implementation in Ireland](#)' conducted as part of this project and available on [www.findingcommonground.ie](http://www.findingcommonground.ie).

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7 E.g. see [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_10\\_1581](https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1581) and [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_02\\_1950](https://ec.europa.eu/commission/presscorner/detail/en/IP_02_1950)

8 See 'Report on Aarhus Implementation in Ireland', 06/06/22, available at [www.findingcommonground.ie](http://www.findingcommonground.ie)

## 4. Status and Ratification in UK/NI

4.1 The UK, including Northern Ireland, also ratified the Aarhus Convention in 2005.

The UK transposed EU law implementing measures, carrying into UK law the Aarhus obligations through a range of both UK-wide and devolved legislation and legislative amendments (Day, 2018) (Orbinson, 2015). Since Brexit, the situation has been complicated with some legislation being repealed, amended, or replaced. While a member of the EU, the UK was the subject of multiple infringement actions relating to Aarhus obligations brought by the Commission (in particular, around the issue of costs) – in a number of instances this related directly to breaches relating to Northern Ireland. In addition, the UK as a whole has been found by the Compliance Committee to the Aarhus Convention to have been in “longstanding” non-compliance with the Convention by failing to give citizens fair and equitable access to environmental justice. There are some ongoing reviews of administrative law in the UK which have the potential to create additional problems with access to justice in the UK (Ministry of Justice, 2020). More information on Northern Irish implementation can be seen in the ‘[Report on Aarhus Implementation in Northern Ireland](#)’ conducted as part of this project and available on [www.findingcommonground.ie](http://www.findingcommonground.ie).

## 5. The Role of the Aarhus Convention in Post-Brexit Regulatory Alignment

- 5.1 The island of Ireland is a single ecological unit housing two separate legal jurisdictions. The Aarhus Convention influences the environmental law/governance framework on the island in two ways, both pre- and post-Brexit, through the creation of frameworks for regulations and rights. Firstly, through EU law implementation it created analogous frameworks in both jurisdictions in significant areas of environmental governance such as spatial planning and pollution licensing, This regulatory alignment has been recognised as significant in the context of Brexit, and the loss of such alignment is recognised as a threat to post-Brexit all-island environmental governance, impacting the coherence of environmental regulation on the island (Hough, 2019) (Gravey, et al., 2018; NESDO, 2021). Secondly the Convention created a range of significant rights for individuals that can be exercised without discrimination based on citizenship or residency. The Convention reinforces these arrangements through a compliance mechanism that can be invoked by the public (including NGOs), the secretariat or State Parties, against State Parties. Individuals and environmental organisations who make up the ‘public concerned’ can utilise the rights in the Convention. The Convention prohibits restriction of the ‘public concerned’ to those resident in a particular State. Therefore, the Conventions rights are expressly exercisable across borders, allowing it trans-boundary application. This means that it allows people on the Irish side of the border the right to participate in all environmental decision making on the Northern Ireland side of the border and vice versa (as well as access information and justice).
- 5.2 The continued cross-jurisdictional applicability of the Aarhus Convention post-Brexit, together with similar implementation methods through EU law, make it potentially an important source of regulatory alignment across a range of areas of environmental law.
- 5.3 The Convention has never been fully implemented in the United Kingdom (Day, 2018) and Northern Ireland (Orbinson, 2015) and has been the subject of both EU infringements and ACCC findings against the UK for failure to implement Aarhus Convention obligations.<sup>9</sup> It is also notable that the Convention has largely been implemented through EU law in both Northern Ireland and Ireland, but in Northern Ireland, the connection to the dynamics of EU law has been broken by Brexit. Many of the provisions implementing the Aarhus Convention fall within the ‘retained’ EU

<sup>9</sup> E.g., see the recent decision of the Meeting of the Parties against the UK including some complaints regarding Northern Ireland in Decision VII/8s available here [https://unece.org/sites/default/files/2022-01/Decision\\_VII.8s\\_eng.pdf](https://unece.org/sites/default/files/2022-01/Decision_VII.8s_eng.pdf)

law as a result of s.6 of the European Union (Withdrawal) Act 2018 ('the Withdrawal Act 2018'). This means that for now the regimes have many common elements resulting from their common origin, but to the extent that many of these laws are not included in the annexes to the [Protocol on Ireland and Northern Ireland](#), they may diverge going forward. This has the potential for vastly different standards to apply either side of the border, and the devolved administration has competence to amend retained EU law in areas of devolved competence (environment is a partially devolved competence) (McCrudden, 2022, p. para 10.2). The role of the Aarhus Convention Compliance Committee (ACCC) becomes of greater importance in the context of the removal of the oversight of the EU Commission, providing an external and objective assessment of standards and compliance with international law obligations (Brennan, et al., 2022). While international law and its mechanisms like the ACCC are not directly effective in dualist systems like the UK, Northern Ireland and Ireland, the findings of the ACCC are binding in international law on the State Parties to whom they are directed and are also considered by the courts to be an authoritative interpretation of the Convention's meaning. The findings of the ACCC have proved highly influential in the Irish Courts (Ryall, 2016) (Ryall, 2018), European Court of Human Rights (Boyle, 2012), the UK courts (Day, 2018) and the CJEU (Nagy, 2018).

5.4 The Aarhus Convention, as a human rights treaty (Boyle, 2012) (Barritt, 2020), operates synergistically with the [Good Friday/Belfast Agreement](#) (GF/BA), which is also a human rights treaty (Brennan, et al., 2022). The GF/BA guarantees the application of the [European Convention on Human Rights \(ECHR\)](#) in both jurisdictions (Hough, 2019). The ECHR and the Aarhus Convention have a strong relationship, with the Aarhus Convention influencing the European Court of Human Rights interpretations of the ECHR rights, in particular the right to private and family life (Article 8) which has been held to have environmental implications.

5.5 The Aarhus Convention also operates in tandem with the [Espoo Convention](#) which provides for environmental impact assessment and for transboundary public participation in transboundary EIA. There are a number of other international environmental agreements that bind both jurisdictions, many of which have transboundary application. These include the [Basel Convention](#) on transboundary movement of hazardous waste, the [Long Range Transboundary Air Pollution Convention](#) (LTRAP), the [Ramsar Wetlands Convention](#) and [Ospar Convention](#) on pollution in the NE Atlantic. [The Paris Agreement](#) is obviously an important Climate Change agreement, which also emphasises public participation in its adaptation, mitigation, and goal setting. Its obligations are in part implemented in [Ireland](#) and [Northern Ireland](#) by separate legislative instruments<sup>10</sup> developed at the same time with almost no interaction or interoperability between them (there are some limited references in the [Northern Ireland Climate Change Bill No. 2](#) to consultation with the Irish [Climate](#)

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<sup>10</sup> Ireland: Climate Action and Low Carbon Development Act 2015 – 2021 as amended, informal consolidation available here: <http://revisedacts.lawreform.ie/eli/2015/act/46/revised/en/html> . Northern Ireland: Climate Change Bill No.2 available at <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2017-2022/climate-change-no.-2-bill/climate-chnage-no.-2-bill-as-amended-at-fcs---full-print-version.pdf>



[Change Advisory Council](#)). There appears to have been limited or no transboundary consultation in either direction in the preparation of these legislative instruments.

5.6 Together, this ecosystem of international agreements offers an under-appreciated but potentially powerful basis for a common regulatory framework of environmental governance and regulation on an all-island basis. What is needed is coherence of approach to implementation of the obligations under these agreements between and within the jurisdictions, as well as improved environmental governance arrangements on an all-island basis in the area of conservation, environmental crime, and environmental enforcement (for further discussion of avenues for this see the NESD Secretariat Paper 21 (Moore, 2021) and Council Report 156 (NESDO, 2021)). To achieve this some kind of all-island co-ordination body is required. The mechanisms of the GF/BA like the NSMC and the BIC were designed for tasks like these, but unfortunately, they are rendered impotent by the repeated extended periods of political crisis in Northern Ireland, which has impeded their functioning and therefore their relevance (Hough, 2019). However, the subsidiary co-operation mechanisms created under the NSMC do not depend on political representation for their operation (such as the Loughs Agency and SEUPB). These operate as independent public bodies, and are therefore not afflicted by political turbulence to the same extent. Therefore, it seems that one route for greater coherence of environmental governance could be the establishment of a similar body, an environmental policy co-operation body, under the GF/BA remit for co-operation bodies. This could be established under the existing provisions of Strand 2, which allows for the creation of implementation bodies in the nominated areas, one of which is the environment. This body could have a role in co-ordinating the fulfilment of environmental obligations under the various pieces of international law that apply in both jurisdictions and provide a forum for coherent all-island environmental policy making, as well as ensuring transboundary consultation obligations are fulfilled. Future directions for cross-border frameworks facilitating environmental co-operation on the island of Ireland are explored in more depth in a forthcoming report '*Linking the Irish Environment*,' due to be published by the IEN and NIEL in the coming months (Brennan, et al., 2022).

5.7 There is a large knowledge gap in the area of cross-border environmental co-operation, around what it is that is actually happening and who is co-operating, and how Aarhus rights are functioning in a cross-border context post-Brexit. The major source of evidence of cross border activity are the SEUPB funding reports showing cross-border projects, but there are far more co-operative activities outside of its remit (NESDO, 2021) (Brennan, et al., 2022). Mapping is needed of these. Public bodies could be obliged to record any cross-border activity, and a public online register of transboundary consultations should be maintained in either jurisdiction.

## 6. Ireland – key findings

(relevant paragraph numbers from the detailed *country report* in brackets – available at [www.findingcommonground.ie](http://www.findingcommonground.ie))

- 6.1 The findings of this research demonstrate overall that the Aarhus principles have yet to become embedded in the practices of public bodies, or in the public consciousness. It is clear that significant work is needed in order to elevate the perceived status of and respect for these rights and those who use them (Section 4). It is very obvious from both the experience of stakeholders and the review of primary and secondary materials that those who exercise their Aarhus rights frequently do so at great personal and reputational cost and risk (4.10). This is a surprising finding in a modern European constitutional democracy, in which democratic and civil rights would be expected to be secure, and the rule of law to be effective in preventing such issues. Greater protections for those exercising their environmental democratic rights are needed, such as those suggested in the recommendations below and the Ireland Report, such as extension of whistle-blower protection outside of the employment/volunteer context (4.6) (as per the definition of whistle-blower in the *UNCAC*), creation of an offence of harassment of environmental defenders (4.7), tackling SLAPP litigation (CASE, 2022), guidelines for media and political discourse around environmental rights, and ending “applicant shaming”<sup>11</sup> (4.16).
- 6.2 The consultations and desk-based research made it clear that simplification of the Irish environmental law framework is urgently needed. The excessive complexity makes the law inaccessible for the public, decision makers and public bodies. The research revealed extensive problems with both the legal framework (e.g., lack of a mandatory timeframe for decision making) and the practice of access to information (Ryall A. , 2016c) (Ryall Á. , 2018), and lack of awareness of the Access to Information on the Environment (AIE) Regulations/lack of capacity. There were also issues with first instance decision making and underfunding<sup>12</sup> of the OCEI (OCEI, 2021). Capacity building of the public (10.23) (Ryall A. , 2016c), and public bodies regarding their Aarhus Rights and civic responsibility is key. Many issues arise from failure of public bodies to appreciate their obligations under the Aarhus Convention (4.2, 5.8, 5.21). Many examples of poor first-instance<sup>13</sup> decision making by public bodies were evident, and it is clear that transposition of the Access to Information on the Environment Directive needs work (5.8, 5.21). The office of the OCEI (Office of the Commissioner for Environmental Information) is underfunded. Cost

11 E.g. see *An Taisce v An Bord Pleanála*, [2021] IEHC 422, Humphreys J., 2<sup>nd</sup> July 2021 [https://www.courts.ie/acc/alfresco/6182043c-443a-49b4-bde9-bb6e3b184689/2021\\_IEHC\\_422.pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/6182043c-443a-49b4-bde9-bb6e3b184689/2021_IEHC_422.pdf/pdf#view=fitH), para 34 & 35. See also *Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanála* [2022] IEHC 6 (High Court (General), Humphreys J, 14 January 2022), *An Taisce V. An Bord Pleanála* (No. 2) [2021] IEHC 422.

12 Mr. Pat Swords and the Department of Environment, Community and Local Government (20 September 2013). <http://www.ocei.gov.ie/en/Decisions/Decisions-List/Mr-Pat-Swords-and-the-Department-of-Environment-Community-and-Local-Government-.html>

13 First-instance refers to the first time a decision is made on an application, as opposed to the appeal or review stages. For planning decisions, this is frequently the County Council decision to accept or reject a planning application.

barriers for appeals to the OCEI are excessive (€150). Timeframes for deciding initial applications should be reduced and timeframes for the OCEI to decide on appeals should be created to tackle delays (5.17).

6.3 Public participation procedures need re-evaluation. Inconsistent practices, high thresholds (6.11 – 6.13), (e.g., forestry, aquaculture), lack of consideration of diversity and inclusion issues, and considerable fee barriers (e.g., €20 for planning submission, €200 for a forestry appeal) in public participation is evident. The issue of fees in particular has been pinpointed as a barrier to participation (Ryall Á. , 2018). Public participation rights are also adversely impacted by AIE failures. The Public Participation Networks (Department of Rural and Community Development, 2020) are an initiative with huge potential to facilitate better engagement at a local level but there are some missed opportunities, particularly with the lack of a joined-up approach and inconsistent practice (Mazars, 2022).

6.4 Access to justice was the area that was most frequently discussed during the consultation, and many issues also emerged from desk-based research (Kelly, 2020) (Kelleher, 2021) (Ryall A. , 2018) (Browne, 2021). In particular, costs are still seen as a problem with the lack of legal aid (7.3) and the issue of own costs drawing criticism. The desk-based research also highlighted the lack of options for public interest litigation, inadequate arrangements for multi-party litigation (4.18) (Kelly, 2020) and third-party funding (4.17) (EU Bar Association & ISEL, 2020) that exacerbate the impact of high costs. It seems likely that the standard of review in judicial review is too restrictive to meet the requirement of access to substantive review,<sup>14</sup> and issues arise with standing (Biehler, 2021) (Ryall, 2019). All of these issues are set against the backdrop of longstanding, well documented dysfunction in the courts caused by lack of efficiency and funding, which some commentators felt could be improved by a dedicated environmental court.<sup>15</sup>

6.5 Capacity building in all of the Convention's areas of operation is lacking, with no public body dedicated to making the public aware of their environmental democratic rights. This was highlighted as an area that could potentially be addressed by an Aarhus Centre, but this should not obscure the State's responsibility to achieve fulfilment of the Conventions rights.

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<sup>14</sup> Although the outcome of a complaint to the ACCC is awaited on this in ACCC/C/2017/156

<sup>15</sup> Urgent need for dedicated environment court in Ireland, symposium told – The Irish Times 21<sup>st</sup> January 2022 <https://www.irishtimes.com/news/environment/urgent-need-for-dedicated-environment-court-in-ireland-symposium-told-1.4782633>

## 7. Northern Ireland – key findings

(relevant paragraph numbers from the detailed [country report](#) in brackets – available at [www.findingcommonground.ie](http://www.findingcommonground.ie))

7.1 Workshop participants criticised the lack of a culture of transparency in Government decision making and the failure of key Government departments to lead when they should on Aarhus commitments. One participant stated

*“There seems to be a culture of withholding information. Information requests are interpreted as narrowly as possible, and refusals on spurious grounds are common. The public are viewed as a nuisance to be tolerated rather than an important component of a healthy democracy.”*

7.2 There are considerable issues with implementation of Aarhus rights in Northern Ireland (Orbinson, 2015) (Day, United Kingdom, 2018; Barritt, 2020). Some of these parallel the problems in Ireland (time delays, costs, standing) (Gordon, 2014) (McKay & Murray, 2017), but there are also unique challenges that arise with access to information and public participation. There is a poor culture of transparency in the public service (see section 9.7) (PAC, 2022) (RHI Inquiry, 2020) (PAC, 2022) (NIAO, 2022) and training is needed around access to information and public participation (10.24) in environmental decision making. The lack of equal rights of appeal for the public in planning decisions (10.25) is causing downstream problems such as pressure on the courts via judicial review. Issues arise with lack of public participation/EIA in ‘retention permission’ cases (10.26). The standard of scrutiny of decisions in judicial review (11.7 – 11.15)<sup>16</sup> and the issue of costs (12) represent significant issues. Regulatory divergences already exist and are likely to be exacerbated by Brexit in key areas such as habitats legislation, creating further barriers for those seeking to exercise Aarhus rights in Northern Ireland and cross-border (11.3). The lack of a governing mechanism for recognition and enforcement of judgments in civil cases is problematic (11.4). The issues in both Northern Ireland and Ireland with implementation of the Convention take place against the backdrop of serious environmental governance problems generally and low levels of enforcement in both jurisdictions, resulting in a poor overall picture of environmental protection and governance across the island of Ireland (Brennan, Purdy, & Hjerp, 2017). This is exacerbated in Northern Ireland by the absence of an independent regulatory agency with full oversight over private operators. Aarhus implementation remains incomplete and fragmentary, leaving members of the public without full vindication of their rights under the Convention.

<sup>16</sup> Mentioned by the Compliance Committee in ACCC/C/2013/90 (River Faughan Anglers Clg), and expected to be given more thorough consideration in ACCC/C/2017/156 (UK Costs).

## 8. Aarhus Centres

- 8.1 Aarhus Centres are organisations established with a view to furthering Aarhus Convention implementation. There are over 50 Aarhus Centres spread across the countries that are State Parties to the Convention (OSCE, 2016). The Aarhus Centres help government fulfil the requirements of the Aarhus Convention and provide information and capacity building for people who wish to exercise their Aarhus rights (OSCE, 2009). Some centres also have an advocacy role, others engage in litigation (OSCE, 2009). Some are NGO run but Government funded, others are NGO run but independent. Some centres are situated in Government Departments. They have different geographical focus as well, with some being regional and others being national.
- 8.2 Previous research by EJNI demonstrated the level of support in the Irish and Northern Irish NGO community, as well as highlighting the fact that many eNGO organisations on the island are already engaged in the type of activities that would fall within the remit of what would be expected of an Aarhus Centre. (Brennan, Hough, & Doran, 2020)
- 8.3 The Organisation for Security and Co-operation in Europe (OSCE) has in the past been instrumental in establishing Aarhus Centres in many eastern European and other States as part of their peacebuilding efforts, because it is recognised that sustainable development, environmental protection, and peace are all interlinked (Melis, 2022). At the stakeholder consultation held on the 20th of May, the OSCE representative present, Christian Melis, expressed support for the establishment of an Aarhus Centre in Ireland, and believes that they are needed in any State Party with issues around implementation.<sup>17</sup>
- 8.4 As discussed above, it is clear from the research and consultation that there is a huge unmet need for awareness raising and capacity building around the Aarhus rights set, and existing Aarhus Centres in other countries carry out this role very successfully (Hakala, 2012) (Melis, 2022). An Aarhus Centre could also advise Government bodies on implementation of the Conventions rights as appropriate. They are very useful for dealing with transboundary problems and for creating networks of stakeholders (OSCE, 2016) (ENVSEC, N.D.).

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<sup>17</sup> Ireland and UK to be informed of Organisation for Security and Cooperation Europe support for Irish Aarhus Centre - Friends of the Irish Environment <https://www.friendsoftheirishenvironment.org/press-releases/18176-ireland-and-uk-to-be-informed-of-organisation-for-security-and-cooperation-europe-support-for-irish-aarhus-centre>

- 8.5 There was a consensus in the survey and consultation that there should be a directly government funded, independent public body with independent oversight. However, many respondents also favoured a holonic structure and virtual or pop-up activity over bricks and mortar premises, and a network-based approach, and some respondents felt that any government funding would harm independence. Respondents expected the prospective Centre to fulfil a diverse range of roles, including holding Government to account and disseminating environmental information, providing training to public bodies, producing educational materials for public bodies, and awareness and capacity building for the public. Respondents also expressed a preference for a decentralized, holonic, bodies with different specialisations.
- 8.6 It is difficult to see one body being able to fulfil all of these criteria. Therefore, it seems that the gap could best be filled by separate bodies, operating in a linked fashion or under a co-ordinating body, as is common in other countries. One category of body is the Government run public body which co-ordinates Aarhus training and compliance across the public sector as well as disseminating environmental information. The other would be a possibly NGO led, agile structure, run virtually with a low-cost base through collaboration or piggybacking on other organisations, as envisaged by the proposal for a 'holonic' structure, with less dependence on Government, possibly funded through fundraising, philanthropic funding, and some indirect government grant funding, ensuring the freedom to engage in the kind of critique of government policy and advocacy envisaged.
- 8.7 It is possible that the holonic structure (several linked autonomous units operating under a council or steering group) could encompass a type of network/coalition approach where existing NGOs pool resources and recognize the respective contributions and domains already occupied but engage in greater co-ordination and more rational use of resources. This is supported by the findings of the EJNI research in 2020 that there were a number of NGOs in Ireland already carrying out activities that would sit comfortably within the range of activities usually undertaken by an Aarhus centre, such as An Taisce, [Eco-Advocacy](#), and CLM's [Centre for Environmental Justice](#).
- 8.8 It is clear that the idea of an all-island Aarhus Centre (or Centres) has strong support among the NGO sector on the island, and from the OSCE. Further discussions need to be had among Irish and Northern Irish eNGOs to work out the best form an all-island Aarhus Centre could take and the roles it might take on, as well as where its funding should come from.

## 9. Conclusions

- 9.1 As can be seen from the above, considerable work is needed to bring both jurisdictions closer to full implementation of the Aarhus Convention. There are significant areas of common deficiency such as access to information, a multi-level governance culture of lack of transparency, problems with thresholding of public participation and full implementation of EIA, problems with standing, the standard of judicial review, and costs, in particular 'own costs.' There are also areas of difference both positive and negative peculiar to each jurisdiction, for example the lack of right of appeal to the higher level of the planning tribunal for participants and observers in the Northern Ireland planning process, and the extreme examples of lack of record keeping and reason giving around important environmental decisions in Northern Ireland, but also positives such as the ability to make submissions and observations at almost any stage in the proceedings, and the comprehensive online portal system. The Irish Public Participation Network (PPN) is a good example of an initiative with potential for positive public engagement (though further work is needed (Mazars, 2022)), as are the Citizens Assemblies. There are also many examples of serious issues with public participation in both jurisdictions.
- 9.2 In the cross-border and transboundary space, lack of coherence is evident, probably in large part due to a combination of intermittent political vacuums in Northern Ireland, and the fragmented division of responsibility between the UK and NI for action on matters to do with Brexit. This makes it difficult to have coherent discourse and action between the jurisdictions. The GF/BA mechanisms are underutilised as vehicles for this, and recommendations are made below for addressing this, in particular through establishing a co-ordination body for environmental governance under the GF/BA.
- 9.3 Improved environmental governance mechanisms would improve Aarhus implementation, and improving implementation of the relevant international law instruments would improve environmental governance.

## 10. Recommendations

### 10.1 Ireland

- Funding should be provided for Aarhus Centre(s). Appropriately supported, Aarhus Centres or Environmental Rights Centres could play an important role in NGO and public capacity building, and in monitoring compliance.
- The cross-border exercise of Aarhus Rights is threatened by Brexit and mechanisms are needed to enhance coherence of the regulatory framework and to facilitate and encourage cooperation.
- Key Recommendations to support Aarhus Rights:
  - Cost barriers to public participation and access to information should be removed.
  - The EIA Directive should be fully applied to all areas, including extractive industries.
  - Research is needed to develop solutions in the areas identified above, in particular protection of environmental defenders, standing in judicial review, costs measures, and the standard of review.
  - Measures to encourage pro-bono legal assistance (e.g., tax write-offs & CPD points).
  - Media balance policies and Oireachtas Guidelines to be updated to discourage “applicant shaming” and establish standards for discourse/coverage of the climate and biodiversity crisis and human rights.
  - Environmental NGOs are instrumental in environmental governance and accountability, their funding and supports should be increased.
  - Increased awareness and training for public bodies and capacity building for the public is urgently needed.
  - The development of specialised Environmental Courts should be explored.
  - Mechanisms to promote regulatory coherence with Northern Ireland are needed.



## 10.2 Northern Ireland

- Brexit continues to pose an existential threat to environmental regulation in Northern Ireland, and by extension the whole island. The need for compliance with international law frameworks should be integral to discussions around regulatory changes planned in Northern Ireland.
- Capacity building in Aarhus Rights is needed: Training for public authorities and the public regarding Aarhus rights is urgently needed.
- The multi-level governance culture around access to information needs improvement: Implementation of the Northern Ireland Public Accounts Committee (PAC) Report recommendations should be a priority.
- Public participation needs to be enhanced in the planning system: Equal rights of appeal in the planning system are needed, and the regimes for regularisation of developments need to be reviewed.
- Access to Justice: Improved access to legal aid, and removal of the prohibition on ‘no-win, no fee’ provision by the legal profession. The standard of review in judicial review needs consideration.
- Support for NGOs and environmental defenders: Increased funding and legislative protections similar to those recommended for Ireland are needed.
- Funding should be provided for Aarhus Centre(s).

## 10.3 Cross Border

- Barriers to cross border exercise of Aarhus rights need to be reviewed: Cross-border access to justice issues regarding recognition and enforcement of judgements should be urgently addressed, as should cross-border/transboundary notification and participation in planning processes.
- A public register of transboundary public participation needs to be established.
- Establishment of a transboundary environmental governance mechanism for co-ordination of environmental law, policy and enforcement should be considered, possibly as an independent implementation body under Strand 2 of the GF/BA similar to existing bodies (e.g. the Loughs Agency).
- Establishment of an all-island NGO led Aarhus Centre to engage in capacity building, monitoring, and advocacy on Aarhus issues.

#### 10.4 Areas for further research:

- Research to elucidate the practicalities of cross-border environmental co-operation, such as the experiences of NGOs engaged in conservation efforts on cross border sites.
- Research into the barriers experienced by NGOs that operate cross border.
- Research into the experience of cross-border users of public participation mechanisms.
- Research on the barriers to cross-border access to justice and litigation issues.
- Research on possible solutions to the cost of access to justice in both jurisdictions.
- Empirical data on the impact of broad access to justice on judicial review in general.
- Research on the extent to which transboundary consultation obligations are complied with.

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