REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 2, NR. 1, 99-112, EUROPA LAW PUBLISHING © 2009

Immovable Object Meets Irresistible Force?

Case C-215/06 *Commission* v. *Ireland*
Judgment of the European Court of Justice, 3 July 2008)

Professor Sharon Turner

Queen's University Belfast

Abstract

Poor compliance with EC law on the environment is an established problem for the EU. It poses significant problems for the environment but also raises fundamental questions about the Commission's ability to ensure regard for the rule of EC law. Ireland is one of the most serious offenders in this context with an established track record of systemic non-compliance and a clear political willingness to protract infraction proceedings over many years. Case C-215/06 is the latest in a series of European Court rulings against Ireland. It is important for two reasons. First, it demonstrates Ireland's commitment to facilitating development and disregard for the rule of EC law. Secondly, it raises important questions about the infraction process itself. Although the slow pace of enforcement action has been justifiably criticized, ultimately the credibility of the process depends on whether it is perceived by Member States as an irresistible legal force even in the context of entrenched national resistance.

1 Introduction

In Case C-215/06 *Commission* v. *Ireland,* the European Court of Justice confirmed once against that Ireland was guilty of failure to comply with EU environmental law. Although the Court's judgment is unremarkable in terms of its contribution to the development of Community constitutional or environmental law, this case is important for two reasons. First, it casts into sharp relief Ireland's commitment to facilitating development and its disregard for both modern standards of environmental governance and the rule of Community law. Secondly, this case raises important questions about the efficacy of the European Commission's approach to the enforcement of Community law on the environment. Case C-215/06 concerns an instance of serious and protracted non-compliance in law and in practice with key aspects of the Community's *acquis* on the environment. It is furthermore the latest in a series of European Court rulings against Ireland reflecting a pattern of systemic non-compliance with Community environmental law. Although the Commission has intensified the infraction pressure exerted on the Irish Government, it has done so very slowly – effectively spanning a decade during which Ireland has experienced some of the highest levels of economic growth in Europe. Given the apparently trenchant nature of Ireland's resistance to compliance with EU environmental law and

the potential scale of environmental harm caused by its largely construction driven 'tiger' economy, this situation provides a fascinating test of whether the infraction process can ultimately deliver sufficient legal and political traction to force a manifestly recalcitrant Member State to comply with the rule of EU environmental law.

2 Factual Background

The infraction proceedings in Case C-215/06 involve two complaints, one concerning serious legislative non-compliance, the other a graphic failure to apply Community law in practice. Under Article 2(1) and (2) of the Environmental Impact Assessment (EIA) Directive 85/337/EEC[1] as amended by Directive 97/11/EC,[2] Member States are required to adopt all measures necessary to ensure that, before consent is given, projects likely to have a significant effect on the environment by virtue of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their environmental effects. This fundamental requirement of a prior environmental assessment is common to both the original and amending EIA Directive. The Directives are implemented in Ireland by the Planning and Development Act 2000, as amended and the Planning and Development Regulations 2001. Under the Irish legislation[3] there is a general obligation to obtain consent for all development projects within the scope of Annex I and II of the EIA Directives and a requirement that applications for permission must be lodged and consent received prior to the commencement of works. However, while the implementing legislation provides that it is a criminal offence to carry out unauthorised development and confers significant enforcement powers on the Irish planning authorities to prevent and stop such development, they are nevertheless empowered by section 32(1)(b) to issue 'retention permission' effectively regularising unauthorised development. While the Irish legislation makes clear that an application for retention permission cannot be made after the commencement of enforcement action, the Irish planning authorities are not obliged to take enforcement action other than issue a warning letter. Consequently, under the Irish legislation, a failure to undertake an environmental impact assessment prior to the granting of development consent, as required by the Directive, can be remedied by obtaining retention permission which makes it possible to leave unauthorised developments undisturbed provided that the application for such permission is made before the commencement of enforcement proceedings.

In addition to legislative non-compliance with the EIA Directives, this case also involves Commission complaints concerning the practical applica-

[1] OJ 1985 L 175.

[2] OJ 1997 L 73.

[3] Section 32(1)(a) of the 2000 Act.

tion of the EIA Directives to the construction of a wind farm in Derrybrien in County Galway. The Derrybrien project was the largest terrestrial wind farm ever planned in Ireland and one of the largest in Europe. Its was also the cause of an ecological disaster resulting from a landslide of peat dislodged during construction which led to the pollution of a nearby river, the death of approximately 50,000 fish and lasting damage to fish spawning beds. Construction of the wind farm was carried out in three stages for which several development consents were required.

In April 2001 the Commission issued formal infraction correspondence and in 2005 referred the case to the European Court of Justice under Article 226 EC. In essence the Commission argued that because it was possible under the terms of the Irish legislation to undertake an environmental assessment either during or after the execution of a development, Ireland had failed to create a clear obligation to subject EIA developments to an assessment of their environmental effects prior to their commencement thereby fundamentally undermining the preventative objectives of both the original and amending Directives. In relation to the construction of the wind farm at Derrybrien the Commission argued that Ireland's application of the environmental impact assessment process during all stages of this project was highly problematic breaching both the original EIA Directive 85/337/EEC and the subsequent amendments introduced by Directive 97/11/EC.

3 European Court's Ruling

a) Inadequate legislative transposition

Not surprisingly given the almost florid nature of Ireland's failure to ensure legislative transposition of perhaps the most fundamental obligation contained in the EIA Directives, the European Court upheld all aspects of the Commission's complaints in this regard and declared Ireland to be in breach of its obligation to comply with Articles 2, 4 and 5-10 of the EIA Directives. Consistent with its previous rulings concerning the EIA Directives, the Court reiterated its view that they require projects likely to have a significant effect on the environment by virtue of their nature, size or location to be made subject to a requirement for development consent and an environmental impact assessment. The Court furthermore pointed out that the fundamental and unambiguous objective of the Directives is to require that works relating to projects governed by the Directives cannot commence unless development consent has been applied for and obtained and, where it is required, that an environmental impact assessment is carried out before development consent is granted. Although the Court acknowledged that the Irish implementing legislation requires that environmental impact assessment and development consent must, as a general rule, be carried out and obtained prior to the execution of works, it pointed out that under

Irish law retention permission is deemed to be equivalent to development consent granted prior to the commencement of works and can be granted even though the project to which it relates requires an environmental impact assessment under the Directive and the project itself has been executed.

The Court accepted that Community law could not preclude the introduction of national rules regularising, in certain circumstances, operations or measures which are unlawful under Community law. However, it emphasised that this possibility should not enable affected persons to circumvent or dispense with Community requirements. It furthermore ruled that it should remain the exception. The Court ruled that the possibility of obtaining retention permission could have the effect of encouraging developers to forgo ascertaining the environmental impacts of proposed projects coming within the terms of the Directives. Although Ireland sought to rely on the European Court's decision in Case C-201/02 *Wells*[4] to argue that a remedial environmental assessment could be carried out at a later stage in exceptional circumstances, the Court pointed out that use of retention permission was not exceptional in Ireland and rejected the Irish Government's interpretation of the decision in *Wells*. Instead the Court emphasised that the ruling in *Wells* stated that under the principle of cooperation set down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of EU law. The Court reiterated its decision in *Wells* to the effect that competent authorities are therefore required to remedy failure to carry out an environmental impact assessment, for example by the revocation or suspension of a consent already granted. In this regard the Court stated that this did not mean that an environmental impact assessment, undertaken after the project had been carried out to remedy the failure to do so prior to the issue of development consent, could be deemed to be equivalent to an assessment preceding issue of the development consent as required by the Directive.

The Commission also argued that the legislative provisions and practices surrounding Ireland's discretionary enforcement regime concerning unauthorised development failed to offset the absence of provisions requiring an EIA before development is carried out and undermined proper implementation of the EIA Directives. Once again the Court upheld the Commission's complaints in this regard. The Court deemed it unnecessary to address the examples of inadequate enforcement practices submitted by the Commission because the evidently deficient nature of the Irish enforcement regime rendered an examination of enforcement practice superfluous. As far as the Court was concerned the inadequacy of the Irish enforcement regime was demonstrated by the fact that the absence of an environmental impact assessment could be remedied by obtaining retention permission provided the application for the permission was made before the commencement of enforcement proceedings. Not surprisingly, the Court pointed out that one

[4] [2004] ECR I-723.

of the consequences of this situation was that the Irish planning authorities would exercise their discretion not to take enforcement action to suspend or put an end to development undertaken in breach of the EIA Directives.

b) Construction of the Derrybrien wind farm

The Court's ruling in relation to the Commission's complaints concerning non-compliance in practice was more complex due to the fact that the construction process involved several development consents considered during the period when only EIA Directive 85/337/EEC was in operation, but also after the introduction of amending Directive 97/11/EC. In this regard the Court's ruling began by clarifying that the applications for development consents for the first two phases of the wind farm construction were governed only by Directive 85/337/EEC because the initial consents for these works were granted in 1998 prior to the coming into force of Directive 97/11/EC. However, while installations for harnessing wind power for energy production were not listed in either Annex I or II of Directive 85/337/EEC and therefore did not require an EIA under Community law, the Court pointed out that the first two phases of construction required extensive ancillary works (specifically the extraction of peat and minerals and road construction), of a type listed in Annex II of that Directive. The Irish authorities took the view that the EIA Directive was not applicable to the ancillary works because they were 'minor'[5] aspects of the wind farm construction. Not surprisingly, this view was rejected by the European Court.

First and foremost the Court emphasised that simply because these works were of secondary importance in relation to the overall wind farm construction project, did not mean that that they were unlikely to have significant environmental impacts. Secondly, it pointed out that the extraction and road construction works required for the first two phases of the wind farm construction were far from insignificant in terms of their size or location and were moreover essential to the installation of the turbines and the progress of the construction works as a whole. The Court pointed out that overall area of the wind farm covered 200 hectares of peat bog and was the largest of its kind in Ireland. Moreover, the works were being carried out on the slopes of a mountain largely covered by plantation forestry and layers of peat up to 5.5 metres in depth and close to a river. In the Court's opinion, the location and size of the extraction works and road construction, and the proximity of the site to a river, all constituted specific characteristics which demonstrated that the ancillary works, which were inseparable from the installation of the wind turbines, had to be regarded as likely to have significant effects on the environment had consequently must be subject to an environmental impact assessment in conformity with Directive 85/337/EEC. The Court ruled that the purpose of carrying out an environmental impact assessment under Directive 85/337/EEC is to identify, describe and assess in

[5] Paragraph 99.

an appropriate manner the direct and indirect effects of a project on factors such as flora, fauna, soil and water and the interaction of those factors. Although the developer had submitted an environmental statement with the application for the first two phases of the wind farm construction, the Court ruled that it was deficient and in particular failed to examine the question of soil stability despite being fundamental when excavation is intended. Consequently, the Court concluded that by not ensuring that the grant of development consent for the first two phases of wind farm construction was preceded by an environmental impact assessment in compliance with Articles 5-10 of Directive 85/337/EEC, and in merely attaching deficient environmental impact statements to the applications for development consent, Ireland had failed to comply with the requirements of EIA Directive 85/337/EEC.

The remaining part of the Court's judgment focused on decision-making by the Irish authorities concerning applications for consents relating to the wind farm after the coming into force of amending Directive 97/11/EC (in 1999) – specifically, an application for development consent for the third phase of construction (involving the installation of 25 new turbines) submitted in October 2000 and an application lodged in June 2002 for consent to alter the originally authorised phases of construction to change the type of wind turbines to be installed. Consents for both activities were granted without a preceding environmental impact assessment. The Court ruled that the Commission's complaints concerning the application of Community law to these aspects of the wind farm construction would be considered in light of Directives 85/337/EEC as amended by Directive 97/11/EC. In this regard the Court pointed out that amended Directive 85/337/EEC applied not only to wind power installations (point 3(i) Annex II), but also changes or extensions of Annex II projects already authorised, executed or in the process of being executed, which may have significant environmental impacts. In addition, it pointed out that the amendments to Directive 85/337/EEC required Member States to apply selection criteria set out in Annex III when deciding whether to subject Annex II projects to environmental assessment, which included the risks of accidents having regard to the technologies used. In this regard, the Court pointed to the criteria relating to environmental sensitivity of the geographical area, which must be considered having regard to the 'absorption capacity of the natural environment' paying particular attention to mountain and forest areas. Given the manifest application of Directive 85/337/EEC as amended to the works in question, and the associated site conditions outlined above, it was no surprise that the Court concluded that in failing to subject the third phase of wind farm construction including the associated construction of new service roadways, and the application to change the type of wind turbines initially authorised, to a prior environmental impact assessment, Ireland had failed to comply with Articles 2, 4 and 5-10 of Directive 85/337/EEC as amended.

4 Analysis

Poor compliance with Community law on the environment is a well established problem for the EU.[6] It poses a significant problem not only for the environment but also raises fundamental questions about the Commission's ability to ensure regard for a key element of the Community's *acquis*. Although Ireland does not lead the Commission's infraction league table, its infraction statistics reflect not only a deep-seated reluctance to compliance with EU environmental law but also a willingness to protract or essentially 'game' the Community's discretionary and highly political infraction process. There are currently thirty six open environmental infractions against Ireland.[7] While it comes third after Italy and Spain in terms of numbers of environmental infractions, the open infractions against Ireland include ten cases[8] in which the European Court has already ruled under Article 226 EC, with six further cases awaiting hearing and referrals already made in relation to several others. As Cashman of DG Environment recently noted, the most striking feature of Ireland's infraction statistics is the high number of advanced cases and that enforcement action has been taken in relation to non-compliance with almost every aspect of Community environmental law.[9] Case C-215/06 is essentially another example of what is now an established pattern. With no credible line of defence, Ireland successfully protracted the informal, pre-litigation phase of a manifest and serious infraction for almost five years. By refusing to amend its planning legislation and ensure lawful application of the EIA Directives in relation to the Derrybrien wind farm, Ireland forced the Commission to refer this case to the European Court of Justice thereby affording its construction industry two and a half more years of non-compliance pending the inevitable judicial confirmation of the breach. It was only in 2008, after receiving the Court's judgment, that the Irish Government finally indicated its willingness to amend the Planning and Development Acts 2000-2006 to abolish retention planning permission for development requiring an environmental assessment under Community law. At the time of writing, almost a decade after the infraction process began Ireland has yet to adopt the necessary legislation.

---

6 DG Environment has for many years carried the most significant enforcement case load within the Commission. The most recent report published by the Commission concerning infraction activity, published in 2007, reports that 20% of all infraction cases concern compliance with EU law on environment. In 2007 there were 739 open cases on environment, and in 2007 another 461 new cases were opened. See: http://ec.europa.eu/environment/legal/law/statistics.htm.

7 L. Cashman, 'Key Goals of Commission Enforcement Policy in Relation to the Environment, with Particular Reference to Ireland', [2008/15] *IPELJ* 102.

8 There are 9 rather than 10 rulings because Case C-418/04 concerns two separate infringements.

9 *Supra* note 7 at p. 102.

Although the Commission is formally the 'guardian' of the Treaty, the logistical impossibility of taking infraction action in relation to every instance of non-compliance across the Community has long been recognised. Instead it has tried to use its infraction powers in a strategic manner with the objective of embedding regard for Community law in each national jurisdiction in ways that limits the long-term need for *ad hoc* Commission intervention.[10] However, given the protracted and endemic nature of Ireland's failure to comply with EU environmental law, one is forced to question whether the Commission's approach to the use of its infraction powers can ever achieve this strategic objective. As with many of the open cases against Ireland, the period of non-compliance represented in Case C-215/06 aligns with an era of unprecedented growth in its largely construction driven economy. However, despite evidence that use of retention permission was common place in a context of intensive development and that one of the largest wind farms in Europe was being constructed without proper application of the EIA Directives, the pace of this infraction can only be described as lethargic. There is no evidence that the Commission even sought an interim injunction to suspend application of Irish planning legislation or the construction process. Indeed, despite the apparently trenchant nature of Ireland's resistance to compliance, the Commission has only once formally requested that the European Court impose a financial penalty under Article 228 EC; and even this request was withdrawn in 2005 once the required legislative amendments were enacted.[11]

There is little doubt that the slow pace of enforcement action and the Commission's apparent reluctance to seek the imposition of financial sanction could be viewed as encouraging brinkmanship, particularly for a Member State so clearly committed to facilitating its construction driven economy. However, there are also encouraging signs that despite the slow pace of infraction action, this process may nevertheless yield the legal traction necessary to transform Ireland's entrenched resistance towards ensuring compliance with the rule of Community environmental law. In this regard the European Court's decision in Case C-494/01 *Commission* v. *Ireland*[12] is a milestone. Like Case C-251/06, Case C-494/01 concerned an instance of Irish non-compliance with Community environmental law. By the time it was referred to the European Court in December 2001 it was clear that Ireland had failed to ensure compliance with core elements of the Community's waste management regime, particularly waste licensing and the control of unlicensed operations, despite the fact that the deadline for implementing the original waste Directive 75/442/EEC[13] expired in 1977,

[10] Ibid note 7 at p. 104. See also the Commission Communication on implementing Community Environmental Law, COM(2008) 07773 final.

[11] This was in relation to its failure to comply with the 1999 Court ruling concerning other non-compliance with the EIA Directive.

[12] [2005] ECR I-3331.

[13] OJ 1975 L 194.

and the amended Directive 91/156/EEC[14] in 1993. The Commission demonstrated that the problem of unlicensed waste operations was widespread throughout Ireland and had caused serious environmental pollution and damage to wetlands and other sensitive areas. It furthermore demonstrated that these failures took place within the remit of several local government authorities, indicating an administrative problem of a more general character and a failure of central Government policy. Advocate General Geelhoed and the European Court upheld not only the Commission's specific complaints concerning non-compliance with the Waste Directives, but for the first time declared a Member State to be in systemic breach of its Community obligations. Although discussed in more detail by the Advocate General, the Court agreed that the scale, duration and seriousness of Ireland's failure to comply with the requirements of the Waste Directives represented a 'general and persistent' infringement of Community law.

Although occurring somewhat belatedly to avert the worst environmental excesses of Ireland's 'tiger' economy, the European Court's ruling in Case C-494/01 undoubtedly signals a serious intensification in the infraction pressure facing Ireland. In addition, the Commission's recent decision to progress three of the open infractions against Ireland,[15] including Case C-494/01, to the Article 228 EC stage also indicates an intention to continue this gradual intensification of pressure. Given the systemic nature of its failure to comply with EU waste law, and the inevitable loss of credibility and negotiating leverage stemming from its hinterland of significant non-compliance, Ireland faces a significant challenge in convincing the Commission it has taken sufficient steps to comply with the Court's ruling in Case C-494/01. Indeed, despite significant action to improve compliance levels, the Director of Enforcement for the Irish Environmental Protection Agency has recently reported that the Commission remains dissatisfied with the enforcement of Community waste controls in Ireland.[16] The Irish Government will similarly face serious challenges in ensuring compliance with the Court's ruling in Case C-215/06. Although Ireland has indicated its intention to abolish the concept of retention permission for development requiring environmental assessment under EU law, it will be much more difficult to comply with the obligation to nullify the consequences of failure to comply with the EIA Directives. Given that it was accepted that use of retention permission was common place, and given the pace of construction experienced in Ireland during the period covered by this infraction, action to nullify the consequences of the breach could affect numerous projects for which development consent has already been granted. It is clear from the Court's ruling in Case C-215/06 that environmental assessments

[14] OJ 1991 L 78.

[15] D. Lynott, 'The Detection and Prosecution of Environmental Crime' [2008] Vol 8(1) *Judicial Studies Institute Journal* 185.

[16] Ibid.

undertaken after development consent has been issued will not be accepted as a means of remedying the breach. Subject to national procedural rules, compliance with the Court's Article 226 EC ruling will almost certainly require either revocation or suspension of development consents and the undertaking of what would then be a prior environmental assessment, or the provision of financial compensation for affected parties. Remedying the breach in relation to the construction of the Derrybrien wind farm will also pose difficulties at this late stage. Such action will almost certainly trigger EU state liability action by the developer and require significant public investment to remedy the aspects of the environmental damage caused by the construction process that are attributable to the failure to properly apply the EIA Directives. In effect, given the scale of the compliance challenges facing Ireland in Cases C-215/06 and C-494/01, both seem destined to be referred to the European Court under Article 228 EC. In this regard, it is important to emphasise that while the Commission has previously been willing to withdraw the referral of a case against Ireland under Article 228 EC, it has subsequently indicated a tightening of its position, signalling that it would not, in general, be willing to make such withdrawals in future.[17]

Even this brief analysis of the situation makes clear that Ireland now faces a serious risk of swinging financial sanctions. Although the process has progressed slowly, the capacity of advanced infraction pressure to transform political and administrative attitudes should not be under-estimated. In this regard the recent experiences of the other Irish Government are instructive. Until very recently Northern Ireland had become synonymous with failure to implement EU environmental Directives in law or in practice. Meaningful action to redress this situation was only taken because the UK central Government and the devolved administration in Northern Ireland faced several serious and advanced infraction proceedings. Although this litigation coincided with the profound political and administrative challenges associated with the devolution of legislative power to the new Northern Ireland Assembly in 1998, the threat of serious and overlapping EU fines forced the newly devolved administration to deliver an ambitious legislative programme, commence a major programme of infrastructural renewal to its sewage and water systems and modernise the institutional governance of both services. In effect, despite decades of failure to ensure compliance, advanced infraction pressure forced Northern Ireland's new Government to clear its notorious backlog of unimplemented EU environmental Directives in five years.[18]

[17] L. Cashman, 'EC Environmental Law – Ensuring Accountability of Member States for Compliance', paper delivered to the 2007 Annual Irish Environmental Law Conference, University College Cork. Paper available at http://www.ucc.ie/eu/lawsite/eventandnews/previousevents/environapril2007/documentfile.

[18] For further discussion of the infraction process in this context, see: S. Turner, 'Transforming Environmental Governance in Northern Ireland. Part One: The Process of Policy Renewal', [2006/18] *JEL* 55.

However, it is also important not to underestimate the scale of the challenge facing the Commission south of the Irish border. Quite apart from political resistance in Ireland, it is far from clear that the Irish judiciary will support the Commission in embedding a culture of compliance with EU environmental law. In stark contrast to the steady flow of references from courts in the UK and across the EU, there has yet to be a single preliminary reference submitted by an Irish court to the European Court of Justice in an environmental case.[19] In addition, many of the infraction cases brought by the Commission against Ireland could have been, but were not resolved through litigation before its national courts. Despite this, there is clear evidence of public dissatisfaction with the application of Community environmental law by national authorities. The European Commission receives the highest number of environmental complaints *per capita* from Ireland.[20] Not surprisingly, given the veritable explosion in the pace of development experienced in Ireland since the mid-1990s, many of these complaints concern failures to comply with the EIA Directives in planning decisions. Although the current confines of space prevent a more full discussion of this issue, there is little doubt that the flow of domestic litigation has been significantly stemmed by the highly restrictive approach taken by the Irish superior courts to the issue of access to environmental justice.[21] Despite the growing framework of EU and international laws requiring wide public access to environmental justice, particularly in the context of EIA development, superior courts in Ireland have proven reluctant to enforce this tenet of contemporary environmental governance and in so doing have demonstrated a pronounced unwillingness to ensure that Irish decision-makers are held to account for failures to comply with Community environmental law.

In this regard the decisions of the Irish High Court and Supreme Court concerning the issues of standing for judicial review and costs are particularly revealing. As part of a major review of domestic planning legislation in 2000, the Irish Government introduced a mandatory judicial review procedure designed to govern challenges to a wide range of planning decisions. Whereas applicants for judicial review had previously been required to demonstrate a 'sufficient interest' in the subject matter under review in order to establish standing, under section 50 of the Planning and Development Act 2000 applicants were instead required to meet a more demanding standard of demonstrating a 'substantial interest'.[22] In effect, just as the

[19] *Supra* note 7 at p. 104.

[20] A. Ryall, 'Access to justice and the EIA Directive: the Implications of the Aarhus Convention' in J. Holder & D. McGillivray, *Taking Stock of Environmental Assessment* (Routledge-Cavendish 2007) at p. 195.

[21] Ibid and more generally A. Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directives in Ireland* (Oxford: Hart Publishing, 2009).

[22] This change in standing requirements was discussed by Y. Scannell & S. Turner, 'A Legal Framework for Sustainable Development in the Republic of Ireland and Northern Ireland', in J. McDonagh, T. Varley & S. Shorthall (eds), *A Living Countryside* (Ashgate, 2009 forth-

international and European Communities embraced the concept of wide public access to justice as a fundamental tenet of modern environmental governance, and despite signing the Aarhus Convention two years previously, the Irish Government introduced legislation designed to restrict the opportunity to judicially review planning decisions. In a series of decisions culminating in 2008 with the Supreme Court decision in *Harding* v. *Cork County Council,*[23] the superior courts in Ireland interpreted the concept of substantial interest in a highly restrictive manner, ruling in effect that applicants must be affected by proposed development in a way that is 'peculiar or personal' to them. The Irish courts' interpretation of the statutory standing requirement for judicial review in planning matters appears to take little or no account of Ireland's international obligations under the United Nations Rio Declaration or the Aarhus Convention[24] which oblige signatories to ensure wide public access to environmental justice. More fundamentally for present purposes, Irish courts have also proven unwilling to take account of EU provisions designed to implement the Aarhus Convention within the *acquis* of Community environmental law. In *Harding* the applicant argued that the concept of substantial interest was sufficiently broad to be interpreted so as to give effect to Directive 2003/35/EC,[25] which incorporates the Aarhus requirement for 'wide' public access to justice in the context of decisions concerning environmental impact assessments under Community law. Although commentators agree that the wording of the Irish legislation was sufficiently broad to sustain such an interpretation,[26] the Supreme Court refused to adopt this approach on the grounds that it would require an interpretation *contra legum*.[27]

Irish courts have taken, if anything, an even more restrictive approach to the equally important issue of costs in instances of public interest litigation despite the very high costs of litigation in Ireland[28] and the requirement in Article 10a of Directive 2003/35/EC that access to environmental

coming) 25-51; G. Simmons, 'Locus Standi, public interest and the EIA Directive' [2007/14] *IPELJ* 21; and B. Conroy, 'Harding v Cork County Council: No Standing Room in Public Interest Environmental Litigation?' [2008/15] *IPELJ* 95.

[23] Unreported, May 2, 2008.

[24] United Nations Economic Commission for Europe, *Convention on access to information, public participation in decision making and access to justice in environmental matters* 1998.

[25] OJ 2003 L 175.

[26] See for example, Simmons and Conroy, *supra* note 21.

[27] In 2006 the Irish Government took action to implement Article 10a of Directive 2003/35/EC by means of the Planning and Development (Strategic Infrastructure) Act 2006. The 2006 Act grants automatic standing to certain NGOs to judicially review development requiring an environmental impact assessment. While the Act may significantly mitigate the restrictive impact of the Supreme Court decision in *Harding*, it will not operate in cases where NGOs decline to mount a challenge or in cases where and EIA is not required under EU law.

[28] This issue is discussed by Ryall, *supra* notes 19 and 20.

justice should not be prohibitively expensive. In 2006, the Irish High Court in *Friends of the Curragh Environment Ltd* v. *An Bord Pleanala*[29] ruled that Article 10a was incapable of direct effect. Although all parties agreed that Ireland had failed to implement Directive 2003/35 within the prescribed time limit, the Court refused to make a protective cost order shielding the applicant from an award of costs despite the fact that a representative public interest group had taken a case raising important issues concerning the application of the EIA Directives. The following year the Irish Supreme Court in *Dunne* v. *Minister for the Environment, Heritage and Local Government (No.4)* [30] confirmed the general position in Ireland concerning costs, namely that they would follow the event except in very exceptional circumstances. In doing so, the Supreme Court set a very high threshold of what constitutes public interest litigation, which is entirely inconsistent with the thrust of Community requirements in the context of public interest challenges to EIA decision-making. Further hostility to the Aarhus agenda and the rule of EU law was reflected in the High Court decision in *Kavanagh* v. *Ireland (No.2)*[31] during which Article 10a of Directive 2003/35 was referred to as a "crank's charter".[32]

5 Conclusion

Although the slow pace of EU enforcement action has been justifiably criticised in many quarters, ultimately the credibility of the process depends on whether Member States perceive infraction litigation as an irresistible legal force even in the context of entrenched national resistance. Ireland's reaction to its evolving infraction liability will provide a fascinating insight into the Commission's capacity to use its infraction powers to dislodge deep-seated political antipathy towards the rule of EU environmental law. However, it is also possible that the Commission's unfortunate handling of the more recent infraction in Case C-427/07 will regrettably provide Ireland with a degree of unwarranted comfort. In March 2007 the Commission commenced infraction proceedings concerning Ireland's approach to the implementation of Directive 2003/35/EC[33] and rightly cited the High Court's decision in *Friends of the Curragh Environment* as evidence of this failure. In an opinion that has undoubtedly caused unease in the environmental NGO community, Advocate General Kokott was not persuaded by the Commission's complaints concerning Ireland's approach to the issue of standing in judicial reviews to challenge decisions concerning EIA development and

[29] [2006] IEHC 243.

[30] [2007] IESC 60.

[31] [2007] IEHC 389.

[32] Per Smyth J.

[33] Commission Press Release 22, March 2007.

took a restrictive view of the Article 10a requirements concerning costs. Most unusually, the Advocate General also recommended that a number of the Commission's key complaints should be deemed to be inadmissible due to what appears to have been a rather jumbled submission to the Court. Quite apart from the substantive implications of this case for the development of EU law concerning access to environmental justice, one can only hope that the European Court does not adopt a similarly restrictive position. Such a ruling would undermine the Commission's hard won political traction in dealing with Ireland's refusal to comply with EU environmental law and potentially weaken support within the Commission for the application of further legal pressure. Perhaps even more fundamentally, it would almost certainly reinforce the forces of conservatism amongst Ireland's superior courts concerning the judicial role in holding national authorities to account for failure to comply with EU law on the environment.