



Document A – Text of Public Consultation

This consultation seeks to initiate discussion on a review of domestic provisions implementing Article 9 of the Aarhus Convention with a view to improving clarity and ensuring on-going effectiveness of the implementing measures. This consultation provides an opportunity for all to input into the process of further enhancing the legislation which implements Article 9 of the Aarhus Convention into Irish law.

It has been prepared by the Department of Environment, Community and Local Government (DECLG). It examines each relevant provision of Article 9 of the Aarhus Convention in turn and gives a very brief outline of how Ireland has implemented each provision. Discussion questions are provided regarding each provision of Article 9.

The Aarhus Convention

Ireland has fully implemented the provisions of the Aarhus Convention into national law. Over 60 pieces of legislation have been used to implement the Convention. Details of the legislation used and further background information on the Aarhus Convention in Ireland is available at www.aarhusconvention.ie.

While Ireland has fully implemented the provisions of the Aarhus Convention in legislation, some concerns have been raised in relation to the clarity and practical implementation of the existing legislation. The DECLG is now launching a consultation process to elicit views on these matters and, following this process, will consider changes, both regulatory and other, to address these concerns.

Access to Justice

This consultation deals solely with the access to justice elements of the Aarhus Convention. These are contained in Article 9 of the Convention. The public consultation seeks to identify practical legislative changes which may be appropriate to enhance the implementation of the Aarhus Convention obligations in Ireland. While the public consultation is limited to the implementation of Article 9, the general principles of the Aarhus Convention, in particular those of Article 3, will be taken into consideration in any amendments made to the implementing legislation.



SECTION 1

Article 9(1)

This Article provides for access to justice for those individuals who feel that their rights under the access to information provisions of the Convention (Article 4) have not been met. Further general information on access to environmental information in Ireland is available at www.environ.ie/en/Environment/AccessToInformationontheEnvironment/

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

In Ireland this has been provided by Articles 11, 12 and 13 of the European Communities (Access to Information on the Environment) Regulations 2007 to 2011 (hereafter referred to as “the AIE Regulations”) and section 5 of the Environment (Miscellaneous Provisions) Act 2011.

Article 11 of the AIE Regulations provides for internal review. Article 12 establishes the Office of the Commissioner for Environmental Information (OCEI) which is an independent and impartial body established by law. Article 13 provides for an appeal to the High Court on a point of law from a decision of the Commissioner. Further relevant provisions are found in Article 15 of the AIE Regulations. These include the fees to bring an appeal before the Commissioner and where these fees can, at the discretion of the Commissioner, be waived or refunded.

Section 5 of the Environment (Miscellaneous Provisions) Act 2011 ensures that appeals to the High Court on a point of law from a decision of the Commissioner are not prohibitively expensive.

Discussion questions

1. Does Ireland’s legislation implementing Article 9(1) fully comply with the requirements of the Convention? If not, why not?
2. Does the implementation of the existing legislation fully comply with the Convention in practice? If not, how do you think implementation fails to comply?



3. If the answer to either of the above questions is “No”, what changes would you suggest to the existing legislation to improve Ireland’s compliance?

SECTION 2

Article 9(2)

Article 9(2) sets down access to justice provisions for specific projects, namely those that are covered by Article 6 of the Convention. These are listed in Annex I to the Convention and are broadly in line with projects which require environmental impact assessment (EIA) European Union (EU) legislation. It also applies to other activities which may have a significant effect on the environment.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

- (a) Having a sufficient interest
- or, alternatively,
- (b) Maintaining impairment of a right,

where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

In Ireland, any member of the public who demonstrates a sufficient interest can apply for leave for a judicial review under Order 84 of the Rules of the Superior Courts or under specific legislation where this sets out judicial review in respect of that legislation. There is no requirement in Irish legislation to demonstrate the impairment of a right.

Judicial review permits the review of the legality of any decision of an administrative authority, including all decisions covered by the EIA, Industrial Emissions Directive (IED) and Public



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Participation Directives. This includes both the substantive and procedural legality of any such decision.

Standing for certain environmental non-governmental organisations (NGOs) has been provided in section 50A(3)(b) of the Planning and Development Act 2000 as amended. It has also been expressly provided in a range of other consent systems through the recently enacted European Union (Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 2014.

Ireland has a number of preliminary review procedures before administrative bodies. These include reviews before An Bord Pleanála and the Aquaculture Licensing Appeals Boards.

Discussion questions

1. In Ireland, Judicial Review is the review procedure required by Article 9(2). Are there alternative review procedures that could be used to implement this Aarhus review requirement? For example, is it appropriate that the review procedure be before a court or should it be before an independent and impartial body established by law such as a tribunal? Please give reasons for your preference.
2. If before a court, should it be before the High Court or before the Circuit Court or a newly established specialist Environmental Court or a Regulatory appeal/review Court at either High Court level or Circuit Court level? Please give reasons for your preference.
3. Should the legislation be amended to provide expressly that the judicial review system is the review system required by the Aarhus Convention? If not, why not?
4. Are there other legislative amendments that the Irish authorities should consider to improve clarity for members of the public on the appropriate methods of review of environmental decision-making?
5. Is the requirement for exhaustion of administrative review procedures prior to recourse to judicial review procedures appropriate? If so, please outline your reasons and identify the advantages of the existing or proposed approach.

SECTION 3

Article 9(3)

Article 9(3) requires access to justice procedures for review of acts and omissions of private persons and public authorities concerning national law relating to the environment.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law



Irish environmental law ensures that members of the public who have a sufficient interest can challenge alleged breaches of national environmental law by both private persons and public authorities before both administrative and judicial bodies.

The availability of complaints procedures in local authorities, planning authorities, the EPA and other regulatory bodies also enables the public to challenge breaches of environmental law. In addition the Environmental Protection Agency has expanded the national waste line (a confidential telephone service) to a full national environmental complaints line.

Judicial Review is the principal instrument available to members of the public demonstrating a sufficient interest to challenge acts and omissions which contravene provisions of national law relating to the environment. The Judicial Review procedure is governed by Order 84 of the Rules of the Superior Courts as supplemented by specific procedural rules provided for in certain statutory codes, e.g. section 50 of the Planning and Development Act 2000 (as amended). Declarations and injunctions can also be sought by way of plenary proceedings and in some instances applications can be brought by way of motions to the appropriate court.

Discussion questions

1. Is it appropriate / useful to define and / or list what is covered by the term “national law relating to the environment”?
2. Should a list of specified legislation be set down in law or is it preferable to leave it to the judiciary to decide in individual cases whether the law in question falls under Article 9(3)?
3. Or should it be a combination of a list of environmental legislation with a fall back mechanism of judicial decision should the need arise?
4. Why do you favour one or other approach?

SECTION 4

Article 9(4)

The provisions of Article 9(4) apply to all procedures implementing Articles 9(1), (2) and (3). These require, inter alia, that the procedures provide adequate and effective remedies, be fair, equitable, timely, not prohibitively expensive and that decisions are given or recorded in writing. Court decisions must be publicly accessible.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.



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Ireland ensures that the procedures of administrative and judicial review referred to above provide adequate and effective remedies.

Decisions of the procedures listed in Art. 9(1), (2), (3) are binding and may be appealed to the High Court and in many cases decisions of the High Court may be appealed to the Supreme Court.

Section 8 of the Environment (Miscellaneous Provisions) Act 2011 provides that judicial notice shall be taken of the Aarhus Convention.

Remedies

The reliefs available in judicial review proceedings include both private and public law remedies. The traditional public law remedies of certiorari, prohibition, mandamus and quo warranto are available together with injunctive and declaratory relief.

Certain pieces of legislation provide for specific remedies, e.g. section 160 of the Planning and Development Act 2000, section 57 of the Waste Management Act 1996, section 99H of the Environmental Protection Agency Act 1992, section 11 of the Local Government (Water Pollution) Act 1977 and section 28 of the Air Pollution Act 1987.

Discussion questions

1. Are the remedies provided under Irish legislation sufficient to meet the requirements of the Aarhus Convention? If not, how do the remedies fail to meet the requirements?
2. Are the Irish court procedures fair, timely and effective? If your view is that they are not, what are your reasons for that opinion?
3. Are there specific legislative or procedural changes that could be made to improve these elements with respect to environmental cases? If yes, please specify.

SECTION 5

Timely

The rules on judicial review (as amended by S.I. No. 691/2011) require that a judicial review be dealt with in an expeditious manner. This includes time limits for applications and time limits for exchange of written documentation. Following the return date the matter is assigned a hearing date.

Section 126 of the Planning and Development Act 2000 (as amended) An Bord Pleanála is required to ensure that appeals and referrals are disposed of as expeditiously as possible and within a maximum timeframe of 18 weeks.

Under Section 43(4) of the Waste Management Acts it is the duty of the EPA to ensure that decisions under this Act are given as expeditiously as possible.



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Article 12(7) of the AIE Regulations requires public authorities to comply with decisions of the Commissioner for Environmental Information (CEI) within 3 weeks. Internal reviews of AIE applications must be carried out within 4 weeks. Analysis of recent appeals to the CEI shows that they have taken between 3 and 34 months.

Section 50A(12) of the Planning and Development Act 2000 (as amended) provides that the rules of court may make provision for the expeditious hearing of applications for Section 50 leave and for applications for judicial review on foot of such leave.

Discussion questions

1. Are there any issues with regard to timeliness of access to justice in Ireland?
2. Could these be addressed through legislative amendments and/or changes to the rules of procedure?

SECTION 6

Not prohibitively expensive

There is a standard fee of €150 to appeal to the CEI. In certain circumstances (e.g. medical card holders), a reduced fee of €50 applies. The CEI also has discretion to waive the appeal fee in certain circumstances (Article 15(5)-(7)).

Special costs rules were introduced in section 3 of the Environment (Miscellaneous Provisions) Act 2011 for certain environmental civil proceedings. Section 6 of this Act applies these cost rules to judicial review proceedings relating to environmental licences (section 4) and AIE Regulations (section 5) and for interim or interlocutory relief in said proceedings. Section 7 of the Environment (Miscellaneous Provisions) Act 2011 provides that a party to such environmental proceedings can apply to the Court at any time before or during the proceedings for a determination that the special cost rules apply to those proceedings.

Section 50B of the Planning and Development Act 2000 (as amended) provides that each party shall bear its own costs or the court may award costs in favour of the applicant to be borne by the respondent and/or the notice party where their actions contributed to the applicant obtaining relief in judicial reviews / applications for leave for judicial review of cases relevant to the EIA, IED or Strategic Environmental Assessment (SEA) directives.

The cost rules introduced in the Environment (Miscellaneous Provisions) Act 2011 and Planning and Development (Amendment) Act 2010 mean that an applicant will very rarely be obliged to pay the costs of a respondent, even if they are unsuccessful (except in cases where the litigation is, for example, vexatious) and that they may still be awarded costs if their case is a matter of exceptional public importance.



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There has been much criticism of Ireland’s implementation of the “not prohibitively expensive” requirements of the Convention. Ireland has made several very significant changes to its legal system, in particular, changes introduced by the Environment (Miscellaneous Provisions) Act 2011 and Section 50B of the Planning and Development Act 2000 as amended.

Discussion questions

1. Is it appropriate to make further changes to the cost rules in respect of challenges to environmental proceedings? If so, why?
2. Could changes be made to the list of legislation to which the cost rules apply? If so, what kind of changes would be beneficial?
3. Could changes be made to the procedural rules of court in respect of the cost rules set out in the legislation? If so what kind of changes would be beneficial?
4. Could changes be made to how the cost rules are set out?
5. Are changes to how it is determined that cost rules apply appropriate e.g. should the parties to proceedings determine this in advance? In writing? In court proceedings? What effect would such changes have?
6. It has been suggested that the cost rules in section 50B should be repealed and that there should be one set of general cost rules re-drafted to include both those currently provided for in section 50B (i.e. those relevant to the EIA, IPPC and SEA directives) and the Environment (Miscellaneous Provisions) Act 2011. Others have suggested that 50B be retained, but limited to planning decisions with other EIA, IPPC and SEA cases covered under another general cost rule. Which approach would you support? Why?
7. What guidance should be made available to the court to ensure that the cost rules only apply to Aarhus cases? How best can it be ensured that only Aarhus cases are so protected?
8. Should developers be excluded from the protection provided by the cost rules? Should State bodies continued to be excluded from this protection? If so, why? If not, why not?

SECTION 7

Publicly accessible decisions

Written judgments of the High and Supreme Courts are published on the [Courts Service website](#). [Decisions of the CEI are published on the website of that office](#). Decisions of An Bord Pleanála are published on www.pleanála.ie/. Decisions on licenses and permits issued by the EPA are available www.epa.ie/licensing.

Discussion questions

1. Are there problems in practice with public access to court decisions? If yes, please specify. How could access to court decisions be improved?



SECTION 8

Article 9(5)

Article 9(5) requires that the public is informed of the access to justice provisions of the Convention and that consideration is given to removing or reducing financial or other barriers to access to justice.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Provision of information

Information is provided to the public on access to administrative and judicial review procedures under a number of statutory provisions:

- The Comhairle Act 2000 and the Citizens Information Act 2007.
- The European Communities (Public Participation) Regulations 2010 (S.I. 352/2010) implement this requirement with respect to EIA consent systems.
- See also the Waste Licensing (Amendment) Regulations 2010 (S.I. 350/2010) and the Environmental Protection Agency (Licensing) (Amendment) Regulations 2010 (S.I. 351/2010)

The information provided under Article 9(4) (above) sets out how Ireland has introduced mechanisms to remove financial barriers to access to justice. Similarly, through the recognition of environmental NGOs, another possible barrier to access to justice has been removed.

Discussion questions

1. What other barriers to access to justice in relation to environmental decision-making do you consider might exist in Ireland?
2. How can these be addressed?