NORTHERN IRELAND

FINDING COMMON GROUND

Report on Aarhus Implementation – NORTHERN IRELAND

ABSTRACT:

This report gives a broad overview of how the Aarhus Convention is implemented in Northern Ireland and identifies key issues with implementation in the areas of access to information, public participation, and access to justice in Northern Ireland. It highlights deficiencies in the areas of access to information, equal rights of appeal in planning cases, affordable access to justice, the standard of review in judicial review. It also highlights issues with cross-border access to justice, which pre-exist and are exacerbated by Brexit, as well as new issues caused by Brexit.

REPORT ON AARHUS IMPLEMENTATION IN NORTHERN IRELAND

Lead Author: Alison Hough BL, Senior Law Lecturer, TUS

Co-author: Dr. Ciara Brennan, EJNI

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.

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 is a 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). It involved working with NGO umbrella bodies, The Environmental Pillar/IEN and NIEL (Northern Ireland Environment Link).

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".

A separate report "Aarhus Implementation in Ireland" has also been prepared and is available on the website www.findingcommonground.ie. There is also an overall project report, titled "Synthesis Report: All-island Implementation of the Aarhus Convention" available on the website.

Thanks to Research Officer Caitlin McIlhennon of Environmental Justice Network Ireland (EJNI), the Gathering NI, all of our webinar speakers, those who participated in the workshops, the eNGO communities Northern Ireland and Ireland, and our funder, the Irish Research Council (New Foundations) for their support in undertaking this project.

IRISH RESEARCH COUNCIL
An Chomhairle um Thaighde in Éirinn

TUS Midlands Midwest

Friends of the Irish Environment

EJNI Environmental Justice Network Ireland

QUEEN'S UNIVERSITY BELFAST

Friends of the Earth Northern Ireland

#LoveIrish Research

WITH THANKS TO:

Laura Neal, Friends of the Earth Northern Ireland

Carol Day, RSPB

For their helpful comments and feedback on the early draft of this report.

AND SPECIAL THANKS TO:

Anurag Deb, PhD Candidate QUB

Dean Blackwood

For their patience and contributions of comments and advice across the early drafts of this report, without which it could not have been completed.

Contents

Executive Summary

The Aarhus Convention embodies a key principle of international environmental law - that environmental decisions are best handled with the participation of those concerned. The three pillars of the Convention are access to information about the environment, public participation in environmental decision making, and access to justice when these rights are denied. The Convention's implementation in Northern Ireland/UK mainly relies on EU directives which implemented it in the areas of information and participation rights (but not access to justice).

There are considerable issues with implementation of Aarhus rights in Northern Ireland. Some of these parallel the problems in Ireland (time delays, costs, standing), but there are also unique challenges that arise issues arise with Access to Information and Public Participation. There is a poor culture of transparency in the public service (see section **9.7**) 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**) 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. 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.

Some key recommendations include:

1. **Cross border Aarhus rights need to be reviewed:** recognition and enforcement of judgments needs to be tackled urgently, as does cross-border notification and participation in planning processes.
2. **Capacity building in Aarhus Rights is needed:** Training for public authorities and the public regarding Aarhus rights is urgently needed.
3. **Public Service culture around Access to Information needs improvement**: Implementation of the Northern Ireland Public Accounts Committee (PAC) Report recommendations.
4. **Public Participation needs to be enhanced in the planning system**: Equal rights of appeal in the planning system are needed to enhance public participation, and the continued permitting of regularisation of EIA developments needs to be reviewed.
5. **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.
6. **Support for NGOs and environmental defenders:** Funding and legislative protections.
7. **Funding should be provided for Aarhus Centres.**

1. This Report

1.1 This project is an NGO-Academic collaboration, which is reflected in the design of the project, which was carried out collaboratively with the NGO Friends of the Irish Environment, and in partnership with Environmental Justice Network Ireland (EJNI) and Friends of the Earth Northern Ireland FOE-NI. It is also reflected in the consultation on the draft reports with the communities in both jurisdictions interested in environmental governance (eNGOs, activists and lawyers). This co-design approach to research ensures that those with on-the-ground experience of the issues the report seeks to address have input into the research design and outputs. This increases the likelihood of the relevance of the research and the validity of its recommendations.

1.2 This report was produced through a combination of desk-based research by the authors which utilized transnational, comparative and doctrinal legal research methodologies, and data gathered by the research team from stakeholders through a targeted online stakeholder consultation and survey with participants who had been provided with copies of the draft reports and relevant information in advance, to ensure informed participation. The stakeholders engaged with were representatives of environmental NGOs from Northern Ireland, lawyers practicing in Northern Ireland, activists from Northern Ireland and the border regions, as well as some participants from Ireland with an interest in/experience of cross border environmental governance. The research team consisted of the author, Alison Hough BL, Senior Lecturer, TUS, Dr. Ciara Brennan, Director of the EJNI and Visting Fellow of Newcastle University and Dr. Peter Doran of QUB. The project activities aimed to gather knowledge about Aarhus Convention implementation that would not be available from the State version of the National Implementation Report submitted to the UN.

1.3 The purpose of this project is to carry out a preliminary assessment to identify key implementation issues in relation to Aarhus Convention rights. The data gathered is intended to be used to identify research priorities to form the foundation of a future, more comprehensive research project on Aarhus implementation. As such this report does not claim to be a comprehensive or systematic analysis of the areas covered.

1.4 The author would like to thank all the eNGOs, activists and lawyers who took the time to participate in the activities that contributed to both the design of this project and the formulation of this report.

2. Introduction to the Aarhus Convention

2.1 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.[1]

2.2 The Convention marked a departure from previous international environmental law approaches (UN, 2014) in several respects, creating rights for NGOs and individuals, 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,[2] 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 Á. , 2016b), but also that perhaps the changes imported by the Convention, and the impact of the Aarhus Convention Compliance Committee (ACCC) were unanticipated (Ryall Á. , 2013).

2.3 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 Á. , 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.

3. Status and Ratification in the EU

3.1 The EU ratified the Aarhus Convention in 2005 (EU, 2019).[3]The European Union was specifically envisaged as a signatory during the drafting of the Convention and is circumspectly referred to as a Regional Economic Integration Organization or REIO in the Convention (UN, 2019).

3.2 The status of the Convention in EU law is that it is a mixed multilateral environmental agreement signed by both the EU and its constituent Member States (Nagy, 2018)

[1] Principle 10 of the Rio Declaration 1992 A/CONF.151/26/Vol.I: Rio Declaration on Environment and Development (un.org) 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.

[2] 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.

[3] Decision 2005/370/EC, making it part of EU law as per Art 216 TFEU.

separately. Article 216(2) TFEU declares that agreements concluded by the Union are binding on the institutions of the Union and on its Member States. The CJEU has determined that the provisions of such agreements are binding on the EU institutions and form an 'integral part' of EU law. Provisions of an international agreement entered into by the EU can have direct effect when they are sufficiently clear and precise and can have indirect effect under the principle of harmonious interpretation (Craig & DeBurca, 2020, p. 390). The CJEU has previously held that some provisions of the Aarhus Convention lack this quality of direct effect but are subject to the principle of harmonious interpretation[4] (Hough, 2022). It is also important to note that the EU has competence to act in the area of environmental law at Member State level. Art 4 of the TFEU provides that the EU has shared competence in the area of Environment, as well as a range of other areas including Freedom, Security and Justice. Art 2 TFEU provides that in areas of shared competence "The Member States shall exercise their competence to the extent that the Union has not exercised its competence.". This is further supported by Art 191 and 192 TFEU which create EU competence in the area of environmental matters.

3.3 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).

3.4 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 Á. , 2016b) (Hough, 2022) The more recent approach has been to adopt non-binding guidance documents on access to justice at Member State level.[5]

3.5 The net effect of the EU implementation is that the Aarhus Convention has largely been implemented through identical routes in both jurisdictions, through transposition of the EU Directives mentioned above. However, differences in transposition approaches introduced nuances of implementation that render the legal implementation of the Convention similar but slightly different in specific ways in both jurisdictions.

3.6 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 continue in Northern Ireland) the UK parliament.

[4] Case C-240/09 "LZ No. 1", where the CJEU applied the principle of harmonious interpretation in relation to Art 9(3), and in Joined Cases C-404/12 and C-405/12 "Stitching Natuur en Milieu", the CJEU held that Art 9(3) was not sufficiently clear and precise so as to have direct effect.

[5] 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. 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

4. Status and Ratification in Ireland

4.1 Ireland was one of the last countries to ratify the Aarhus Convention in 2012 (Nagy, 2018). Ireland has implemented the EU law implementing measures, which carry into Irish law the Aarhus obligations through a complex piecemeal set of amendments to various pieces of legislation, which has been the subject of infringement actions[6] brought by the Commission against Ireland.

4.2 Ireland has not fully implemented the provisions of the Convention[7], 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.

5. Status and Ratification in UK/NI

5.1 The UK, including Northern Ireland, also ratified the Aarhus Convention in 2005. The UK implemented EU law implementing measures, carrying into UK law the Aarhus obligations through a range of both UK-wide and devolved legislation and legislative amendments. 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 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)

6. What does the Convention do?

6.1 The Aarhus Convention ostensibly creates an interlocking set of procedural environmental rights, the right to access environmental information, the right to participate in environmental decision making, and the right to access justice to defend either of those rights and the environment itself by challenging breaches of environmental law (UN, 2014).

6.2 It has been described as a powerful force for change (Ryall Á. , 2013) and recognised as signalling a new era in environmental rights (Jendroska & Stec, 2001), even to have established a new legal culture (Caranta, Gerbrandy, & Mueller, 2018).

[6] E.g. see https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1581 and https://ec.europa.eu/commission/presscorner/detail/en/IP_02_1950

[7] See "Report on Aarhus Implementation in Ireland", 06/06/22, available at www.findingcommonground.ie

6.3 However, the densely drafted legal text of the Convention is complex, subtle and at times ambiguous in meaning (Barritt, 2020) (Ryall Á. , Access to Justice in Environmental Matters: the Evolving EU Jurisprudence, 2016). There are multiple layers to the Convention's meaning and rights. For example, in its requirements of public participation in environmental decision making articulated in Article 6 it appears to imply a requirement that such decision making will be subject to environmental impact assessment (Art 6 para 6). It does this by requiring that information about the significant effects on the environment be made available to the public for the purpose of facilitating participation in decision making. Another area of ambiguity is the expression of a right to a clean and healthy environment which is set out in Article 1 and the Preamble to the Convention, articulated as "the right to live in an environment adequate to his or her health and well-being,". This right is set out but in a non-mandatory way, particularly when compared to the procedural rights set out in the Convention which are phrased in a much more definitive way. Barritt suggests this reflects the inability of the negotiating parties to reach agreement on whether such a right should be recognised or not (Barritt, 2020). By contrast the more recent Escazú Agreement between Latin American countries and the Caribbean, expressly recognises the right to a clean and healthy environment (Art 4, para 1[8]). Barritt argues for a purposive interpretation of the Aarhus Convention based on Art 31 of the Vienna Convention, and the status of the Convention as a human rights treaty (Barritt, 2020). This is in line with the CJEU's approach to interpretation of the Convention's provisions, in particular Art 9 which has been expressly purposive (Lee, 2014). This is consistent with the approach to interpreting fundamental rights, according to them the highest level of protection.

6.4 The Aarhus Convention describes itself as a human rights instrument, but the rights it creates are primarily procedural in nature (Boyle, 2012) (UN, 2014). The creation of participation rights in environmental decision making is possibly its most significant contribution with practical effect in day to day life. These rights promote environmental participatory democracy (Barritt, 2020) as an enhancement of representative democracy at local and national level. "Environmental decision making" covers a multitude from spatial planning development consents ("planning permission" in the Irish and UK systems), pollution licensing and environmental impact assessment. Lee states the most significant contributions in EU law were in the EIA and IED directives' public participation provisions (Lee, 2014).

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

7.1 The Aarhus Convention influences the environmental law/governance framework in two ways, both pre- and post-Brexit. Firstly, through the existing EU law implementation it created analogous frameworks 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

[8] "The Escazú Agreement", The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean Adopted at Escazú, Costa Rica, on 4 March 2018, entering into force on the 21st April 2021, available at: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf

regulation on the island (Hough, 2019) (Gravey, et al., 2018). Secondly the Convention itself creates directly enforceable rights for individuals against States, which are enforceable through the Compliance mechanism. These rights are created without regard to residency or citizenship and are exercisable by anyone who makes up the public concerned. 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.

7.2 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.

7.3 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.

8. Issues with the Convention in Northern Ireland

Preliminary matters: Brexit

8.1 The Convention has never been fully implemented in the United Kingdom and Northern Ireland and has been the subject of both EU infringements and ACCC findings against the UK for failure to implement Aarhus Convention obligations.[9] 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 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 these laws are not included in the annexes to the Protocol on Ireland and Northern Ireland, they may diverge going forward, with 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.

9. Access to Information

9.1 The Environmental Information Regulations 2004 (EIRs) and the Freedom of Information Act 2000 implement Directive 2003/4/EC on Access to Environmental Information (the EU implementation of Articles 4 and 5 of the Aarhus Regulation) and apply to information held by public authorities in Northern Ireland, England and Wales (Scotland has its own legislation). The provisions also apply to private bodies exercising public functions. The exact meaning and scope of application to private bodies exercising public functions has been the

[9] 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

subject of much litigation in the UK[10]. There is extensive information about the EIRs and how they operate on the UK Information Commissioner's website.

9.2 Under the EIRs, what constitutes Information relating to the environment is very broad and it includes 'state of the environment' information like water quality levels, chemical use levels, plans or programs affecting the environment, environmental legislation reports, cost-benefit analyses, and matters affecting human health and the food chain.

9.3 The EIRs are very similar to the Freedom of Information Act, however there are some important differences: a wider range of organisations are covered by the EIR, including some private organisations; the EIR relates to environmental information only and requests for information do not have to be in writing under the EIR - they can be verbal[11].

9.4 There is a presumption in favour of release. All exemptions for refusing an EIR request are subject to a public interest test.

9.5 Time limits within which responses to EIR information requests must be made are considered relatively long in the UK (20 working days which can be extended to 40 working days for complex requests) compared to many EU countries. However, the time period is shorter than that in Irish law (1 month, extendable to 2 months).

9.6 The provisions regarding active collection and dissemination of environmental information are covered by the EIRs but in practice in Northern Ireland the amount and quality of environmental data being provided is at a very low level.

9.7 There is also evidence that access to information is frequently confounded by "culture" within the Northern Ireland Civil Service (NICS), and public service at central and local government levels, of not documenting in writing important decisions and discussions, which has consequences for the availability of important environmental information for the public (e.g. see para 56 and Recommendation 28 of Vol 3, Chapters 42- 56 of the RHI Report (RHI Inquiry, 2020)). Indeed, the practice of "oral government" has been raised as a concern by the Northern Ireland Public Services Ombudsman (NIPSO) suggesting this practice is more widespread in NICS beyond those Departments that were the focus of the RHI Inquiry[12] . Also, there are many decisions by NIPSO against local authorities involving findings of maladministration in the area of planning for failure to keep written contemporaneous records of important meetings and decision-making processes which, may suggest emerging patterns of "oral government" among some local authorities."[13]

---

[10] E.g. Fish Legal v Information Commissioner (2015)

[11] What should we do when we receive a request for environmental information? | ICO https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/receiving-a-request/

[12] "Investigation into a complaint against NIEA", NIPSO Ref: 17453, para 29, available at https://nipso.org.uk/site/wp-content/uploads/2020/03/s44-17453.pdf.

[13] For example, see: "Investigation of a complaint against Derry City and Strabane District Council" April 2018, NIPSO Ref: 17101, para 75-77, available at https://nipso.org.uk/site/wp-content/uploads/2018/04/Investigation-of-a-complaint-against-Derry-City-and-Strabane-Council-Ref.-17101.pdf , and "Investigation of a complaint against Newry, Mourne and Down District Council" Jan 2019, NIPSO Ref: 17326, pg.7 Summary and para 42, 56 and 91, available at https://nipso.org.uk/site/wp-content/uploads/2019/01/Investigation-of-a-complaint-against-Newry-Mourne-and-Down-District-Council-1.pdf, and "Investigation of a complaint against Causeway Coast and Glens Borough Council", April 2019, NIPSO Ref: 17922 available at https://nipso.org.uk/site/wp-content/uploads/2019/09/s44-report-17922.pdf, and "Investigation of a complaint against Mid and East Antrim Borough Council", 2020, NIPSO Ref: 18716, available at https://nipso.org.uk/site/wp-content/uploads/2020/01/s44-18716.pdf, and "Investigation of a complaint against the Newry, Mourne and Down District Council", 2020, NIPSO Ref: 18321, available at

9.8 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*."

10. Public Participation

10.1 Public participation in spatial planning consent arises largely a result of various implementations of the EIA Directive, as well as the IPPC/IED Directives. Also, domestic planning regulations for non-EIA type applications (e.g. public advertisement and neighbour notification).

10.2 Since April 2015, Individual spatial planning consent applications are required to be determined within the context of local development plans,[14] which are large scale, long term plans for the functional area of a local authority, setting development objectives. However there has been a large-scale failure of the local development plan system (McKay & Murray, 2017) (NIAO, 2022) (PAC, 2022) leaving individual applications to be determined based on out of date/generic planning frameworks that do not reflect more recent environmental or public concerns. LDPs are underway in all council areas but in the meantime, decision making falls back on a set of generic planning policy statements and the old Area Plans, most of which are vastly out of date.

10.3 For individual applications, the planning procedure[15] distinguishes between major and local developments, the majority of which are processed by the local council, unless "called-in" to be dealt with by the Department[16] (McKay & Murray, 2017). Feedback from research participants suggest "calling-in" is rare. Section 31 of The Planning Act (NI) 2011 requires that the Council must prepare a "scheme of delegation" by which any application for planning permission can be either dealt with by the Planning Committee of the local council, or can be delegated to a planning officer. Certain applications cannot be delegated, such as major applications, or significant deviations from the development plan for example. All applications that are considered major require a community consultation stage during the pre-application period, including circulation of a newspaper notice and the holding of an event in the community, and the production of a report[17] on this showing the comments and how they were taken into account. The threshold for qualifying as a major development includes all EIA developments, as well as other scale-based thresholds set out in the Planning (Development Management) Regulation (Northern Ireland) 2015. (McKay & Murray, 2017)

---

https://nipso.org.uk/site/wp-content/uploads/2020/07/s44-18321-1.pdf, and "Investigation of a complaint against Causeway Coast and Glens Borough Council" Dec 2021, NIPSO Ref: 201915620, available at https://nipso.org.uk/site/wp-content/uploads/2021/12/Case-Ref-201915620-21863-Final-investigation-report.pdf.

[14] Part II, Planning Act (Northern Ireland) 2011 https://www.legislation.gov.uk/nia/2011/25/contents

[15] Created by the Planning Act (Northern Ireland) 2011 https://www.legislation.gov.uk/nia/2011/25/contents

[16] Planning (Development Management) Regulations (Northern Ireland) 2015 The Planning (Development Management) Regulations (Northern Ireland) 2015 (legislation.gov.uk)

[17] Contents of the report set out in Development Management Practice Note 10

10.4 Additional opportunity for participation in spatial planning occurs in the main planning application process.[18] The main planning application process provides for the planning authority to publish a newspaper notice, a notice on their website, and to serve notice on neighbouring landowners of the application as well as statutory consultees. The public/NGOs are entitled to participate in the usual fashion by way of comments in writing made through the Northern Ireland Planning Portal or by post. The "site notice" used in Ireland alongside the newspaper notice as a standard means of notification of the public concerned is not used in Northern Ireland. However, neighbour notification is used in the Northern Ireland system, which is not a practice in Ireland.

10.5 Additionally, there is provision for a "public local inquiry"[19] to be held by the Northern Irish Planning Appeals Commission (herein NI PC, not to be confused with the Public Accounts Committee (PAC)) or a person appointed by the Department, in particular cases, such as where the proposed development would be significance to the whole or a substantial part of Northern Ireland, have significant effects outside Northern Ireland, or involve a substantial departure from the local development plan (McKay & Murray, 2017). The Department is not obliged to follow the recommendations in the report from the public inquiry (R v Secretary of State ex-parte Ulster Estates Limited (1990)). The purpose of the public inquiry is to be a forum for the making of representations (McKay & Murray, 2017) (R v Secretary of State ex-parte Blair (1995)).

10.6 If it is determined no public inquiry is required a draft notice of opinion is served on the applicant and the council, with opportunity for a hearing with the PC/person appointed by the Department on the draft decision.

10.7 Planning permission if granted will be subject to time limitations, a period within which works must commence, and may be subject to any other conditions considered necessary and relevant. Reasons must be given for refusal, and for conditions.

10.8 Applicants can appeal decisions that have been refused, or conditions imposed on permissions to the Planning Appeals Commission. The legislation provides they must hold some form of hearing and provide both the Council and applicant an opportunity to participate. The PC determines the application as if at first instance. Currently, developers can vary their development proposal at appeal stage, but the Department for Infrastructure have recommended a change to s.59 of the Planning Act (Northern Ireland) 2011 to stop this from happening (DFI, 2022, pp. 56- 57). The Planning Act 2011 is non-prescriptive as to the form hearings must be conducted in, and the PC may determine its own procedures, and uses both formal and informal hearings as well as written representations with site visit by a commissioner (by far the most common method) (McKay & Murray, 2017).

10.9 The Planning Act (Northern Ireland) 2011 section 45 requires that the planning decision set out how representations have been taken into account in reaching a determination of a planning decision.

10.10 The EIA Directive is currently implemented for spatial planning by the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017.[20] These provide opportunity for publicity and consultation (Part 5) and also provide an obligation to show how the representations have been taken into account (s.27).

[18] Set out in the The Planning (General Development Procedure) Order (Northern Ireland) 2015 (legislation.gov.uk) https://www.legislation.gov.uk/nisr/2015/72/contents

[19] Section 26, Planning (Northern Ireland) Act 2011

[20] The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 https://www.legislation.gov.uk/nisr/2017/83/made

10.11 The relevant habitats legislation is transposed through The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 (as amended, including in 2015 to transfer functions to the new local councils) and Wildlife and Natural Environment Act (Northern Ireland) 2011 and requires assessment of impacts. The 2017 EIA regulations require such assessments be "co-ordinated".

10.12 Pollution prevention and control is governed by the Pollution Prevention and Control (PPC) Regulations (Northern Ireland) 2013 which set out a similar regime to that of the spatial consent outlined above, with application made to the local authority at first instance and appeal to the Department. Publication occurs of the license application, by the developer, and comment is invited. Operations of a large scale are made directly to the NIEA, as set out in the Regulations. The schedules thereto set out the provision for advertising the application for comment, and for large scale applications, advertising the draft decision for comment also.

10.13 Unlike the planning system in Ireland, in Northern Ireland there is no fee for a submission or observation on an initial planning application (in IE it is €20/€50 on appeals), and there is a central online portal for making comments and observations on all applications and appeals. In IE it is still required to write in by post to the individual local council rather than a central planning portal. However, the central electronic portal in the NI system requires the user register with an NI postcode and does not accept postcodes from IE. This violates the Aarhus Convention requirement that the public concerned not be defined by domicile.[21] A new planning portal is currently at an advanced stage of development by DFI, it is not known if this defect will be remedied in the new system. Also, early indications are that not all Councils will participate in the new online portal[22]. The minimum time period for submissions is two weeks in NI, whereas it is five weeks in IE. Submissions made at any time during the processing of an application must be considered. There is a non-binding 4 week time frame for making a representation when an EIA is required (but in practice submissions and observations are accepted any time up to the application being decided[23]). These targets are more designed to try to encourage the public to engage at an early stage, but again are not strictly binding, unlike the situation in IE where deadlines for submissions and observations are held strictly. Notably, despite longer and more extensive consultation opportunities in the IE system, delay seems to a bigger issue in the NI system, with data indicating that applications are in many cases taking years, with EIA applications taking an average of 125 weeks (instead of the 16 weeks prescribed by the 2017 Regulations), and one fifth of planning applications (which for non-EIA developments have a time limit of 8 weeks[24]) not determined within three years (NIAO, 2022). There is also an issue with the length of time that competent authorities take to make EIA screening and scoping determinations, often breaching Regulation 8 of the EIA Regulations.[25] Indeed, this

[21] Art. 3(9) Aarhus Convention ("without discrimination as to citizenship, nationality or domicile").
[22] Minutes of Evidence, Public Accounts Committee, meeting on Thursday, 10 February 2022, http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=30358&eveID=15281
[23] E.g. see the Ards and Northdown guidance "Commenting on an a planning application" available at https://www.ardsandnorthdown.gov.uk/downloads/ards-and-north-down-borough-council-commenting-on-a-planning-application.pdf
[24] Section 12 of the Planning (General Development Procedure) Order (Northern Ireland) 2015, available at https://www.legislation.gov.uk/nisr/2015/72/article/12
[25] The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017, available at https://www.legislation.gov.uk/nisr/2017/83/made#f00009

has drawn a "stern reprimand" from the Courts for one local authority.[26] Research participants reported cases where planning authorities only made an EIA determination at the same time as it recommends approval one week before the Planning Committee. This practice deprives the public of understanding how the EIA process is being conducted.

10.14 The ACCC have previously criticised the practice under articles 67B(3) and 83A of the Planning (Northern Ireland) Order 1991 of retrospective declaration of lawfulness of development conducted in the absence of development consent, finding this to be a breach of Art 6 public participation requirements in ACCC/C/2013/90, as it denies the public early public participation when all options are open, as required by Art 6(4). In Decision VII8s UK, the Meeting of the Parties to the Aarhus Convention made the following recommendation in relation to ACCC/C/2013/90 which was approved by the Meeting of the Parties:

> "*4. Recommends that the Party concerned take the necessary legislative, regulatory, administrative and practical measures to ensure that:*
> *(a) Decisions to permit activities subject to article 6 of the Convention cannot be taken after the activity has already commenced or has been constructed, save in highly exceptional cases and subject to strict and defined criteria;*
> *(b) Activities subject to article 6 of the Convention are not entitled, by law, to:*
> *(i) Become immune from enforcement under article 67B (3) of the Planning (Northern Ireland) Order 1991 or any legislation that supersedes it;*
> *(ii) Receive a certificate of lawful development under article 83A of the Planning (Northern Ireland) Order 1991 or any legislation that supersedes it;*"

10.15 Articles 67B(3) and 83(A) of the Planning (Northern Ireland) Order 1991 have since been repealed by s.253 of the Planning Act 2011. S.169 of the same act now declares lawfulness in respect of existing development or use ("CLEUD" procedure). This allows for existing development or use to be declared lawful and therefore planning compliant if no enforcement action was taken in relation to it (because it wasn't a breach or because time has elapsed for doing so) and it does not constitute a contravention of the requirements of any enforcement notice then in force. The failure to comply with a condition of a planning permission is lawful if the time for enforcing on it has expired and it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force. This would appear to allow a development or change of use to be declared lawful which was not originally compliant because the time has elapsed for enforcement. While this does not amount to a grant of planning permission, it does mean no enforcement action can be taken against the development and renders the development lawful that would otherwise have been unlawful, removing any difficulties with sale or transfer that would usually arise with an unauthorised development.

10.16 There are also no provisions in the CLEUD in relation to developments requiring EIA or AA (Appropriate Assessment under the Habitats Directive) and the case law indicates that they can be granted even in cases where EIA would have been required but wasn't carried out ("Vitacress"[27]). A CLEUD does not seem to be a "planning permission", and therefore it

[26] In the matter of Dean Blackwood representing the River Faughan Anglers ltd vs Derry & Strabane District Council [2018] NIQB 87, para.[68], available at https://www.judiciaryni.uk/sites/judiciary/files/decisions/Blackwood%27s%20%28Dean%29%20Application_0.pdf

[27] R. (on the application of Evans) v Basingstoke and Deane BC [2013] EWCA Civ 1635; [2014] 1 W.L.R. 2034; [2013] 11 WLUK 532 (CA (Civ Div))

does not seem to fall within the general proviso in Art. 4 of the Planning (Environmental Impact Assessment) Northern Ireland Regulations 2017 [28] (2017 Planning EIA Regulations) that all planning applications for EIA developments be subject to EIA. This would appear to be contrary to the ECJ judgement in Commission v Ireland C-215/06 (the "Derrybrien Windfarm" case).

10.17 Additionally, the law provides for what is known as "retention permission" a type of planning permission obtained after the development has been carried out. This obviously raises the same issues with early participation as the CLEUD process. It appears CLEUD is used primarily for regularisation of development where time for enforcement has expired, whereas the more involved "retention" permission is used where time for enforcement has not yet expired.

10.18 S.55 of the 2011 Act allows for granting permission for development already carried out, and s.145 allows for granting permission on determination of an appeal of an enforcement notice for planning non-compliance. S.55 retention would appear to be a "planning application" and therefore subject to the requirement under the Art. 4 requirement in the 2017 Planning EIA Regulations that all planning applications for EIA developments be subject to EIA[29]. The grants of permission under s.145 is subject to an express requirement that it cannot be made where EIA would have been required[30] (under Art.33 of the 2017 Planning EIA Regulations).

10.19 While the law as set out above requires that EIA be carried out when retention is sought of EIA developments, the law appears to allow permission to be granted for EIA developments after development has been carried out (particularly with s.55 "retention" and s.169 "CLEUD" procedure). This is problematic in terms of public participation, not allowing participation at the earliest possible opportunity as highlighted by the Aarhus Convention, and contrary to the "Derrybrien Windfarm" ECJ judgment discussed above.

10.20 Workshop participants highlighted the lack of an independent environment agency as being the source of major environmental governance problems in Northern Ireland, with the Northern Ireland Environment Agency being situated in a government department instead of being an independent organisation as is the case in Ireland or England for example. The NIEA were described as protective of Government decision making.

10.21 Workshop participants also complained about the timing and nature of public consultations, and that it was often a fight to have the voice of the public heard in decision making, citing the example of the Mobuoy Dump case. Public participation arrangements in general were described by participants as "not sufficient". Participants described narrow consultations with loaded questions leading to a preconceived outcome as the standard model for public involvement.

10.22 The planning system in Northern Ireland has been the subject of a recent damning reports by the Public Accounts Committee (PAC) (PAC, 2022) in March 2022, and the Northern Ireland Audit Office (NIAO) (NIAO, 2022) in February 2022, which have found widespread and systemic issues with the planning system across all areas of function. The issues highlighted included problematic record keeping, failure to document reasons for key decisions, general lack of transparency, siloed approaches between the Department and

[28] Planning (Environmental Impact Assessment) Northern Ireland Regulations 2017 No.83 of 2017 available at https://www.legislation.gov.uk/nisr/2017/83

[29] Planning (Environmental Impact Assessment) Northern Ireland Regulations 2017 No.83 of 2017 available at https://www.legislation.gov.uk/nisr/2017/83

[30] Ibid

Local Council, delays, low confidence in the planning system and inadequate public participation. The Department has recently reported on its initiative "Planning Engagement Partnership" aimed at improving public participation.

10.23 This is exemplified by some high profile obviously bad decisions such as the decision to site a giant wind turbine at the site of a neolithic monument at Knock Iveagh. Some of the concerns highlighted in the report were lack of accountability, transparency, delays, poor quality applications and decisions, impacts on the public purse. The PAC report concludes starkly that the planning system is not working and recommends a 'root and branch' independent review.

The 12th Recommendation is worth quoting in full:

> "*There is a fundamental need for a cultural change in the way local and central government interact around planning. Whilst cultural change will take time, this should be reflected immediately in a more inclusive planning forum which includes representation from developers and communities*."

10.24 This need for culture change was also highlighted by workshop participants who were highly critical of the culture surrounding public participation in government departments and agencies. Workshop participants felt that there really wasn't a commitment from the top down in organisations that should be leading on delivery of Aarhus commitments. Government departments were described as hostile, defensive and having no appetite to acknowledge failures.

10.25 While the planning system endeavours to provide opportunities for public consultation and to ensure that the inputs from the consultations inform the decisions taken, it is clear from the PAC and NIAO reports (PAC, 2022) (NIAO, 2022) that public confidence in the system is low. This is, in part, because there is no provision for what are known in the UK system as 'third party' or equal rights of appeal for participants against a planning decision, as there is in the Irish system. However, when an application is appealed, objectors or anyone with an interest in the proposal may make a response to the Planning Appeals Commission. The first-instance decision of the Planning Appeals Commission can only be challenged by citizen participants by way of judicial review, in the High Court, but as explored below, there are issues with judicial review which does not provide an appeal but rather a procedural review (see the discussion of the grounds of judicial review above) and is risky and for many unaffordable. The inability of citizen participants (as opposed to applicant developers) to initiate an appeal within the system means that many poor-quality decisions will go unchallenged, depriving the planning system of an important accountability mechanism.

10.26 The case of "In the Matter of Duff (Re Glassdrumman Road, Ballynahinch) for Judicial Review" [2022] NIQB 37 the Court expressed concerns about the Council's compliance with the relevant policies in granting planning permission for two houses on sites in a rural area (based on concerns about ribbon development and visual breaks as well as hedgerow removal). However ultimately the court found that the decision while "at the outer edge" of rationality, did not meet the Wednesbury standard of irrationality. The Court went on to state that the issues would be better dealt with by way of third-party appeal rather than judicial review, where such substantive matters could be addressed. At para 64:

> "*Indeed, the grant of permission at this site might well be considered to lie at the outer edge of what might rationally be considered to comply with the Policy CTY8 exception. However, much of Mr Duff's challenge was more appropriate to argument which would have been better directed towards a third party appeal against the grant of permission on the merits. Indeed, Mr Duff lamented the*

absence of availability of such an appeal route in our planning system in some of his submissions."

10.27 In this way it is seen that the restrictive application of the Wednesbury rules in planning cases worsens the participatory/access to justice deficit caused by the absence of equal rights of appeal, because there is effectively no venue to challenge a bad decision.

10.28 The NIAO suggest equal rights of appeal may also reduce the risk of impropriety in the decision-making process. This also sends a very strong message about the role of the public in environmental decision making in Northern Ireland. The ACCC have been critical of these discrepancies between the rights of the public/NGOs and the rights of developers in previous decisions (para 143 of ACCC/C/2013/90).

10.29 While the recent report on the review of the implementation of the Planning Act (Northern Ireland) 2011 found that the Department was not persuaded of the need for equal rights of appeal (DFI, 2022, pp. 57-58) the Public Accounts Committee report has subsequently recommended that deeper consideration be given to a limited form of equal rights of appeal within the Northern Ireland planning system (PAC, 2022, p. 26), signalling that the Department will need to revisit the issue.

11. Access to justice

"People go to court because there is nowhere else to go"[31]

11.1 Access to justice was one of the most discussed issues relevant to Aarhus implementation both in literature, case law and among the study workshop participants. Many workshop participants highlighted the excessive costs associated with going to court. Others pointed out that the only reason that access to justice was the topic of so much discussion was because the upstream system failures in public participation and access to justice. Tackling the problems in the planning system, and improving implementation of existing rules, would relieve the pressure on the courts by reducing the need for judicial review. However, the justice system itself is also in need of scrutiny and reform in order to meet the standards required by the Aarhus Convention in the area of Access to Justice (as required by Art. 9 of the Convention).

11.2 This part of the Convention requires that the public concerned have access to substantive and procedural review of environmental decision making they have participated in, and where the provisions of the Convention or domestic environmental law are breached in some way. This must be fair, equitable, timely and not prohibitively expensive. It is suggested that State Parties should establish mechanisms providing assistance with the costs of litigation. Access to justice has traditionally been the most contentious area of implementation of the Convention, but without it, the Convention would be just words on paper. However, tensions remain between the set of norms described by the Convention and the actual concepts of justice in the State Parties, with research (Milieu, 2019) on EU Member States (which included the UK at the time) showing that access to justice was problematic in almost all Member States, whether due to costs barriers, issues of standing, procedural restrictions, delay or capacity (knowledge and skills needed to exercise the rights). EU attempts to legislate to implement access to justice in the Member State level governance systems have run aground due to resistance by the Member States themselves (Cenevska, 2015). The provisions of Art 9 have partially implemented through the EIA Directive, and the case law of the CJEU has taken a broad approach to this area, developing

[31] Workshop Participant, Stakeholder Consultation on Aarhus Implementation in Northern Ireland, held 20/05/22.

the theory of the "interpretative obligation". This means while the provisions of Article 9 do not have direct effect, Member State courts and the CJEU must interpret domestic law in light of Art 9 and in a manner compatible with its provisions[32].

Cross-Border Access to Justice

11.3 Access to justice in cross-border cases involves difficulties for everyday people and NGOs, such as navigating unfamiliar systems, laws and procedural requirements. Lack of knowledge of how to use the system in the other jurisdiction may hamper making complaints and bringing cases in a timely manner, resulting in exclusion. The Aarhus Convention prohibits discrimination as to nationality, citizenship and domicile, therefore guaranteeing cross-border access to justice in its State Parties, as the definition of the public concerned does not stop at State borders. There are practical and systemic issues, some of which are exacerbated by Brexit. Uneven implementation and divergence in implementation of rules such as the Aarhus Convention create barriers to exercising those rights cross-border, and Brexit has increased this as well as removing some mechanisms important in cross border access to justice.

11.4 The potential for regulatory divergence between Ireland and Northern Ireland in the area of the environment is significant, with key pieces of legislation such as the Habitats, Waste Framework Directive, Water Framework Directive and the "Aarhus Directives" (e.g. Public Participation 2003/35/EC and Access to Information 2003/4/EC), not covered by Annex II & IV of the Protocol on Ireland and Northern Ireland, and therefore not being required to be kept in force. They currently continue to be part of UK and Northern Irish law as part of "retained EU law" created by the EU (Withdrawal) Agreement Act 2018 as amended, but are vulnerable to being altered by UK Ministers under powers in that Act While there are provisions in s.10 of that act preventing alteration of any retained EU law that would impact on North South co-operation, they appear to only offer limited protection. The UK Environment Act 2021, and the draft Statement of Principles made under it are supposed to offer protection against lowering of standards. However, the relevant sections (s.20) have not been commenced and offer insufficient protection even if commenced. There is no oversight/enforcement any more by the EU Commission/CJEU in areas of environmental law not covered by the Protocol. The Office of Environmental Protection (OEP) created under the Environment Act 2021, is intended as an environmental regulator, but is not an effective mechanism to combat environmental damage by private bodies or regulatory divergence, because it only regulates public bodies. The absence of an independent regulator in Northern Ireland has already been highlighted as undermining effective and consistent enforcement in Northern Ireland (Brennan, 2016).

11.5 Before Brexit, there was a reciprocal mechanism for enforcement of judgements and determination of jurisdiction between UK and Ireland (and other EU countries), the Brussels Convention I recast. This no longer applies post-Brexit. This leaves the appropriate jurisdiction a matter to be determined on a case-by-case basis, the law applicable to the dispute open to challenge, and generates problems enforcing judgements across the Northern Ireland-Ireland border. The absence of any such agreement adds extra procedural complexity and costs to enforcing judgements. The UK was expected to join the Lugano

[32] E.g. see the approach of the CJEU in LZ No. 1 "Slovak Brown Bears" Case C-240/09 https://curia.europa.eu/juris/document/document.jsf?docid=80235&doclang=EN

Convention which would have provided a comparable framework, but the EU blocked[33] their accession on grounds that the Convention had previously only been acceded to by EFTA members not third countries, with concerns regarding guarantees of sufficient commonality. Hopes are now turned on the Hague Convention 2019, but so far only Uruguay and Ukraine have signed this agreement[34].

11.6 The Cross-Border Legal Aid Directive[35] no longer applies to cross-border cases taken by people between Ireland and Northern Ireland, removing the possibility of legal aid in these cases. This allowed a person from one jurisdiction litigating a civil case in another jurisdiction to benefit from the legal aid rules of the jurisdiction they were suing in. For NGOs litigating from Ireland into Northern Ireland for pollution cases, this may have been potentially beneficial because Northern Ireland legal aid rules allow NGOs to seek legal aid, and also allow for legal aid in environmental cases (unlike the situation in Ireland).

Judicial Review

11.7 There is no appeal of planning decisions to the courts, but in there is access to "judicial review" (JR) of planning decisions. This is a process by which the courts (a single judge of the High Court) review the decision-making process of a public body for compliance with principles of fairness and the relevant rules applicable to the decision-making process. Judicial review is a significant feature of the planning system (McKay & Murray, 2017), as the main route to challenge a decision made by a planning body. However, while developers frequently take judicial reviews of planning decisions (of refusals, or of restrictive conditions imposed), citizens face significant barriers to access to justice outlined further, usually when seeking to challenge grants of permission.

11.8 In both Ireland and Northern Ireland, the courts adopt a deferential approach to quasi-judicial expert tribunals such as An Bord Pléanala, or the Northern Irish Planning Appeals Commission (herein the NIPC (usually called the PAC, not to be confused with the Public Accounts Committee), or planning authorities. Generally speaking, the court will not interrogate whether the decision made is the "right" one, but rather looks at the process followed in arriving at the decision, ensuring procedural fairness. In general, the threshold for going beyond a review of the process followed to review of the substance of the decision made is high and varies depending on the legal context of the decision. Judicial review has been compared to an "audit" of the decision-making process (McKay & Murray, 2017).

11.9 The limited role of judicial review in Northern Irish planning cases is summarised well in Re Newry Chamber of Commerce [2015] NIQB 65 at para 44 where the court highlights that it is not a merits-based appeal but rather a review of legality of the planning process:

> "It follows from the above that the role of the court in planning cases is limited to reviewing the legality of the decision making process. The court will not conduct an appeal against the planner's judgement: it will not substitute its judgement on the weight to be attached to the relevant factors in place of the planner's judgement on that question. It will however review the legality of the planning process on the basis

[33] https://www.ibanet.org/Brexit-UK-assesses-implications

[34] Ibid

[35] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0008

of the well understood principles of public law where a case is made out that the planner has made an error of reviewable kind"

11.10 This means generally that in both jurisdictions the emphasis is on the procedure followed in arriving at the decision, with less emphasis on review of the merits of the decision (review of whether the decision itself was good or bad). There are many grounds for judicial review, but this higher level of scrutiny can only be applied in a planning case in a limited class of cases (discussed from 11.11 onward, below). Judicial review in Northern Ireland is governed by the Judicature (Northern Ireland) Act 1978 and Order 53 of the Rules of the Court of Judicature (NI) 1980, the common law precedents in the area, and additional guidance in practice notes issues by the Northern Ireland Courts and Tribunals Service (McKay & Murray, 2017).

11.11 Like the Irish system, there is a leave stage application to filter out unmeritorious applications (McKay & Murray, 2017) (Anthony, 2014). The applicant must show "sufficient interest" in order to establish standing, as in the Irish system, and like the Irish system, what will satisfy this standard varies depending on the extent of public interest at issue in the case. The applicant also needs to establish an "arguable case". There is a time limit of three months. The three-month time limit may be extended if there are grounds to do so. The Irish system time limit is considerably tighter for planning judicial reviews under s.50 of the P&D Act 2000, at eight weeks (one of the strictness time limits in the law). There was a "promptitude" requirement in both the Irish and Northern Irish systems which created uncertainty due to the possibility an application could be rejected as out of time even though it was within the three month limit, for not being taken at the first possible opportunity, but this has been removed from Northern Ireland judicial review rules due to concerns that it might violate the procedural requirements of clarity and certainty under EU law.[36]

11.12 In Northern Ireland (as well as England and Ireland), when an executive discretion is entrusted by Parliament to a body (such as that exercised by the local authority when making planning decisions), the exercise of that discretion can only be challenged in the courts in limited circumstances. There are broadly three grounds of review: irrationality, illegality and procedural impropriety (although there is a lot of cross-over between these grounds in practice (see Ch. 6, McKay & Murray, 2017)). The threshold for review of the merits of the decision for irrationality is set out in the Wednesbury principles.[37] In Newry Chamber of Commerce and Trade's Application [2015] NIQB 65 Treacy J. stated: "The Court will not interfere with the exercise of the planners' discretion on the weighting of the factors, provided it is rational in the Wednesbury sense".

11.13 Irrationality, traditionally described as "Wednesbury irrationality", is "where an error of reasoning "robs the decision of logic" (R v Parliamentary Commissioner for Administration ex p Balchin [1996] EWHC 152 (Admin), [1998] 1 PLR 1, at paragraph 27) (Deb, Honey BL, Fegan, & Anyadike-Danes QC, 2019). The logic here is that matters of planning involve a level of technical expertise which is not readily found in courts, and thus planners are better placed at evaluating these technical aspects than courts. This is subject to an outer boundary of rationality, catching any decision which simply has no logic at all

[36] The Rules of the Court of Judicature (NI) (Amendment) 2017 came into force on 8 January 2018. These amended Order 53 rule 4(1) of the Rules of the Court of Judicature (NI) 1980.

[37] E.g., The "GCHQ case" - Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9 (22 November 1984) https://www.bailii.org/uk/cases/UKHL/1984/9.html

within the planning context. It is at this point that courts intervene to quash a decision, but not before.

11.14 The courts should only interfere with discretionary choices that are taken beyond the outer reaches of the decision-makers' power, where the decision is so unreasonable that no reasonable authority could have taken it (Anthony, 2014). This is generally applied strictly or less strictly depending on the context and whether fundamental rights are at issue in the case (Anthony, 2014). This means that review of the merits of the decision is not available in every case of judicial review of a planning decision (in fact it is almost never carried out in a planning case in either jurisdiction). The court will however examine the way in which the decision was reached in order to make a determination as to whether the threshold for engaging with the substantive decision is reached. R v Environment Secretary ex p Tesco [1995] 2 PLR 72 the court highlighted that:

> "It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit. and the courts will not interfere unless he has acted unreasonably in the Wednesbury sense"

11.15 This refusal to engage with the merits of the decision unless the high threshold of irrationality is met may be a violation of the Aarhus Convention requirement to have access to both procedural and substantive review of environmental decision making. This is particularly so when it comes to the courts failure to engage with conflicts of the evidence on either side. ***Re MORA's application for judicial review*** [2022] NIQB 40 is a recent example of evidence of factual error being presented to the court by an expert witness, and shows that the court reviews evidence like this in limited circumstances. In that case the court stated: "…judicial review of planning decisions does not admit merits-based challenges, save where Wednesbury irrationality can be established…". It went on to refuse to engage with expert evidence of errors in the EIS because the standard had not been reached.

11.16 This is well illustrated by the High Court judgment in River Faughan Anglers Ltd[38] case which went on to be considered by the ACCC in the findings ACCC/C/2013/90. This case involved the decision to approve a planning application to re-site leachate lagoons in a concrete factory on the banks of the River Faughan, an SAC. The necessity for the application arose because of the risk of pollution from the lagoons into the River Faughan and its protected habitat. However, the project was the subject of a negative EIA screening by the planning authority – meaning that it was not considered to require an EIA. The screening decision merely recorded the letter "N" beside the relevant criteria regarding risk of pollution and whether sensitive habitats were implicated. The Court refused to consider arguments on these grounds on the basis that the Court was not allowed to examine the substance of the decision, and that these were matters within the discretion of the decision maker (citing the Wednesbury principles in support of this finding).

[38] In the matter of Dean Blackwood representing the River Faughan Anglers ltd vs Derry & Strabane District Council [2018] NIQB 87, available at https://www.judiciaryni.uk/sites/judiciary/files/decisions/Blackwood%27s%20%28Dean%29%20Application_0.pdf

11.17 The ACCC highlighted[39] that the failure by the Court to engage with the issue of the obvious misapplication of the EIA regulations, and differences in evidence regarding the practicality of implementing of planning conditions, which meant that the standard of review applied in this case was insufficient[40] (while declining to comment on whether the Wednesbury principles themselves were sufficient in terms of the Convention, leaving this issue over to another decision which is under consideration by the Committee, ACCC/C/2017/156). This was because the Court relied on the evidence of the decision maker that the EIA determination had been properly carried out, refusing to enter into consideration of the contrary evidence offered by the applicant on these points. The ACCC also highlighted the fact that the court did not offer any reasoning or even mention the evidence offered by the communicant on a factual discrepancy regarding whether the planning conditions could be implemented without environmental harm, on grounds that the threshold of irrationality had not been met.

11.18 The Wednesbury approach to irrationality and what is a "material consideration" in this type of case is well explained by this passage from Newry Chamber of Commerce and Trade's Application [2015] NIQB 65:

> "[105] As the parties acknowledge it is well-established that a challenge of irrationality to a planning judgment, and the weight to be attached to a specific factor, is a very high hurdle to overcome. See e.g. Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 W L R 759 at 780 H per Lord Hoffman.[106] I accept the respondents primary submission that relevant matters have been taken into account. The weight to be attached to the evidence and the balancing of relevant considerations are matters properly falling to the Respondent to determine, challengeable only on Wednesbury grounds. The Department's balancing of the relevant factors and the conclusions are unimpeachable on Wednesbury grounds."

11.19 The problem with this approach becomes apparent on consideration of the facts of the "River Faughan case", set out above, as discussed in paras 134 – 140 of the ACCC's decision on the case ACCC/C/2013/90[41]. The decision maker appears not to have accorded any weight to evidence offered by the applicant in relation to the planning conditions regarding moving of the lagoons, which suggested that the decision was based on factually incorrect information, and moreover failed to address the factual conflict between the evidence given by the respondent with the evidence in relation to the practicality of the planning conditions given by the applicant. The court seems to have simply preferred the planning authority's evidence over the directly contradictory evidence of the applicant with no explanation. Under the Wednesbury principles this practice by the original decision maker, of ignoring contradictory material before it, which is repeated by the court, is unchallengeable. The decision maker is entitled to decide what weight if any to accord to the evidence before them, and as long as there is some evidence before them on which they could have based their decision, it is within the bounds of Wednesbury rationality. The most that could be said is that reasons ought to have been given for preferring one piece of

[39] at paras 121 – 132, and 141 of ACCC/C/2013/90

[40] ACCC/C/2013/90 para 133 & 141.

[41] See paras. 134 – 140 setting out the discrepancies on the planning condition which related to whether the lagoons which needed to be moved, and the proposed location they were to be moved to, overlapped or not. It was the respondent's evidence they did not

evidence over another, but the court do not seem to feel that this was necessary. In this way the original errors have been perpetuated and reinforced by the courts. The freedom to exercise discretion entails the freedom to get it wrong.

11.20 This Wednesbury deference leading to the court refusing to engage with expert evidence that the decision maker had made a factual error is also evident in the case of Re MORA's Application for Judicial Review [2022] NIQB 40 (paras 82-97), discussed above. The decision also provides an interesting insight into the Courts view of the role of expert evidence in such proceedings, with the court being highly critical of affidavit evidence offered by the experts for the applicant, for straying into what the judge clearly considered to be their remit, that of the legality of matters before the Court, although this was also because the allegations of illegality of these matters had not previously been pleaded and therefore were not considered relevant to the case.

11.21 Finally, it is worth mentioning a class of cases where the Court will engage somewhat in a review of the substance of the decision, the "Tameside Decisions"[42]. These involve failure to make such inquiries as would be considered appropriate in a decision-making process of that kind, such that no reasonable authority could have concluded they had sufficient material before them that would enable them to make the decision properly. The nature of the Tameside enquiry is such that the court must ascertain the material the decision maker had before it and examine whether a reasonable decision maker would have concluded they had sufficient information before them. To some extent "Tameside" review involves an examination of the substance of the matters the original decision maker addressed, but this is limited only to ensuring they followed appropriate principles of procedural fairness, and is limited within the bounds of Wednesbury reasonableness.

11.22 Whether the "Wednesbury" standard of review meets the requirements of Art 9(2) of the Convention is under consideration separately in the communication ACCC/C/2017/156 United Kingdom, yet to be determined.

12. Costs in Judicial Review

12.1 The CJEU[43] and the ACCC,[44] have previously commented on the prohibitively expensive nature of UK costs. Since these cases, the costs rules in the UK and Northern Ireland have been altered in an attempt to implement the Aarhus Convention and the relevant provisions of the EIA Directive which implement the Aarhus Convention requirement that costs of review proceedings not be prohibitively expensive. The relevant legal rules[45] in Northern Ireland provide for a regime of cost capping, with the possibility of a

[42] From the judgment by Diplock in Secretary of State for Education and Science v Tameside MBC [1977] AC 1014, https://www.bailii.org/uk/cases/UKHL/1976/6.html, where he said at page 1065B: "The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?". These principles were further developed into six propositions in Plantagenet Alliance Ltd, R (On the Application Of) v Secretary of State for Justice [2014] EWHC 1662 (QB) (23 May 2014) (bailii.org) https://www.bailii.org/ew/cases/EWHC/QB/2014/1662.html

[43] E.g., Case C-530/11 European Commission v. UK, Case C-260/11 Edwards v. Environment Agency

[44] ACCC/C/2008/33 https://unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf. See also Report to the 6th Meeting of the Parties on Compliance of UK 2nd August 2017 available at https://unece.org/DAM/env/pp/mop6/English/ECE_MP.PP_2017_46_E.pdf

[45] The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 https://www.legislation.gov.uk/nisr/2013/81/contents/made as amended by The Costs Protection

cost capping order in Aarhus Convention matters, if the applicant is of limited means. The most that can be recovered from an individual applicant on losing their claims is £5,000, and £10,000 where they are an NGO applicant. There is currently a dispute as to whether VAT can be added to this. There are also provisions to lower this if it would be prohibitively expensive, having regard to a detailed range of factors which include considering the applicants situation and means and whether the claim was a public interest matter or was vexatious. An individual litigant who is successful may recover up to £35,000, with provision to increase this in the interests of fairness. The Regulations also provide that, in deciding whether a cap makes the proceedings prohibitively expensive, the court should have regard to all the costs that an environmental litigant has had to face including any court fee and their own legal costs. They apply the same provisions to costs of appeals in Aarhus Convention cases.

12.2 Campaigners have praised the provision regarding the possibility of reducing the costs recoverable against applicants who lose but have criticised the £35,000 cost cap for applicants who are successful, describing this aspect of the provisions as making environmental judicial review cases potentially "too expensive to win",[46] for example where the applicant's own costs are far more than the £35,000 which they are entitled to recoup from a public authority on a successful JR, then they must pay this difference. The prohibition on contingency fees in Northern Ireland (discussed below) and lack of legal aid means that the applicant is almost always exposed to a risk of costs should they win or lose.

12.3 The requirement to bear own costs can still result in cases being prohibitively expensive, with judicial review "own costs" running into hundreds of thousands.[47] The concerns that "own costs" are too expensive has been linked by commentators to an increase in "lay litigants" or "litigants in person"[48] representing themselves before the Northern Ireland Courts. Studies in Northern Ireland indicate that litigants in person face considerable obstacles in effectively participating in court proceedings (McKeever, Royal-Dawson, Kirk, & McCord, 2018).

(Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 https://www.legislation.gov.uk/nisr/2017/27/made. The 2017 amendment applies to all proceedings commenced after 14 Feb 2017.

[46] E.g. in relation to the original 2013 Regs, see ACCC/C/2013/90 the communicant set this out on page 9 of their supplemental information on their complaint "Additional Information of the Communicant 30/08/2013" available at https://unece.org/DAM/env/pp/compliance/C2013-90/Correspondence_Communicant/frCommC90_30.08.2013/frCommC90_30.08.2013_Redacted.pdf and also NIEL made this statement in their submission on legal costs (NIEL, 2016). See also Client Earths comments on the 2017 Regs https://unece.org/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frCommunicants/frCommC33_ClientEarth_V9n_25.04.2017_comments_on_3rd_PR.pdf
See also comments of RSPB to the ACCC on United Kingdom Decision V/9n, available here https://unece.org/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frObserver/frObserver_CAJE_V9n_comments_on_Party_concerned_s_second_progress_report_17.12.2015.pdf

[47] E.g. in ACCC/C/2013/90 the communicant cited own costs of £160,828.63, see para 43 of the decision available at https://unece.org/sites/default/files/2021-11/ECE_MP.PP_C.1_2021_14_E.pdf

[48] E.g. see Comments from RSPB and FOE 3rd November 2021 on Decision VII/8s of the Meeting of the Parties on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention https://unece.org/sites/default/files/2022-03/frCommC33andObsVII.8s_30.03.2022_letter_Redacted.pdf

12.4 However, the ACCC have indicated that as long as the court makes judicious use of the discretionary capacity to increase the costs cap for successful applicants, the provisions do not necessarily render proceedings prohibitively expensive.[49]

12.5 Another unique feature of the Northern Ireland system when compared to the Irish or English systems is the prohibition by the Law Society NI on solicitors offering "contingency"[50] or "no-win, no-fee" costs basis for clients (not to be confused with percentage fees which are not allowed in either jurisdiction). Also described as "no-foal, no fee" arrangements, in this type of agreement a legal professional undertakes the work for the client on the basis that if the case fails the legal professional will not charge a fee, relieving the client from the burden of "own costs" in the event that they lose. It would be expected that the illegality of such arrangements would impact on ability to obtain representation because, as mentioned above, "own costs" can still be so very substantial as to represent an unacceptable risk to an individual wishing to take a public interest case.

12.6 It is interesting to note that the fact that NI legal practitioners do not offer "no win no fee" arrangements drew criticism from some workshop participants, with perceptions that the legal profession were implicated in the high costs associated with litigation in NI. Some workshop participants felt that there was "no good reason" for not offering conditional fee arrangements. Solicitors are legally prohibited from offering conditional fee arrangements in Northern Ireland (unlike Ireland, or England). However, that legal prohibition is ultimately created by the profession itself (being Law Society NI created rules). Therefore, ultimately it seems the profession as a whole could remove the prohibition.

12.7 Workshop participants also highlighted the great need for public interest litigation and the lack of any kind of adequate mechanism to facilitate this. A need for capacity building was also identified, to give people the confidence to go forward and engage competently with the appropriate professionals and systems.

12.8 Virtual court systems were highlighted as having massive potential to enhance accessibility of the Courts.

13. Conclusion

13.1 There are considerable issues with implementation of Aarhus rights in Northern Ireland, and many parallels to the difficulties of implementation in Ireland as the systems have historic links. In Northern Ireland however, while there are very similar problems in respect of Access to Justice (time delays, costs, standing), there are unique challenges that arise issues with Access to Information and Public Participation, which are unlike the issues in the Irish system. The situation with respect of equal rights of appeal for the public in planning decisions is the most notable of these. The lack of public participation and environmental impact assessment in "substitute consent" is also very concerning. Of further concern is that post-Brexit, further divergences will arise, creating further barriers for those seeking to exercise Aarhus rights in Northern Ireland and cross-border. The lack of a governing mechanism for recognition and enforcement of judgments in civil cases is also problematic. It is important to note that the issues in both Northern Ireland and Ireland with implementation of the Convention take place against the backdrop of serious environmental governance problems generally (Brennan, Purdy, & Hjerp, 2017) and low levels of enforcement in both jurisdictions, resulting in a poor overall picture regarding

[49] Para 85, Report to the 6th Meeting of the Parties on Compliance of UK 2nd August 2017 available at https://unece.org/DAM/env/pp/mop6/English/ECE_MP.PP_2017_46_E.pdf

[50] Regulation 17, The Solicitors Practice Regulations 1987 (as amended) available at

environmental protection and governance across the island of Ireland. Enhanced implementation of the Convention is essential for providing for improvements in environmental governance, which will cause knock-on improvements in environmental protection in both jurisdictions, providing better protection for the single biogeographic unit of the island.

13.2 Recommendations arising out of this research include:

- **Cross border access to justice, public participation, access to information** – those dealing with environmental problems cross border face the problem of fighting on two fronts or in unfamiliar territory. Ways to address this could include establishing a commission or oversight body to ensure coherence of the procedural elements of the justice system and relevant legislation either side of the border, and the provision of targeted capacity building for border communities and cross-border NGOs. Also, the establishment of an all-island 'Aarhus Centre' could assist in identifying and targeting these issues as they emerge.
- Recognition and enforcement of judgments needs to be tackled urgently.
- **Capacity building** of the public regarding their Aarhus rights. A consistent program of public education, starting in secondary schools, building in third level, and moving into communities, in a way that consistently targets disadvantaged groups in society, would go a long way towards making the public aware of their rights under the Aarhus Convention.
- **Training for public authorities:** Many issues arise from a "culture problem" and failure of public bodies to appreciate their obligations under the Aarhus Convention and various pieces of legislation, or poor quality first-instance decision making in development consent and licensing. Better professional development of staff dealing with environmental issues in public authorities and decision-making bodies is vital for vindication of Aarhus Convention rights.
- **Access to Information**: The PAC Report recommendations should be implemented, and targeted efforts made to tackle the poor culture of transparency in the public service and local government/government agencies. Poor first-instance[51] decision making by public bodies in relation to information requests, and poor practice in public participation design and implementation generally arise from lack of training/knowledge in the public bodies concerned, or a lack of clear guidelines/implementation of guidelines. Ongoing awareness raising/training among the staff of public authorities is urgently needed on a scale that would match that of efforts to promote data protection on the implementation of GDPR.
- **Public Participation** procedures need re-evaluation. The lack of equal rights of appeal is one area where there is a massive gap in public participation rights between developers and communities. Ensuring the online portal is accessible for those not from Northern Ireland like those resident in border communities in IE is important (the current requirement to give a UK postcode should be removed). Inconsistent practices are evident across many local authorities, with poor information provision leading to impaired participation. Substitute consent procedures need to be reviewed in order to ensure that they are adequately protecting public participation rights and the environment. A lack of consideration of diversity and inclusion issues in public participation is evident. Ensuring training for all government body staff in the right to public participation, development of a set of standards for public bodies carrying out consultations and a system for monitoring the quality of public consultations is urgently needed.

[51] 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.

- **Access to Justice:**
    - **Costs** are still a massive barrier despite the recent changes to the costs capping regime. Own costs are still prohibitive for many individuals and NGOs. A lack of proper legal aid provision for individuals and NGOs seeking to take environmental cases, and dysfunction and underfunding in the Courts service have the biggest impact on the area of Access to Justice, followed closely by the issue of costs in general and capacity building. Improvements are needed in education on how to use the Courts system for the general public and NGOs, in order to increase capacity. The removal of the statutory prohibition on conditional fee arrangements should be considered by the Law Society to enable practitioners to provide "no win no fee" services.
    - **Judicial review**: Consideration needs to be given to increasing the scope for merits-based review in judicial review of environmental decision making to ensure compliance with the Convention.
    - **Public Interest Litigation**: Development of mechanisms to facilitate public interest litigation should be considered.
- **Support for NGOs and environmental defenders:** NGOs that protect the environment require more support than they currently receive in order to ensure a strong civil society sector in this area. Funding streams available are much lower than other jurisdictions and should be increased.
- **Funding should be provided for Aarhus Centres.** Appropriately supported, Aarhus Centres or Environmental Rights Centres could play an important role in NGO and public capacity building, and in monitoring State compliance from an objective point of view.

Bibliography

Anthony, G. (2014). *Judicial Review in Northern Ireland* (2nd ed.). Belfast: Bloomsbury.

Barrett, E. (2014). Problems of the Irish Wind Energy Sector for the Aarhus Convention to the Strategic Environmental Assessment (SEA Directive). *IPELJ, 21*(2), 58-66.

Barritt, E. (2020). *The foundations of the Aarhus Convention : environmental democracy, rights and stewardship .* Oxford: Hart Publishing.

Bell, S., McGillivray, D., Pedersen, O., Lees, E., & Stokes, E. (2017). *Environmental Law* (9th ed.). Oxford: OUP.

Boyle, A. (2012, August 03). Human Rights and the Environment: Where Next? *European Journal of International Law, 23*(3), 613-642. doi:https://doi.org/10.1093/ejil/chs054

Brennan, C. (2016). The Enforcement of Waste Regulation in Northern Ireland: Deterrence, Dumping and the Dynamics of Devolution. *Journal of Environmental Law, 28*(3), 471 - 496. Retrieved from https://ejni.net/wp-content/uploads/2019/06/Brennan-2016.pdf

Brennan, C., Dobbs, M., Gravey, V., & Ui Bhroin, A. (2018). *Policy Paper: The Future of Environmental Governance in Northern Ireland.* Brexit and Environment. Retrieved from https://www.brexitenvironment.co.uk/download/4083

Brennan, C., Purdy, R., & Hjerp, P. (2017). Political, Economic and Environmental Crisis in Northern Ireland: the true cost of environmental governance failures and opportunities for reform. *NILQ, 68*(2), 123-157.

Browne, D. (2015). Ireland's Compliance with the Aarhus Convention - Some Suggestions for Reform. *IPELJ, 22*(2), 43-62.

Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., . . . Reid, C. (2018). *Environmental Policy in a Devolved United Kingdom: Challenges and Opportunities after Brexit.*

Caranta, R., Gerbrandy, A., & Mueller, B. (2018). Introduction. In R. Caranta, A. Gerbrandy, & B. Muller, *The Making of a New European Legal Culture: the Aarhus Convention:.* Europa Law Publishing.

Carbery, E. (2020). Post-Brexit Impact on Environmental Law. *Irish Planning and Environmental Law Journal*(4), 145-153.

CASE. (2022, March). *Shutting out criticism: How SLAPPS threaten European Democracy.* Retrieved from www.the-case.eu: https://static1.squarespace.com/static/5f2901e7c623033e2122f326/t/623897f6f5eb056c82fe2681/1647876093121/CASE+report+SLAPPs+Europe.pdf

Cenevska, I. (2015). The European Union and Environmental Democracy: The Aarhus Convention in EU Law. *Justinianus Primus Law Review, 6*(2). Retrieved from http://lawreview.pf.ukim.edu.mk/

Cowell, R., Ellis, G., Fischer, T., Sykes, O., Jackson, T., & Muinzer, T. (2019). *Environmental Planning After Brexit: Working with the legacy of EU environmental directives.* RTPI.

Craig, P., & DeBurca, G. (2020). *EU Law Texts Cases and Materials* (7th ed.). Oxford: Oxford University Press.

Day, C. (2018). Chapter 10 United Kingdom. In R. Caranta, A. Gerbrandy, & B. Muller, *The Making of a New European Legal Culture: The Aarhus Convention* (pp. 276 - 318). Groningen: Europa Law Publishing.

Deb, A., Honey BL, R., Fegan, C., & Anyadike-Danes QC, M. (2019). *Judicial Review in Planning and Environmental Cases in Northern Ireland: A Guide for Litigants in Person.* FOE-NI. Retrieved from https://ejni.net/wp-content/uploads/2019/12/Judicial-Review-guide-FINAL-v2.pdf

DECC. (2022, January 13). *Aarhus National Implementation Report 2021.* Retrieved from Gov.ie: https://www.gov.ie/en/consultation/16a9e-public-consultation-on-the-implementation-of-the-unece-aarhus-convention-and-prtr-protocol-in-ireland/

DFI. (2022). *Review of the Implementation of the Planning Act (NI) 2011.* Belfast: DFI. Retrieved from https://www.infrastructure-ni.gov.uk/sites/default/files/publications/infrastructure/review-planning-act-report-jan2022.pdf

DFI. (2022a). *Planning Your Place: Getting Involved Report of the Planning Engagement Partnership.* Belfast.

EU. (2019). *The EU and the Aarhus Convention*. Retrieved from Europa: https://ec.europa.eu/environment/aarhus/legislation.htm

EU. (2021, 07 23). *2020 Annual Report on monitoring the application of EU law.* Retrieved from Europa.eu: https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure/2020-annual-report-monitoring-application-eu-law_en#member-states

Ewing, M., Hough, A., & Amajirionwu, M. (2011). *Assessing Access To Information, Participation, and Justice in Environmental Decision Making in Ireland.* EPA. Dublin: EPA. Retrieved from https://www.epa.ie/pubs/reports/research/econ/STRIVE_86_web.pdf

Ewing, M., Hough, A., & Amajirionwu, M. (2011). *Assessing Access To Information, Participation, and Justice in Environmental Decision Making in Ireland (2005-SD-MS-47).* EPA. Retrieved from https://www.epa.ie/researchandeducation/research/researchpublications/strivereports/strivereport86.html

Grashof, F. (2018). Towards a Common European Legal Culture under the "First Pillar" of the Aarhus Convention. In R. Caranta, A. Gerbrandy, & B. Muller, *The Making of a New European Legal Culture± the Aarhus Convention* (pp. 319-346). Groningen: Europa Law Publishing.

Gravey, V., Burns, C., Carter, N., Cowell, R., Eckersely, P., Farstad, F., . . . Reid, C. (2018). *Northern Ireland: Challenges and opportunities for post-Brexit environmental governance.* ESRC.

Gravey, V., Dobbs, M., & Brennan, C. (2019). Out of the Frying Pan, Into the Fire? Environmental Governance Vulnerabilities in Post-Brexit Northern Ireland. *ELR, 21*(2), 84-110.

Hardiman, A. (2016). Development of Strategic Infrastructure Projects under Irish Planning and Development Law: Part 2. *IPELJ, 23*(3), 83-87.

Hough, A. (2019). The Potential of the Good Friday Agreement to Enhance post-Brexit Environmental Governance on the island of Ireland. *Irish Planning and Environmental Law Journal*(2), 55 - 65.

Hough, A. (2020). *Submission to the Public Consultation on General Scheme of the Housing and Planning and Development Bill 2019.* Submission to Public Consultation. Retrieved from https://research.thea.ie/handle/20.500.12065/3120

Hough, A. (2022). Access to Environmental Justice in the EU: Interpretation, Harmonisation and the Search for Consistency. In B. Vanheudsen, T. Iliopoulos, & A. Vanhellemont, *Harmonisation in EU Environmental and Energy Law* (pp. 101 - 127). Cambridge: Intersentia Ltd.

Institute of European Environmental Policy. (2019). *Development of an assessment framework on Environmental Governance in the EU Member States.* Retrieved from https://ieep.eu/uploads/articles/attachments/a48ea483-d931-42f8-8071-4c0cf834f483/Development%20of%20an%20assessment%20framework%20on%20environmental%20governance%20in%20the%20EU%20Member%20States.pdf?v=63728772354

Jendroska, J., & Stec, S. (2001). The Aarhus Convention: Towards a New Era in Environmental Democracy. *Environmental Liability*, 140.

Kelleher, O. (2021). Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A purposive approach. *JEL*, 107-134. doi:https://doi.org/10.1093/jel/eqab037

Kingston, S. (2016). Regulating Ireland's Environment. *The Irish Jurist, 56*, 42-65.

Kramer, L. (2015). The Aarhus Convention and the European Union. In C. Banner, *The Aarhus Convention: A Guide for UK Lawyers* (p. 79). Oxford: Hart Publishing.

Kramer, L. (2017). Access to Environmental Justice: The Double Standards of the ECJ. *Journal of European Environmental and Planning Law*(14), 159 - 185.

Law Society of Ireland. (2022, 03 25). *38 EU actions against Ireland last year.* Retrieved from Law Society Ireland Gazette: https://www.lawsociety.ie/gazette/top-stories/2020/08-august/38-eu-actions-against-ireland-last-year#:~:text=Environmental%20issues&text=At%20the%20end%20of%202019,double%20the%20figure%20for%202018.

Lee, M. (2014). *EU Environmental Law, Governance and Decision-Making.* Oxford: Hart Publishing.

Macrory, R. (2018, September 24). Environmental law in the United Kingdom post Brexit. *ERA Forum*. doi:https://doi.org/10.1007/s12027-018-0531-6

McCrudden, C. (2022). *The Law and Practice of the Ireland-Northern Ireland Protocol.* Cambridge: Cambridge University Press.

McKay, S., & Murray, M. (2017). *Planning Law and Practice in Northern Ireland* (1st Ed ed.). Taylor Francis.

McKeever, G., Royal-Dawson, L., Kirk, E., & McCord, J. (2018). *Litigants in Person in Northern Ireland: Barriers to Participation.* Belfast: Ulster University.

Milieu. (2019). *Study on Implementation of the Aarhus Convention in the Area of Access to Justice in Environmental Matters.* Brussels: EU Commission. Retrieved from https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implemention_environmental_matters_2019.pdf

Nagy, A. D. (2018). The Aarhus-Acqui in the EU. Developments in the Dynamics of Implementing the Three Pillars Structure. In R. Caranta, A. Gerbrandy, & B. Muller, *The Making of a New*

European Legal Culture: the Aarhus Convention (pp. 17 - 69). Groningen: Europa Law Publishing.

Nesbitt, M. (2019). *Environmental Governance Assessment: Ireland.* EU Commission. Retrieved from https://ec.europa.eu/environment/environmental_governance/pdf/country-assessment-reports-2019/IE%20EGA%20final.pdf

NIAO. (2022). *Planning in Northern Ireland.* Belfast: NIAO.

NIEL. (2016). *Costs Protection in Environmental Cases: Department of Justice proposals to revise the cost capping scheme for eligible environmental challenges.* Retrieved from https://www.google.ie/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiHx-Lhr4X3AhVHT8AKHXRbBhcQFnoECAIQAQ&url=https%3A%2F%2Fwww.pila.ie%2Fdownload%2Fpdf%2Fnielresponsedojcostsprotectionconsultation.pdf&usg=AOvVaw3zjw9uy8p6FbGveFBesfb6

O'Neill, S., Gleeson, C., Torney, D., Mercier, S., Daly, C., & Wall, R. (2022). *Environmental Justice in Ireland: Key dimensions of environmental and climate injustice experienced by vulnerable and marginalised communities.* DCU. Retrieved from https://communitylawandmediation.ie/wp-content/uploads/2022/03/Environmental-Justice-in-Ireland-230322.pdf

O'Sullivan, K. (2022, January 21). *EU Official Criticises targeting of environmental NGOs.* Retrieved from The Irish Times: https://www.irishtimes.com/news/environment/eu-official-castigates-government-over-environmental-court-costs-1.4782718#:~:text=European%20Commission%20says%20it%20will,access%20to%20justice%20in%20Ireland&text=The%20penal%20and%20uncertain%20costs,by%20a%

PAC. (2022). *Planning in Northern Ireland.* Retrieved from http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/pac/reports/planning-in-ni/public-accounts-committee---planning-in-northern-ireland.pdf

PILS. (2012). *Judicial Review in Northern Ireland.* Retrieved from https://www.pilsni.org/sites/default/files/JRhandbook.pdf

QC, W. O. (2015). The Aarhus Convention in Northern Ireland- A Tale of Two Polities. In C. Banner, *The Aarhus Convention: A Guide for UK Lawyers* (pp. 73-78). Oxford: Hart Publishing.

RHI Inquiry. (2020). *Volume 3, Ch 42-56 Report of the Independent Public Inquiry into the Non-Domestic Renewable Heat Incentive Scheme.* NIAO. Retrieved from https://cain.ulster.ac.uk/issues/politics/docs/rhi/2020-03-13_RHI-Inquiry_Report-V3.pdf

Ryall, Á. (2013). Access to Justice in Environmental Matters: Some critical reflections on developments to date. *ICEL AEAJ.* ICEL.

Ryall, Á. (2014). Planning for Access to Justice in Environmental Matters. *IPELJ, 21*(4), 131-137.

Ryall, Á. (2014a). Aarhus Convention and Access to Justice in Environmental Matters: Some Critical Reflections. *IPELJ, 20*(4), 165-168.

Ryall, A. (2016). Access to Information on the Environment: The Evolving EU and National Jurisprudence. *IPELJ, 23*(1), 3 -11.

Ryall, Á. (2016). Access to Justice in Environmental Matters: the Evolving EU Jurisprudence. *23*(4), 115-124. Retrieved 03 20, 2022

Ryall, Á. (2016a). Access to Information on the Environment: The Evolving EU and National Jurisprudence: Part 2. *IPELJ, 23*(1), 115-124.

Ryall, Á. (2016b). Access to Justice in Environmental Matters in the Member States of the EU: the Impact of the Aarhus Convention. *Jean Monnet Working Paper 5/16*. Retrieved 03 20, 2022, from https://www.jeanmonnetprogram.org/wp-content/uploads/JMWP-05-Ryall.pdf

Ryall, Á. (2017). Pollution, the Public and the Rule of Law. *IPELJ, 24*(4), 143-147.

Ryall, Á. (2018). Challenges and Opportunities for Irish Planning and Environmental Law. *Irish Planning and Environmental Law Journal, 25*(3), 104-111.

Ryall, Á. (2018). Challenges and Opportunities for Irish Planning and Environmental Law. *Irish Planning and Environmental Law Journal, 3*(25), 104 -111.

Ryall, Á. (2018). The Aarhus Convention: A force for change in Irish environmental law and policy. In R. Caranta, A. Gerbrandy, & B. Muller, *The Making of a New European Legal Culture: The Aarhus Convention* (pp. 127-156). Groningen: Europa Law Publishing Ltd.

Ryall, Á. (2019). The Aarhus Convention: Standards for access to justice. In S. Turner, D. L. Shelton, J. Razzaque, O. McIntyre, & J. R. May, *Environmental Rights: The Development of Standards* (pp. 116-146). Cambridge: Cambridge University Press.

Ryall, Á. (2019a). Careful what you wish for: Amending the Rules Governing Judicial Review in Planning Matters. *IPELJ*(4), 151-156.

Turner, S. (2006). Transforming Environmental Governance in Northern Ireland. Part One: The Process of Policy Renewal. *Journal of Environmental Law, 18*(1), 55-87. doi:https://doi.org/10.1093/jel/eqi052

Turner, S. (2006). Transforming Environmental Governance in Northern Ireland. Part Two: The case of environmental regulation. *Journal of Environmental Law, 18*(2), 245-275. doi:https://doi.org/10.1093/jel/eql003

Turner, S. (2009). Devolution as a Barrier to Environmental Reform: Assessing the Response to the Review of Environmental Governance in Northern Ireland. *Environmental Law Review*, 150 - 160. doi:https://doi.org/10.1350/enlr.2009.11.3.054

UN. (1992). *Rio Declaration 1992.* Retrieved from UN: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

UN. (2014). *The Aarhus Convention: An Implementation Guide.* UN.

UN. (2019). *UN Treaty Collection: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* . Retrieved from UN.org: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en

UNECE. (1998). *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.* Retrieved 11 18, 2019, from http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

UNECE. (2017, October 16). *Status of Ratification.* Retrieved from UNECE: https://www.unece.org/env/pp/ratification.html

UNECE. (2021, 03 10). *Seventh session of the Meeting of the Parties to the Aarhus Convention.* Retrieved from https://unece.org: https://unece.org/sites/default/files/2021-12/6Dec2021-MOPsFull_summary.pdf

UNEP. (n.d.). *UNEP Implementing Priniciple 10 of the Rio Declaration.* Retrieved from UNEP: https://www.unenvironment.org/news-and-stories/story/unep-implementing-principle-10-rio-declaration


F
C
G