Review of the Administration of Civil Justice – Judicial Review

Further submission of Transport Infrastructure Ireland (TII) June 2018

In response to a request by the Department in 2017, TII submitted responses to a questionnaire on the impact of judicial review on infrastructure projects, including in the case of delays it can give rise to in Ireland, and whether there are options available to mitigate the impact.

TII has now been asked for further observations and has set out commentary below in the two areas of most significant impact for TII; planning and procurement processes. TII would welcome the opportunity to meet with the review group to discuss these matters further.

(a) Planning and Environmental Matters

TII has noted a significant increase in recent years in judicial review proceedings where consents and decisions relating to strategic infrastructure proposals are being challenged, particularly by individual applicants. This increase in litigation corresponds to changes made to, *inter alia*, cost and standing rules in 2010 and 2011 purporting to ensure compliance with the Aarhus Convention and related European Union legislation, but, in the view of TII, going beyond that required and, potentially, not in keeping with the spirit of Aarhus.

TII believes, in particular, that the current Irish rules fail to recognise the important role the Aarhus Convention accords environmental Non-Government Organisations (eNGOs) in focussing and channelling environmental disputes.

The importance of the role of eNGOs is illuminated by Advocate General (AG) Sharpston in *Djurgården*.[1] In *Djurgården*,[2] AG Sharpston stated that the provisions on access to justice are

[1] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967.

[2] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967.

based on the idea that the natural environment belongs to us all.[3] As such, it is society's responsibility to protect the environment, not just that of individuals or isolated interests.[4] The provisions, she proposed, '*give legal form to the logic of collective action*.'[5] She stated that as eNGOs represent a number of different parties and interests, they have a 'collective dimension.'[6] This is why, she stated, these provisions '*accord an important role to non-government organisations promoting environmental protection*.'[7] AG Sharpston stated that by according eNGOs an important role the functioning of the courts is strengthened.[8] eNGOs, she suggested, can channel environmental disputes[9] and, by possessing the technical expertise to distinguish strong cases from weak ones,[10] act as a filter to assist the courts.[11] AG Sharpston suggested that the authors of the Convention and Aarhus Directive attempted '*to steer a middle course between the maximalist approach of the actio popularis and the minimalist idea of a right of individual action available only to parties having a direct interest at stake*.'[12] Reinforcing the role of eNGOs[13] and providing them with special standing reconciles these two positions.[14]

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[3] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [59].

[4] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [59].

[5] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [59].

[6] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [61].

[7] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [59].

[8] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [62].

[9] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [62].

[10] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [61].

[11] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [62].

[12] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [63].

[13] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [64].

Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [63].

In order to reflect the importance of the role of eNGOs in focussing and channelling environmental disputes, TII believe that Ireland's rules on costs, standing, etc., should be altered appropriately. Consideration should be given to the following:

- The definition of eNGO should be altered to ensure that organisations acquiring automatic standing rights are genuinely concerned with protection of the environment. Requirements in relation to: membership ('*in order to ensure that it does in fact exist and that it is active*'[15]); the length of time that such organisations must have existed for;[16] that the pursuit of an organisation's aims or objectives must be otherwise than for profit;[17] the possession of a specified legal personality and the possession of a constitution or rules;[18] and, that the area of environmental protection to which its aims or objectives relate is relevant to the class of matter into which the decision, the subject of the appeal, may all help to ensure the legitimacy of eNGOs.
- Irish rules should be altered to allow the award of reasonable costs against unsuccessful individual applicants, as allowed under Article 3(8) of the Aarhus Convention. It might be appropriate that eNGOs could continue to avail of the current special cost rules, whilst non-environmental NGO applicants might not. If the special costs rules were altered, it might be appropriate to introduce a counter-balancing measure by making legal aid available to environmental NGOs.
- The rules regarding *locus standi* of individuals should be tightened to encourage litigation of environmental decision making is focussed through eNGOs.
- Section 50A(2)(a) of the Planning and Development Act, 2000,[19] removed '*the requirement that an application for leave to apply for judicial review be on notice*.'[20] Whilst the High Court retains a discretion to: conduct the application on an *inter partes*

[15] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [47].

[16] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [14].

[17] Miriam Dross, 'Access to Justice in Environmental Matters' (2003-2004) 11 Tilburg Foreign L.Rev. 726-7.

[18] Miriam Dross, 'Access to Justice in Environmental Matters' (2003-2004) 11 Tilburg Foreign L.Rev. 726-7.

[19] Section 50A(2)(a) of the Planning and Development Act, 2000, as inserted by Section 32 of the Planning and Development (Amendment) Act, 2010.

[20] Garrett Simons, 'An Overview of the Planning and Development (Amendment) Act 2010' (2010) 17(4) IPELJ 135, 140.

basis; [21] or, '*to treat the application for leave as if it were the hearing of the application for judicial review*,'[22] it is possible that the current Irish rules may impact the effectiveness of the application for leave stage in weeding out unmeritorious claims. Both the Working Group on Access to Environmental Justice and Jackson LJ have highlighted the importance of the application for leave stage in weeding out unmeritorious claims when the 'chilling' effect of costs rules is removed.[23] Consideration should be given to restoring the previous position that application for leave be on notice.

(b) Procurement Challenges

Public bodies such as TII must use public procurement to execute very important projects and operations. For example, the national network of motorways is part of the State's vital economic infrastructure linking cities and regions, the operation of Luas is very important to the functioning of Dublin City and the operation of TII's tolling operations is vital for the funding of the improvement and maintenance of roads. Judicial reviews of procurements can have very disruptive impacts on TII's ability to deliver on its statutory remit to secure the provision of transport infrastructure. TII recognises the right of bidders to challenge procurements and TII considers that such rights of challenge ought to be balanced with judicial review processes that are both rapid and fair to the parties. TII's experience is that procurement challenges cause great delay to projects.

TII's view is that the following lessons learnt, from procurement challenges in recent years, should inform the review of civil law procedures for judicial review of procurements.

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[21] Section 50A(2)(b) of the Planning and Development Act, 2000, as inserted by Section 32 of the Planning and Development (Amendment) Act, 2010. Garrett Simons, 'An Overview of the Planning and Development (Amendment) Act 2010' (2010) 17(4) IPELJ 135, 140.

[22] Section 50A(2)(d) of the Planning and Development Act, 2000, as inserted by Section 32 of the Planning and Development (Amendment) Act, 2010. Garrett Simons, 'An Overview of the Planning and Development (Amendment) Act 2010' (2010) 17(4) IPELJ 135, 140.

[23] The Working Group on Access to Environmental Justice, *Ensuring access to environmental justice in England and Wales – Update Report* (August 2010) [37]. Lord Justice Jackson, *Review of Civil Litigation Costs* (Norwich December 2009) 310-1.

It seems to TII that there are not enough judges to try cases promptly. Even on the Commercial List of the High Court it takes 9 months or more for a trial. Lesson learnt: the State should appoint more judges.

In TII's view, there is a need for greater case management in procurement cases. For example, the automatic suspension of the award of a contract where a tender competition outcome is challenged means that incumbent contractors on operations contracts are incentivised to challenge irrespective of the merits of their case. It seems to TII that in procurement challenges that much of challengers' cases comprise makeweight allegations. Stronger case management is required to test the substance and merit of challenges early. However, active case management requires a sufficient number of judges and there is a shortage of judges currently. Lesson learnt: procurement challenges require active case manage to limit delay.

TII's experience is that a very significant proportion of a Contracting Authority's legal costs in defending a procurement challenge can relate to discovery. Our experience is that discovery of documents also necessitates extensive redaction of commercially sensitive information, which is time-consuming and expensive. Our experience of discovery is that its cost can be multiples of other legal costs. TII's general experience in procurement cases is that discovery is mostly irrelevant to the issues to be tried. Lesson learnt: an approach to case management that seeks to reduce the use of discovery would reduce legal costs and save time.

In the event of an appeal, there is no equivalent of the High Court's commercial list in the Court of Appeal.

Summary

Some of TII's projects and operations are experiencing or have experienced significant delay because of procurement challenges instigated by under-bidders. For example, the Service Areas Tranche 2 PPP has been delayed by three years and the M50 eFlow Tolling Operations Contract is currently being delayed by two challenges – the delay could be several years (it is already delayed fifteen months as of June 2018 with delay continuing).

Delays are exacerbated, in TII's view, for the following reasons:

a) there aren't enough judges to try cases promptly, notwithstanding procurement cases being typically on the commercial list of the High Court;

b) there is a need for greater case management in procurement cases to sift out unmeritorious elements of a challenge;

c) a very significant proportion of our legal costs in defending a procurement challenge can relate to discovery with most discovered documents being irrelevant to the issues being tried – more case management is required to limit such wasteful trawls, and

d) there is no commercial list in the Court of Appeal.

TII recommends the adoption of measures for the judicial review of procurement cases with a view to greatly speeding up the time taken for the courts to determine such challenges.

TII will provide any further information required for the completion of the review exercise.

June 2018

Judicial Review and the Delays which can arise in relation to infrastructure projects

Transport Infrastructure Ireland Response (DRAFT 1 Nov 2017)

Following on from a request from the Taoiseach, a Senior Officials Group, with officials from relevant Departments and the Office of the Attorney General is being convened to consider the question of judicial review, including in the case of delays it can give rise to in Ireland for infrastructure projects, and whether there are options available to mitigate the impact.

The letter from the Office of the Attorney General sets out a framework within which relevant issues could usefully be examined. Drawing from this a list of suggested questions for consideration and completion by relevant Departments has been prepared. The completed questions provide a basis for further consideration of potential legal and non-legal options for improvement that might be taken forward.

Current Issues – litigation:

1. How many cases have been the subject of Judicial Review since 2007 under the various planning and development consent systems?

   a) Planning and Development Act (Strategic Infrastructure) Act;
   b) Planning and Development Act;
   c) Foreshore Acts;
   d) Petroleum and Minerals Development Legislation
   e) Other Development Consent Legislation (EPA licences?)

   -What was the time taken for these cases to be heard and the outcomes?
   -Where there any preliminary references to the European Court and what additional time did these cases add to any judicial review?
   -How many of these cases invoke EU environmental legislation as the basis for judicial review?
   -Are there any key differences in the different judicial review schema (for example restrictions under the SI Act) that might be given a wider application? [SI Act = Strategic Infrastructure Act]

Judicial Reviews and Delays to Statutory Planning Approvals of Transport Projects		
Project Name and Brief Description	**Basis of Planning Consent and Key Details of the Judicial Review**	**Impacts of the Judicial Review**
N22 Ballyvourney Macroom dual carriageway national primary road	Roads Act 1993 (as amended) and Planning and Development Act	27 months from receipt of An Bord Pleanala statutory approval.
N25 New Ross Bypass PPP	• Roads Act 1993 (as amended); • Planning and Development Act;	14 months from receipt of An Bord Pleanála statutory

	• Foreshore Acts. The application primarily focused on the effects of the Development on the integrity of the River Barrow cSAC. The application in summary requested: 1. A quashing of An Bord Pleanála's decision dated 22nd Dec 2008 approving the proposed road development. 2. A declaration that Wexford County Council has failed to implement the provisions of Article 10a of Council Directive 2003/35/EC in relation to the standing requirement required to maintain proceedings of an environmental law nature. 3. A declaration that the standard of review applied by the Irish High Court of the substantive legality and/or merits of a decision taken by An Bord Pleanála in relation to Natural Habitats and in relation to Priority Natural Habitat is to be in the nature of a heightened or anxious scrutiny.	approval to delivery of perfected judgement. There wasn't a referral to the CJEU. The case did invoke EU environmental legislation.

	4. In the alternative, a declaration that Wexford Co Co has failed to implement the provisions of Council Directive 85/337/EEC as amended in relation to the standard review required by the Irish Courts of decisions of an environmental law nature. 5. Other items in relation to costs/security of costs for the applicant. Although initially raising many issues, the applicant narrowed the complaint down to focus on the ground raised in connection with the Habitats Directive (62/34/EEC) and specifically with Article 6 thereof (the site protection rules established by Article 6(2)-(4) of the Directive of the River Barrow cSAC).	
N6 Galway City Outer Bypass. 18km Type 1 dual carriageway and 3.5km Type 3 dual carriageway of national primary road around Galway City. Benefit to cost ratio of 3.4.	Roads Act 1993 and 1998	10 months from receipt of ABP statutory approval to delivery of judgement, which upheld ABP's decision. This judgement was appealed to the Supreme Court who sought the advice of the CJEU. The opinion of the CJEU was delivered 42 months after the appeal to the Supreme Court. The Supreme Court

		subsequently quashed the decision of ABP. There was a referral to CJEU (by the Supreme Court) and their opinion was unfavourable. The case did invoke EU environmental legislation.
N86 Dingle to Annascaul and Gortbreagoge to Camp 28km Type 3 Single Carriagway with pedestrian/cycle facility. Primarily on-line widening/realignment.	Roads Act 1993 as amended & Planning & Development Act 2000, as amended. ABP decision to refuse September 2013 Kerry County Council JR – High Court Order quashing ABP Decision – June 2014 ABP Revised Decision – November 2014 – giving approval. An Taisce JR Initiated Jan 2015. High Court Order Upholding ABP Decision – October 2015 An Taisce Leave to Appeal Rejected by the High Court December 2015	Kerry County Council JR – 14 Months from initial ABP decision to refuse to revised ABP decison to approve. An Taisce JR – 12months from leave to take JR to Hig Court Decision ro refuse leave to appeal. Total Delay 26 months All Commercial Court

Strategic infrastructure projects can also be delayed by judicial reviews at the procurement phase (i.e. procurement challenges). The table below provides some information on a recent transport procurement challenge.

Judicial Reviews and Delays to Public Procurement of Transport Projects

Project Name and Brief Description	Basis of the Public Procurement and Key Details of the Judicial Review	Impacts of the Judicial Review
Service Areas Tranche 2 PPP. Service areas on the M11 Gorey, N6 Athlone and M9 Kilcullen. Services concession.	MSAT2 is a national procurement and as a services concession was out-of-scope of European procurement law. (Since then a Concessions Directive has come into law.) As a national procurement the applicable rules for Judicial Review were RSC Order 84, which permit proceedings to be lodged within 90 days, in contrast to the 30 day limit set out in RSC Order 84A for procurements within the scope of European procurement law.	JR proceedings initiated by underbidder just within 90 day limit in August 2015 - High Court Record No 2015/483 JR. Proceeding withdrawn in April 2017. Delay due to judicial proceedings of 20 months.

Access to the Courts:

2. Can we standardise the time period in which an objector can seek leave to appeal in judicial review cases? Currently ranges from 8 weeks to 12 weeks under the different judicial review schemes?

3. Are there restricted rights of appeal to the Court of Appeal and the Supreme Court generally and specifically under any of the above Consents and can these be further tightened?

4. Could the "standing" test for judicial review be changed be changed from "sufficient interest" (low threshold) to the alternative of "maintaining impairment of a right"?

   [introduces a higher threshold for an objector to achieve before he could maintain an action of judicial review]

It certainly appears that the alternative of 'maintaining impairment of a right' is a higher threshold for an objector to achieve. For example, in *Commission v. Ireland*,[24] Advocate General Kokott indicated that the requirement to 'maintain the impairment of a right' is an even more restrictive

[24] Case C-427/07 *Commission v. Ireland* [2009] ECR I-6277.

access rule than 'having a sufficient interest.'[25] It is suggested that introducing a higher threshold in respect of non-NGO claimants may be appropriate as it may serve to strengthen the role of environmental NGOs, which Advocate General Sharpston has suggested, can channel environmental disputes[26] and, by possessing the technical expertise to distinguish strong cases from weak ones,[27] act as a filter to assist the courts.[28]

5. Is there scope for tighening the rules relating to NGO automatic standing rights? For example introducing a requirement that an NGO must be incorporated as a legal entity rather than an unincorporated assooociation?

It may well be the case that there is scope to tighten the rules relating to NGO automatic standing rights. Section 50A(3) of the Planning and Development Act, 2000, as amended,[29] grants (where there are 'substantial grounds'[30]) '*non-governmental organisations automatic standing to bring planning judicial proceedings in respect of developments requiring an Environmental Impact Assessment*,' subject to them satisfying certain conditions laid down in Section 50A(3)(b)(ii).[31] It is suggested that there may be scope to tighten the conditions laid down in Section 50A(3)(b)(ii).[32]

It would be important to ensure that the tightening of such conditions and other changes cover all types of EIA development, such as 'proposed road development' as approved pursuant to Section 51(1) of the Roads Act, 1993.[33] Please also see Part III of the Transport (Railway Infrastructure) Act, 2001.

f) Extending the length of time that the organisation must have pursued its aims or objectives

Section 50A(3)(b)(ii)(II) of the Planning and Development Act, 2000, as amended, requires that the applicant '*has, during the period of 12 months preceding the date of the application, pursued those*

[25] Opinion of AG Kokott in Case C-427/07 *Commission v. Ireland* [2009] ECR I-6277 [66].

[26] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [62].

[27] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [61].

[28] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [62].

[29] Section 50A(3) of the Planning and Development Act, 2000, as inserted by Section 13 of the Planning and Development (Strategic Infrastructure) Act, 2006.

[30] Section 50A(3)(a) of the Planning and Development Act, 2000, as inserted by Section 13 of the Planning and Development (Strategic Infrastructure) Act, 2006.

[31] Brian Conroy, 'Harding v Cork County Council: No Standing Room in Public Interest Environmental Litigation?' (2008) 15(3) IPELJ 95, 100. Section 50A(3)(b)(ii) of the Planning and Development Act, 2000, as inserted by Section 13 of the Planning and Development (Strategic Infrastructure) Act, 2006.

[32] Section 50A(3)(b)(ii) of the Planning and Development Act, 2000, as inserted by Section 13 of the Planning and Development (Strategic Infrastructure) Act, 2006.

[33] Section 51(1) of the Roads Act, 1993, as substituted by Section 9(1)(e) of the Roads Act, 2007.

aims or objectives.'[34] In *Djurgården*,[35] one of the conditions associations had to fulfil before qualifying as 'the public concerned' was that they had to be active in Sweden for at least three years.[36] As this particular requirement did not appear to be of concern to the European Court of Justice in that case, consideration might be given to extending the length of time that Irish law requires organisations to have pursued their aims or objectives.

g) Additional requirements

Section 50A(3)(b)(ii)(III) of the Planning and Development Act, 2000, as amended, gives the Minister power to prescribe additional requirements, '*of a general nature and for the purposes of promoting transparency and accountability in the operation of such organisations*,'[37] which a relevant body or organisation must satisfy.[38] These may include requirements:

> *(i) in relation to its membership,*
>
> *(ii) that the pursuit of its aims or objectives be otherwise than for profit,*
>
> *(iii) in relation to the possession of a specified legal personality and the possession of a constitution or rules,*
>
> *(iv) that the area of environmental protection to which its aims or objectives relate is relevant to the class of matter into which the decision, the subject of the appeal, falls.*[39]

It is suggested that the making of appropriate regulations could help to: ensure that the organisations that are permitted access do fulfil the role assigned to them; and, prevent abuse of the privileged status afforded eNGOs, under the Aarhus Convention and EIA Directive.

a. Requirements in relation to membership

It may be appropriate to consider creating requirements in relation to membership. Careful drafting of such requirements would ensure Ireland continues to meet its European and International

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[34] Section 50A(3)(b)(ii)(II) of the Planning and Development Act, 2000, as inserted by Section 13 of the Planning and Development (Strategic Infrastructure) Act, 2006.

[35] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967.

[36] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [14].

[37] Section 37(4)(e) of the Planning and Development Act, 2000, as inserted by Section 10 of the Planning and Development (Strategic Infrastructure) Act, 2006.

[38] Section 50A(3)(b)(ii)(III) of the Planning and Development Act, 2000, as inserted by Section 13 of the Planning and Development (Strategic Infrastructure) Act, 2006. See Section 37(4)(e) of the Planning and Development Act, 2000, as inserted by Section 10 of the Planning and Development (Strategic Infrastructure) Act, 2006. See Brian Conroy, 'Harding v Cork County Council: No Standing Room in Public Interest Environmental Litigation?' (2008) 15(3) IPELJ 95, 100.

[39] Section 37(4)(e) of the Planning and Development Act, 2000, as inserted by Section 10 of the Planning and Development (Strategic Infrastructure) Act, 2006.

obligations. In *Djurgården*,[40] AG Sharpston stated, with the ECJ ruling along similar lines,[41] that requirements that eNGOs have a certain number of members before they will be considered 'the public concerned' must not run counter to the objectives sought to be achieved by the access to justice provisions.[42] Therefore, while such requirements may be appropriate '*in order to ensure that it does in fact exist and that it is active,*'[43] they must not deny local eNGOs access to the courts where the project under assessment has an exclusively local impact.[44]

b. Requirements that the pursuit of an organisation's aims or objectives must be otherwise than for profit

Consideration should be given to including requirements that the pursuit of an organisation's aims or objectives must be otherwise than for profit.[45] The imposition of such requirements would appear to be consistent with European and International law. Dross states that such a requirement '*reflects the fear that lawsuits will be brought by competitors in order to obstruct investments or otherwise harm economic rivals*.'[46] According to Dross, such requirements reflect the public interest, and add to the credibility of, environmental litigation.[47] This type of requirements is commonplace and is seen, for example, in Germany, Belgium and Portugal.[48]

c. Requirements in relation to the possession of a specified legal personality and the possession of a constitution or rules would again appear to be acceptable under European and International law

Consideration should be given to introducing requirements in relation to the possession of a specified legal personality and the possession of a constitution or rules. Again, the inclusion of such requirements would appear to be acceptable under European and International law. Dross indicates that '[i]*n all Member States* [studied (which excluded Ireland)] *with the exception of the UK, NGOs have to have legal personality.*'[49]

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[40] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967.

[41] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [47].

[42] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [78].

[43] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [47].

[44] Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 [78].

[45] Section 37(4)(e)(ii) of the Planning and Development Act, 2000, as inserted by Section 10 of the Planning and Development (Strategic Infrastructure) Act, 2006.

[46] Miriam Dross, 'Access to Justice in Environmental Matters' (2003-2004) 11 Tilburg Foreign L.Rev. 726-7.

[47] Miriam Dross, 'Access to Justice in Environmental Matters' (2003-2004) 11 Tilburg Foreign L.Rev. 726-7.

[48] Miriam Dross, 'Access to Justice in Environmental Matters' (2003-2004) 11 Tilburg Foreign L.Rev. 726-7. See Nicholas de Sadeleer, 'Belgium' in Nicholas de Sadeleer, Gerhard Roller & Miriam Dross (eds), *Access to Justice in Environmental Matters and the Role of NGOs* (Avosetta Series, Europa Law Publishing, Groningen 2005) 10.

[49] Miriam Dross, 'Access to Justice in Environmental Matters' (2003-2004) 11 Tilburg Foreign L.Rev. 726-7.

d. Requirements that the area of environmental protection to which its aims or objectives relate is relevant to the class of matter into which the decision, the subject of the appeal, falls

Consideration should be given to introducing requirements '*that the area of environmental protection to which its aims or objectives relate is relevant to the class of matter into which the decision, the subject of the appeal, falls.*'[50] Whilst the imposition of such requirements may be permissible, care would be required in making such regulations. In Belgium, access to the supreme administrative court by eNGOs is subject to a number of conditions, including '[t]*he evaluation of the link between the association's objective and the contested act is undertaken, given consideration to the nature of the contested act and the geographical extent of is impact*.'[51] In ACCC/C/2005/11, the Aarhus Convention Compliance Committee held that this condition had not been applied '*with the objective of giving the public concerned wide access to justice*.'[52]

6. Should we impose the requirement (as provided for in the Aarhus Convention) for the "exhaustion of administrative review procedures prior to recourse to judicial review procedures where such a requirement exists under national law"? No such requirement currently exists in Irish law.

   [AGO indicates that this approach might need to be balanced by a suite of accompanying non-legal measures in the area of public participation and early information provisions]

Transport projects are generally submitted directly to An Bord Pleanala (ABP) as part of the statutory approval process for a road scheme, such as a Motorway Order. Railway Orders are also submitted directly to ABP. Consideration could be given to creating an appellate division within ABP so that a decision giving developmental consent affecting the environment could be reviewed whilst remaining within the administrative process rather than being though judicial review. Affordable fees could be set for a review within such an appellate division of ABP, thus satisfying the requirement of affordability. Reasonable timescales could be set for seeking a review, say two weeks and for the review to be determined, say a further 4 weeks. Only after having had recourse to this appeal process could a person seek leave for judicial review. As an affordable means of seeking review would be available through an appellate division of ABP, the ordinary regime of costs following the decision in judicial could apply, i.e. a person losing a judicial review could be fixed for the reasonable costs of the other party. There would be a need to adequately resource an appellate division as otherwise it could present a risk of increasing delays rather than reducing them.

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[50] Section 37(4)(e) of the Planning and Development Act, 2000, as inserted by Section 10 of the Planning and Development (Strategic Infrastructure) Act, 2006.

[51] Nicholas de Sadeleer, 'Belgium' in Nicholas de Sadeleer, Gerhard Roller & Miriam Dross (eds), *Access to Justice in Environmental Matters and the Role of NGOs* (Avosetta Series, Europa Law Publishing, Groningen 2005) 10, 13.

[52] UNESC Economic Commission for Europe Aarhus Compliance Committee, 'Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to rights of environmental organizations to have access to justice (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium))' (28 July 2006) ECE/MP.PP/C.1/2006/4/Add.2 [33].

7. Depending on 2 above, is there a need to introduce fast track procedures in the Court of Appeal for commercial cases similar to the Commercial list in the High Court?

A commercial list within the Court of Appeal would be consistent with the approach to commercial cases in the High Court and would be highly desirable for projects of importance to the public interest.

8. Ireland has been obliged to introduce a special costs regime which now provides, in effect, that if an objector wins, he or she is entitled to his or her costs and if the objector loses he or she will not be fixed with the costs of the winning party or parties [is there further scope to tighten up in this area?]

It is possible that Ireland's special costs regime goes beyond that required under European and International law and perhaps represents an overreaction to the judgment of the European Court of Justice in *Commission v. Ireland*.[53] Article 3(8) of the Aarhus Convention provides that each Party must ensure that persons exercising their rights under the Convention '*shall not be penalized, persecuted or harassed in any way* [...].'[54] Article 3(8) does, significantly, recognise the power of national courts to award 'reasonable costs.'[55] Article 9(4) of the Convention requires, *inter alia*, that Parties provide review procedures that are 'not prohibitively expensive.'[56] It is respectfully suggested that Ireland's special costs regime should allow its national courts award 'reasonable costs' where an applicant is unsuccessful. It is suggested that there is further scope to tighten up in this area.

Case Management:

9. Is there a need to review the operation of the existing case management procedures in Order 63A of the rules of the Rules of the Superior Courts to ensure that shorter and more definitive timelines are imposed?

Section 50A(2)(a) of the Planning and Development Act, 2000,[57] removes '*the requirement that an application for leave to apply for judicial review be on notice*.'[58] Whilst the High Court retains a discretion to: conduct the application on an *inter partes* basis; [59] or, '*to treat the application for leave*

[53] Case C-427/07 *Commission v. Ireland* [2009] ECR I-6277.

[54] Article 3(8) of UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001). See Phyllis Comerford, 'Access to Justice and Costs in Environmental Judicial Review' (2009) 16(1) DULJ 66, 69.

[55] Article 3(8) of UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001). See Phyllis Comerford, 'Access to Justice and Costs in Environmental Judicial Review' (2009) 16(1) DULJ 66, 69.

[56] Article 9(4) of UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001).

[57] Section 50A(2)(a) of the Planning and Development Act, 2000, as inserted by Section 32 of the Planning and Development (Amendment) Act, 2010.

[58] Garrett Simons, 'An Overview of the Planning and Development (Amendment) Act 2010' (2010) 17(4) IPELJ 135, 140.

[59] Section 50A(2)(b) of the Planning and Development Act, 2000, as inserted by Section 32 of the Planning and Development (Amendment) Act, 2010. Garrett Simons, 'An Overview of the Planning and Development (Amendment) Act 2010' (2010) 17(4) IPELJ 135, 140.

as if it were the hearing of the application for judicial review,'[60] it is possible that the current Irish rules may impact the effectiveness of the application for leave stage in weeding out unmeritorious claims. Both the Working Group on Access to Environmental Justice and Jackson LJ have highlighted the importance of the application for leave stage in weeding out unmeritorious claims when the 'chilling' effect of costs rules is removed.[61]

10. Can issues be narrowed down to those that are most relevant (reduce the "scatter gun" approach prevalent in applicant pleadings)?

Reducing the volume of makeweight issues in pleadings would be very desirable. See also response to nine above.

An unfortunate trend in recent procurement challenges (which are done through judicial review) are requests for discovery. There is a presumption against the need for discovery and cross examination in judicial reviews generally, but applicants are seeking discovery in procurement challenges with the consequence of increasing delay to the project from the proceedings. Consideration could be given to restricting discovery and cross examination in procurement cases.

11. Consideration might be given to seeking to provide for more defnitive requirements on Judges to deliver judgement in reasonable timeframes.

Other Options:

12. Are we clear on what we mean by strategic infrastucture projects?

National roads projects, including motorways, are brought through the planning process under the Roads Act 1993 to 2015 (as amended). The SI Act defines what 'Strategic Infrastructure' is:

Strategic infrastructure development is defined in section 6(c) of the 2006 Act and includes national road development proposals coming under sections 49, 50 and 51 of the Roads Act, 1993 (the 1993 Act), viz:

- motorway schemes, service areas schemes and protected road schemes (made under section 47, but approved under section 49 of the 1993 Act);
- prescribed types of proposed road development for which the preparation of an EIS is mandatory (section 50 (1)(a) of 1993 Act);
- other road development proposals in respect of which An Bord Pleanála has directed that the road authority prepare an EIS in view of the likely significant effects on the environment (section 50(1)(b) and (c) of the 1993 Act, as amended), and
- any "proposed road development" in respect of which an EIS is required to be prepared under section 50 of the 1993 Act. (This type of road development – defined in above terms in section 2 of the Roads Act, 1993 – comes within section 51 of the 1993 Act and is 'caught' by the definition of "strategic infrastructure development" by virtue of the reference therein to section 215 of the Planning and Development Act, 2000 (the 2000 Act). The "proposed road development" concerned is identical to those proposed road projects mentioned in the preceding bullet points.).

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[60] Section 50A(2)(d) of the Planning and Development Act, 2000, as inserted by Section 32 of the Planning and Development (Amendment) Act, 2010. Garrett Simons, 'An Overview of the Planning and Development (Amendment) Act 2010' (2010) 17(4) IPELJ 135, 140.

[61] The Working Group on Access to Environmental Justice, *Ensuring access to environmental justice in England and Wales – Update Report* (August 2010) [37]. Lord Justice Jackson, *Review of Civil Litigation Costs* (Norwich December 2009) 310-1.

The definition of "strategic infrastructure development" also covers any compulsory acquisition of land referred to in specified legislation, including the Housing Act, 1966, and the Roads Acts, 1993 and 1998, where the acquisition concerned relates to road development proposals of the types set out in the foregoing bullet points. The Strategic Infrastructure Division of An Bord Pleanála will accordingly, consider such CPOs.

Light railway and metro projects are brought through the planning process under the transport (Railway Infrastructure) Act 2001 (as amended). In these cases, application for statutory approval (the planning approval, as it were) is made directly to An Bord Pleanala.

13. Are these projects encompassed by the Strategic Infrastructure Act only or do we have a broader interpretation in mind?

14. Is there scope for further measures which would establish processes for the early provision of information and early public participation – for example extending the concept of mandatory pre-application consultations beyond the Strategic Infrastructure Act?

This is not an issue of concern to TII since the planning processes for national roads and light railway or metro projects already provide for early provision of information and early public participation.

15. Can consideration be given to how greater communtiy gain for projects can be devised and communicated so as to reduce risk of litigation – this could build on the concept of planning gain currently provided for under the SI Act.

Community gain for projects is effectively only feasible for those projects promoted by private bodies investing their own money. Public bodies are generally restricted to compensating landowners directly impacted by a project, such as through land acquisition (by agreement or compulsory purchase order) or by providing compensating accommodation works to adjoining landowners to reinstate accesses and such like.
For projects submitted by a local authority / road authority, ABP may attach conditions requiring the provision of a facility or the provision of a service which would constitute a substantial gain to the community. However, subsection 3 conditions shall not be so expensive as to deprive the road authority of the benefits of the proposed road development.

In this regard, a letter of 26 November, 2007, issued by An Bord Pleanála ('Re: Important Information in Relation to Local Authority Development Approval and Compulsory Purchase Order Applications to An Bord Pleanála') states:

> "In this context the Board suggests that a local authority making such an application should indicate any proposals it may have for such 'gain' in its application."

Extending the statutory basis for community gain in relation to publically funded projects could have unintended consequences by, for instance, creating an incentive for persons to object to projects for the purpose of obtaining community gain rather than a genuine concern about the environment and/or the impact of the project on the person in question.