Communicant's response to Committee's question raised on 9th December 2020 relating to the cost aspects of the North East Pylon case and any other developments - Date of Reply: 22 December 2020

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland in connection with the cost of access to justice (ACCC/C/2014/113)

Table of Contents

Abbreviations used:

NPE = Not Prohibitively Expensive
AG = Advocate General
CJEU = Court of Justice of the European Union
Para= paragraph
The 2011 Act = the Environment (Miscellaneous Provisions) Act 2011
ECHR = European Convention of Human Rights
NEPP = The North East Pylon Pressure case
SC = Supreme Court

The North East Pylon Pressure case (NEPP) –

AG Bobek Opinion[1]: 19 October 2017 –

The most critical question of the seven questions raised in the preliminary reference was No (ii);

> *"whether the requirement that a procedure be "not prohibitively expensive" pursuant to art. 11(4) of [Directive 2011/92] applies to all elements of a judicial procedure by which the legality (in national or EU law) of a decision, act or omission subject to the public participation provisions of the directive is challenged, or merely to the EU law elements of such a challenge (or in particular, merely to the elements of the challenge related to issues regarding the public participation provisions of the directive);"*

This question can be subdivided into three queries:

A: Does the NPE requirement only apply to the specific aspects of EU law to which the NPE requirement applied via the Aarhus implementation Directives?

Or **B**: Does the NPE requirement extend to all matters raised in a case involving a matter to which **A** applies, provided those additional matters fall within the scope of EU environmental law?

Or **C**: Does the NPE requirement extend to all matters raised in a case involving a matter to which **A** applies, even if those additional matters only fall within the scope of national law?

In response, AG Bobek proposed that the EU Charter, coupled with the principle of effectiveness of EU law, each imposed a similar obligation to that of the NPE requirement under Aarhus directives; See para 34 -

> *Finally, the NPE rule also reflects the broader EU law requirement that all national procedures falling within the scope of EU law are precluded from being 'prohibitively expensive' in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), which enshrines the right to effective judicial protection. Prohibitively expensive justice means no justice*.

At para 64, AG Bobek said that NPE should be broad in its application –

> *Where such a challenge involves grounds, pleas or arguments alleging infringements of both EU and national law, the NPE rule will generally apply to the challenge and the outcome of the case as a whole.*

At para 91, AG Bobek opines that to dissect the grounds of a case and apply the NPE rule to only some grounds and not others, would defeat the NPE rule itself and make its effective operation impractical and unpredictable.

Hence, AG Bobek's approach would have been quite progressive if adopted by the CJEU.

The question regarding the operation of the NPE rule to an application for pre-litigation costs protection did not arise in the *NEPP* case and was not addressed by AG Bobek.

[1] Case C-470/16 - Opinion of Advocate General Bobek delivered on 19 October 2017, in North East Pylon Pressure Campaign Ltd and Maura Sheehy v An Bord Pleanála and Others.

The CJEU decision in NEPP[2]

The CJEU largely failed to engage with the concern raised by AG Bobek regarding predictability and the destructive effects of uncertainty.

It is noted that the potential adverse costs could come to over 500,000 euro (para 24).

In para 43 of the decision, the CJEU adopted a very restrictive view of the NPE rule and held that it only applies to the public participation aspects covered by EU Directives. In effect, any other claims falling under either EU law or national law, could be subject to national costs rules, seemingly without any regard to any costs constraints which might be imposed by either Article 47 of the EU Charter or the principle of effectiveness, as mentioned by AG Bobek (with reference to the *Edwards and Papadopoulos* decision). To extend the NPE requirement beyond the public participation process would exceed the EU legislature's intent (para 42).

In side-stepping all of AG Bobek's concerns regarding predictability and effectiveness, the CJEU also seemed to ignore its obligations to have regard to the case-law of the ECHR court in interpreting the application of the EU Charter[3], given that Irish procedural laws often allow for "the sky is the limit" style of exorbitant costs awards, and the costs in this case were of a very high nature.

Though the ECHR court's approach on the issue of prohibitive costs, as an aspect of a fair hearing under Article 6 ECHR, is less than robust, and so far, falls well short of the protection offered by Aarhus 9(4), it has nonetheless raised concerns in some cases, and it would likely frown upon costs of the order mentioned in this case.

In effect, by allowing unconstrained costs in all EU law matters (outside of the public participation Directives), according to national procedural rules, the CJEU is disenfranchising most Irish persons, in particular, of the benefits of court access to most EU law rights and protections.

Whereas at para 56, the principle of effectiveness is flagged up; this is only in the context of "rights conferred by EU law", having already held that NPE does not apply outside of the narrow grounds of public participation under EU directives. Thus, the CJEU offers no clear pathway to the application of the principle of effectiveness to assist the costs protection of the *NEPP* applicants.

Although, via para 58 of the decision, the CJEU appears to row-back on the *carte blanche* approach for allowing unconstrained costs, in practice, the direction to apply an interpretive approach, while holding that Aarhus 9(4) has no direct effect, renders this obligation to be of little benefit, if national procedural laws and case-law direct the award of unconstrained costs.[4]

It is worth noting that Humphreys J., at para 31 of his follow-on decision, says of the CJEU decision, that, "*It is fair to say that the language in the judgment of the CJEU at paras. 54 to 58 is not necessarily totally consistent*".

Disallowed conditions –

[2] C-470/16 *North East Pylon Pressure v An Bord Pleanála and Others*, 29 July 2016

[3] See Preamble to the EU Charter – "This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from … the case-law … of the European Court of Human Rights."

[4] By unconstrained costs, I mean unconstrained by any NPE rule – Adjudication of adverse costs is a constraint.

The CJEU held that a claim being "frivolous or vexatious" should not undo a costs protection requirement. However, though perhaps irrelevant , if a purposeful approach is adopted by an Irish court subsequently, it is noted that the CJEU did not engage with the (more expansive) meaning of that term as adopted by the Irish High courts in cases such as *Nowak*, as discussed in my replies to the Committee's questions of circa May 2016.

In para 52, the CJEU implies that Article 9(4) of Aarhus does not have direct effect on national law, as a consequence of the EU being a signatory to the Convention. The CJEU fails to confirm that the NPE requirement of EU Directives has direct effect, but appears to presume this (perhaps, due to it remaining uncontested).

In responding to Question No.(vi), neither AG Bobek nor the CJEU addressed the two other exceptions outlined under Section 50B of the Planning and Development Act (or the 2011 Act), as amended (regarding the conduct of proceedings and/or contempt of court), thus leaving uncertainty in regards to their compliance with the EU Directives.

Application of CJEU Reference Decision

***NEPP* v ABP & Eirgrid**[5] **(No. 5, 30 October 2018):**

Humphreys J. affords the applicants in *NEPP* effective costs protection on issues which were not covered by EU Aarhus Directives, but involve matters of EU environmental law –

See para 32 of his judgement where he says:

> "…Thus there is no need to get unduly caught up in classifying challenges as relating to public participation only as opposed to national environmental law within the EU law field more generally because ultimately both come to the same thing. As regards the rider that national law should be read to this effect 'to the fullest extent possible', this is not a problem for Ireland as the discretion arising from O. 99 is sufficiently flexible that it can always be read in an EU law-compatible manner."

While this approach may advance Aarhus obligations, and is thus a welcome approach, the grounds given may not be a secure precedent for future cases, for a number of reasons. First, I disagree that "*both come to the same thing*". The NPE rule applies (presuming direct effect operates) as a matter of clear law to EU public participation matters. But, in regard to national environmental law matters, whether they fall under the ambit of EU environmental law, or just the Aarhus convention; there is little clear distinction post the *NEPP* CJEU ruling: The CJEU did not endorse the Opinion of AG Bobek that the principle of effectiveness required that the NPE rule applies (even if theoretically, prior to *NEPP,* some lower-grade version of NPE could have been fashioned from the principle of effectiveness, of which there is no concrete example to date) – Therefore, no clear assistance can be drawn from this principle, to apply a NPE rule to national environmental law matters, falling under the ambit of EU environmental law. After the CJEU *NEPP* ruling, it is hard to construe the principle of effectiveness as other than a bygone notion.

Second, the direction to apply the Aarhus Convention "*to the fullest extent possible*", has never been shown to be anything other than a weak interpretive requirement, to interpret ambiguities in compliance with the Convention. It appears that an ambiguity in a law (which can provide a conduit

[5] *NEPP v ABP & Eirgrid* [2018] IEHC 622 (No. 5, 30 October 2018).

for an interpretive approach) differs from the exercise of discretion, specifically under Order 99, which is clearly fettered by legislative policy and precedent.

Under Article 15.2(2) of the Irish Constitution, delegated bodies, in making rules, and courts in applying those rules, are required to adhere to the "principles and policy" outlined in primary legislation. Only if a policy is clearly ambiguous, can a court give weight to an international agreement which has not been transposed into Irish law via statute. It is clear that in framing a patchwork of situations when Aarhus cost protection applies, the Oireachtas (the Irish parliament), did not intend that the Courts' discretion under Order 99, should be used to give cost protection to all cases related to environmental law, which is what the Convention requires. Had that been the intention, then a simple formula could have been drafted to that effect, rather than a convoluted list and list exceptions which was actually legislated for. It seems unlikely that Order 99, which, following C-427/07[6], was viewed as the problem, will become the conduit to Ireland's compliance with the Convention.

Other related cases

Simons J. , in *Heather Hill v ABP*,[7] disagreed with the approach adopted in the *McCallig* case, which had allowed a sub-division of a case into separate claims, with the apportionment of costs per each claim, which had risked burdening a litigant with prohibitive costs. At para 57, he said, "… *I do not think that the judgment in McCallig continues to represent good law*", after opining in para 56 that the court in *McCallig* had failed to give sufficient weight to the direction in the (Slovak) *Brown Bear* case (No.1), and thus that *McCallig* "may have been decided *per incuriam"*.

He held that NPE should apply to all the issues, which fell under the ambit of EU environmental law.

Simons J. left open the question, as to whether NPE should apply to matters under (related to) national environmental law, which fell outside the scope of EU environmental law.

Simons J.'s criticism of *McCallig* is quite qualified. Hence, even if the qualified version of *McCallig*, represents "good law", it is still highly problematic for any prospective applicant. Ascertaining whether a claim is a national environmental law claim, which falls outside or inside the ambit of EU environmental law, is equally onerous, to ascertaining whether a claim falls under EU Aarhus directives, or just under EU environmental law.

He applied the *de minimis* principle to one issue raised in the case, which fell outside EU environmental law. He also said that the direct effect of NPE rules via the Aarhus Convention did not operate, but only required an interpretive approach. See para 92:

> *92. In the event, I do not think that it is strictly necessary, for the purposes of this case, to resolve this particular dispute. This is because I am satisfied that the issues raised—save with the single exception of the landowner consent issue—are all ones which come within the subset of the subset of national environmental law which comes within a field of EU environmental law. (Insofar as the costs of the landowner's consent issue is concerned, the costs associated with this net issue* ***are likely to represent such a small proportion of the overall costs*** *as not to justify separate treatment).*

[6] Case C-427/07 *Commission v Ireland* [2009] ECR I-6277.
[7] *Heather Hill Management Co. and Burkeway Homes Ltd.* [2019] IEHC 186 (29 March 2019).

I have to suggest that there is an inconsistency in the approach taken by Simons J., as per paras 113/114. He indicates that both the CJEU and the Irish SC (*Sweetman* 2016) endorse the *contra legem* principle (para 113). However, he then endorses the interpretive approach applied by Humphreys J. in *NEPP* to apply Order 99 in a costs protective manner, to avoid striking down a statutory provision (which, in *NEPP*, was the offending conditionality of s.4 of the 2011 Act ((i.e. if the issue is unlikely to cause environmental damage)). Reliance on Order 99, as a potential precedent, could be appealed and such an appeal would stand a significant chance of success. For example, by analogy, in the UK case of *Sec for State v Venn*[8], the court held at para 33 that,

> "…Once it is accepted that the exclusion of statutory appeals and applications from CPR 45.41 was not an oversight, but was a deliberate expression of a legislative intent, it necessarily follows that it would not be appropriate to exercise a judicial discretion so as to side-step the limitation (to applications for judicial review) that has been deliberately imposed by secondary legislation."

In effect, this approach is requiring secondary law (Order 99), to go against the intention of a primary statute, even if it does not directly overrule it. More problematically, by adopting an interpretive approach, rather than striking down the offending statute provision, the court is deploying a discretionary system, when EU law may demand direct effect. The CJEU in C-427/07 *Commission v Ireland*, the CJEU held that judicial discretion (under Order 99) was not an appropriate means of ensuring compliance with the NPE requirement of EU directives.

Of course, another court or an appeal court could disapply the offending provisions of the legislation, as suggested by the CJEU in *NEPP*. From an International law viewpoint, it matters little how the required end result is affected, provided it is achieved. The Aarhus Convention, requires additionally, a transparent framework of implementation, and, it is hard to see how a system whereby secondary legislation may be used to overturn a policy outlined in primary legislation, meets that requirement for clarity and consistency.

Court of Appeal case

In the Court of Appeal case of *North Meath Wind Farm Ltd and Element Power Ireland Ltd v An Bord Pleanála and North Meath Wind Information Group and John Callaghan*[9], the court held that because John Callaghan had failed to be given standing to act as a Notice Party in the judicial review, despite having partaken in the preceding administrative procedure , the decision of which was being challenged, he was not entitled to costs protection, because he was not considered to be a party to the case under Irish legislation.

The court appeared not to engage with whether, Article 9(3) of the Convention was applicable. The decision in this case was announced in the interim period between the AG Opinion in *NEPP* and the CJEU decision in *NEPP*, but given the limited level of costs protection outlined by the CJEU, as discussed above, it would appear that the *NEPP* CJEU decision would not have influenced the outcome.

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[8] *The Secretary Of State for Communities and Local Government (Appellant) v Venn* [2014] EWCA Civ 1539 , 17 November 2014.

[9] *North Meath Wind Farm Ltd and Element Power Ireland Ltd v An Bord Pleanála and North Meath Wind Information Group and John Callaghan* [2018] IECA 49, 23 February 2018 (*Callaghan* from hereon).

It could be argued that, in seeking standing, the law was unclear as to whether John Callaghan was directly affected; he was thus seeking to clarify the ambit of the laws relating to the environment.

By analogy, persons seeking a costs protection order are in a similar position. It is the government's position, in response to my Communication, that where an applicant for a costs protection order fails to persuade a court that their proposed litigation falls within the scope of special costs rules, then the system is compliant with the Convention, when an applicant is required to pay the costs of the respondents and/or Notice Parties, regardless as to whether those costs may be prohibitive. The ruling in *Callaghan* chimes with the government's position and exemplifies the absence of a path of protection for persons seeking to rely on Aarhus costs protection in Ireland.

Minimal Protection

The EU Aarhus Directives and their interpretation/application by the Irish courts, may have benefited the litigants in *NEPP*. However, 99% of environmental litigants will require assurance in advance of taking a case that they are provided secure costs protection, and they will not be happy to deal with such an issue after losing a hearing. The Direct Effect doctrine of EU Directives only applies to state emanations, at best, and a (non-state emanation) Notice Party can "jump into" a case between a litigant and a state emanation under judicial review, and demand costs from the losing party; any costs protection reliant solely on an EU Directive NPE provision, which has not been transposed into Irish national law, will only provide an interpretive benefit to the litigants (which will likely result in no benefit in most cases).

Further, as I understand it, the question as to whether the NPE element of EU Aarhus implementing Directives have direct effect only on state emanations, is one which may not have been raised by any state emanation so far, nor has this issue being definitively addressed by the CJEU, of its own motion. Should a claim be mad by a state emanation that direct effect should not apply, on the basis that the NPE requirement is insufficiently precise, then this would leave a litigant flailing about, perhaps seeking to jump into the even more unreliable lifeboat of "Francovich damages".

Additionally, neither the Directives nor EU case-law address the thorny issue of pre-trial costs protection hearings which are essential to the effective implementation of access to environmental justice at an Irish level, given the enormous level of legal costs which can be imposed on litigants. The "catch 22" applicable to costs protection hearings, needs to be addressed by the ACCC in order to open up affordable access to environmental justice in Ireland as there is no direct access to the CJEU to even raise this issue there.

Direct Effect – the Hidden Threat

In two cases, *Stichting Natuur en Milieu* and *Vereniging Milieudefensie*,[10] involving the applicability of 9(3) upon the EU institutions, the CJEU held that 9(3) was not directly applicable, because it was insufficiently precise. The CJEU said at para 47:

> *"With regard to Article 9(3) of the Aarhus Convention, that article does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal*

[10] Joined cases C-404/12 P and C-405/12 P *Council* v *Stichting Natuur en Milieu and Milieu and Pesticide Action Network Europe* [2015] CJEU ECLI:EU:C:2015:5, para 47.

> *position of individuals and therefore does not meet those conditions. Since only members of the public who 'meet the criteria, if any, laid down in … national law' are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure...."*

In regard to member states, the CJEU ruled in the *Slovak Brown Bear* (No.1) case[11], at para 45,

> '"...that it must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals."

The court appeared to be suggesting that the doctrine of direct effect did not apply because of a lack of clarity of the provision, as established in the *Van Gend en Loos* case.[12] The CJEU referenced (at para 14) the declaration of the EU on ratification of the Convention. [13]

There appears to be a possibility, that the concept of the direct effect of International law, to which the EU is a signatory (even though qualitied by exceptions), may give rise to two separate doctrines of direct effect; one which applies to those aspects of a convention which have not been "implemented" via EU Directives, and a separate doctrine which applies to those aspects which have been "implemented" via EU directives. Generally, EU Directives only are deemed to have direct effect if sufficiently precise. – But, a different "doctrine" could apply to the two scenarios. However, to my knowledge, the CJEU has not ruled on whether the NPE requirement of EU Aarhus implementing Directives, has Direct Effect (on state emanations), and neither has any state emanation raised the objection in any UK or Irish case (or any CJEU reference).

If any objection is raised, then it is likely to succeed. The principle of *lex specialis derogat legi generali* can easily be deployed.[14] In ratifying the Convention, the EU declared that Article 9(3) would have to await "until the Community, in the exercise of its powers under the EC Treaty… adopts provisions of Community law covering the implementation of those obligations." The feebleness of the interpretive obligation in this context is clearly evident.

State emanations may have strategic reasons for not raising an objection. If a national court or the CJEU were to rule that the NPE requirement of EU Aarhus implementing Directives did not have direct effect, this may not be favourable to such state emanations in the long term, even if a reprieve from costs was won in a particular case. Such a ruling would likely put political pressure on the EU Commission to abandon its non-prosecution policy related to the NPE requirement of Aarhus

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[11] Case C-240/09 *Lesoochranárske Zoskupenie v Slovakia* [2011] CJEU ECLI:EU:C:2011:125

[12] Case C-26/62 *Van Gend en Loos v Netherlands* [1963] ECR I 13.

[13] EU had expressly part-derogated from Article 9(3), when ratifying the Aarhus Convention; See- Official Journal of the European Union; L 124/1 Council Decision of 17 February 2005. (and also UN declaration) See –

> "In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community … **and will remain so unless** and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations."

[14] The CJEU has applied this principle: See - *Rudolf Gabriel*, Judgment of 11 July 2002, ECR (2002) I-06367, pp. 6398-6399, paras. 35-36 and p. 6404, para. 59; In Case C-626/18, *Poland v EP and Council,* ACTION for annulment under Article 263 TFEU, 3 October 2018; Case C-41/19 *FX v GZ* - Request for a preliminary ruling (Germany), para 33, 4 June 2020.

implementing Directives, adopted since 2016. Thus, a more robust legislative regime might materialise.

The fact that this important question remains unanswered, is not benign. It hovers over any potential litigant, as an additional threat, notwithstanding, that Notice Parties jumping into a case, presents a more prominent danger. The threat of pleading such a defence could be deployed by state emanations, in specific cases, to deter a legal action or an appeal against a state emanation. In fact, such threats could be issued verbally, with no written record, thus potentially stealthily deterring environmental litigation.

Should a claim be found to not involve damage to the environment[15], then the CJEU direction in *NEPP* to excise this condition from Irish implementing statutes could be nullified, if a state emanation pleaded that EU Aarhus directives don't have direct effect. The same fate could befall claims found to be "unsustainable in law". (And, the "conduct of proceedings" exception can house a myriad of nullifications without even pleading that direct effect is non-operational).

Deploying such a defence may be objectively unwise, but what litigant under the threat of losing their homes, due to a potential adverse costs award, is going to dismiss any such a threat? This is why many academics have historically outlined the importance of legal certainty and the clarity of rules for the *rule of law* to operate effectively[16], and why perhaps, among other reasons, the drafters of the Aarhus Convention, included under Article 3(1) the requirement to, "maintain a clear, transparent and consistent framework to implement the provisions of this Convention".

Further Analysis:

The CJEU effectively endorsed the approach of the Irish court in *McCallig*. While raising the flags of "effectiveness", which only applies to EU law, or an interpretive obligation (re Aarhus NPE requirements); neither are required to trump national procedural cost allocation rules. The CJEU rejected the evolvative interpretation of Article 47 of the Charter proposed by AG Bobek and hence left Irish litigants bereft of effective access to most EU law rights (as well as environmental rights).

In para 58 of *NEPP*, the CIEU appears to imply that a mere interpretive approach of the NPE obligation under Article 9(4) of Aarhus can "ensure effective judicial protection". This flows from the literal interpretation of the phrase "to ensure effective judicial protection". - This sets a very weak approach to effective judicial protection in the context of the prevailing prohibitive legal costs in Ireland. In

[15] See conditionality under the Environment (Miscellaneous Provisions) Act 2011, s4, "…causes or is likely to cause environmental damage".

[16] See: Tamanaha, B., 2004, On the Rule of Law: History, Politics, Theory, Cambridge: Cambridge University Press. p3, - "*The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective),* ***be made public, be general, be clear, be stable and certain,*** *and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied.";*

Bingham T, *The Rule of Law* (Penguin Books 2010), p44 – "*The law must be accessible and so far as possible* ***intelligible, clear and predictable.";***

Dicey, A.V., 1982 [1885], *Introduction to the Study of the Law of the Constitution*, London: McMillan and Co., p120 – *"It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and* ***excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority*** *on the part of the government."*

Commission v Poland,[17] the phrase was presented as overlapping with the requirements of Article 6 and Article 13 of the ECHR. However, an interpretive obligation (in the clear absence of direct effect, as also held in para 58) does not even reach the minimum obligations of Article 6(1) ECHR.

Even AG Bobek's proposed approach might not equate to full NPE protection required by Aarhus. In describing the NPE obligation under Aarhus as "supplementary" to Article 47 of the EU Charter right of access to a court, AG Bobek implied that Article 47 based protection would fall somewhat short of Aarhus-NPE; some kind of "NPE-light" would seem to have been a watered down protection.

Similarly, the principle of effectiveness, though flagged-up in such cases as *Impact v Ireland* 2006 CJEU[18], as potentially engaging the issue of excess costs, has never been demonstrated to offer costs protection of a concrete level which could be compared to the protection outlined by either the CJEU or the ACCC case-law. In the couple of Irish cases, where the interpretive obligation has been mentioned in a positive light, it appears that the interpretive obligation was primarily *obiter* to the outcome of those cases. There is a long litany of cases, going back some thirteen years or more, where the interpretive obligation regarding Aarhus costs protection was pleaded by Irish litigants in environmental cases and repeatedly rejected by Irish courts as a means of tilting judicial discretion away from the default option under Order 99 of the Superior Courts Rules, of "costs following the event" with universal failure.

It would be a mistake to project that a few recent *obiter* comments mark a turning point for the operation of judicial discretion under Order 99 that could provide reassurance to Irish litigants that the approach in *McCallig* will not be repeated.

In *McCoy*[19](Court of Appeal case), Hogan J. said (in rejecting the direct effect of Aarhus 9(3) or 9(4)),

> "*If, however, it were subsequently ever to transpire that, for example, these provisions of the 2011 Act did not sufficiently approximate to the requirements of Article 9(3) and Article 9(4) of the Aarhus Convention,* ***then the only remedy in that situation*** *would be for the Oireachtas to amend the law."*[20]

The decision of Humphrey J.'s in *NEPP*, to extend NPE protection to claims falling under the ambit of EU environmental law, does not appear to emanate from the CJEU ruling in *NEPP*, as the CJEU said that, "To extend the NPE requirement beyond the public participation process would exceed the EU legislature's intent (para 42)", and also seems at odds with the *McCoy* Court of Appeal ruling, by Hogan J.

In *Sweetman v Shell* (2016)[21], the SC held that even if the Aarhus NPE requirements had retrospective effect, under EU Directives the "conduct of proceedings" exceptionality could be engaged, where a litigant failed to progress a case, even though it would be within the power of the court system to alternatively progress a case by setting deadlines for same (with a threat of a strike-out if not met), or it would be open to a respondent to seek a dismissal of a case at any time, once a significant delay had set in. This highlights the fragility of the costs protection system currently.

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[17] See - para 100 of Case C-192/18 *Commission v Poland.*

[18] C-268/06; *Impact* is referenced by CJEU in *NEPP* at para 55.

[19] *McCoy v Shillelagh Quarries* [2015] IECA 28 (Case-file was supplied by the party concerned, on 10 June 2016)

[20] This mirrors the comment in *Venn*, "If the flaw is to be remedied action by the legislature is necessary", at para 35.

[21] *Sweetman v Shell* [2016] IESC 58, 17.10.2016 (case on file – from Communicant, 28 November 2016).

The CJEU held in C-427/07 that judicial discretion (under Order 99) did not comply with EU Aarhus Directive obligations to give effect to the Aarhus NPE requirement. In C-525/11 *Commission v UK*, the CJEU held that a series of cases giving effect to an Aarhus obligation did not constitute a reliable and consistent means of implementation of Aarhus obligations.

The ECHR court has also held that there would have to be a quite extensive series of cases to constitute a consistent pattern to be construed as effective compliance with ECHR convention rights implementation. Hence, in *Burden v UK*,[22] the ECHR court held that even 10 out of 13 instances of compliance, where discretionary power was applied to ensure convention compliance, was insufficiently consistent, as no duty to comply was mandated by law. It would be disappointing if the ACCC were to adopt a more lenient approach, particularly considering the demands of Article 3(1) to, "maintain a clear, transparent and consistent framework".

Conclusion

Without a formal costs protection application procedure, which allows applicants to walk away if unprotected, or to drop non-costs-protected-claims, from a list of claims, without a "catch 22" which can trigger financial ruin, the Aarhus convention, as a means of promoting access to justice, will lose its effectiveness for the majority of potential environmental litigants in Ireland. The few who are brave enough to litigate currently, likely only represent a small fraction of those who would partake if a fair system was provided, and any analysis of post-litigation (satellite) costs litigation, and ongoing fluctuations in same, is not going to impact significantly on the overall deterrence of the current system. Ireland retains one of the most oppressive legal costs systems in the world.

I'm unaware of any other significant developments since June 2016.

Kieran Fitzpatrick (22 December 2020)

List of cases included:

1) Case C-470/16 - Opinion AG Bobek delivered on 19 October 2017, in North East Pylon Pressure Campaign Limited and Maura Sheehy v An Bord Pleanála and Others.
2) C-470/16 North East Pylon Pressure v An Bord Pleanála and Others, 29 July 2016
3) NEPP v ABP & Eirgrid [2018] IEHC 622 (No. 5, 30 October 2018).
4) Heather Hill Management Co. and Burkeway Homes Ltd. [2019] IEHC 186 (29 March 2019)
5) The Secretary of State for Communities and Local Government (Appellant) v Venn [2014] EWCA Civ 1539, 17 November 2014.
6) North Meath Wind Farm Ltd and Element Power Ireland Ltd v An Bord Pleanála and North Meath Wind Information Group and John Callaghan [2018] IECA 49, 23 February 2018

[22] *Burden v UK* ECHR, (Appl. No. 13378/05) - See para 41; "… However, given that there have to date been a relatively small number of such declarations that have become final, it agrees with the Chamber that it would be premature to hold that the procedure under section 4 of the Human Rights Act provides an effective remedy to individuals complaining about domestic legislation."