

DRAFT/Communicating European Environmental Citizenship

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Abstract

This paper explores environmental citizenship within the framework of European Union (EU) environmental law. EU law has had an enormous impact on environmental quality, but there are still persistent problems with implementation and enforcement at national level. Environmental citizenship involves individuals and NGOs taking an interest in environmental matters, contributing to policy/decision-making processes and identifying breaches of environmental law.

EU directives offer important procedural rights to support active environmental citizenship including: access to information held by public authorities; participation in decision-making; and access to justice to enforce information and participation rights. These rights equip individuals and NGOs to act as environmental watchdogs. Much remains to be done to inform citizens of their rights under EU environmental law, however. Recent environmental directives oblige Member States to be proactive in publicising environmental law rights amongst the citizenry. In Case C-427/07 *Commission v Ireland*, 16 July 2009, the Court of Justice ruled that simply providing information on rights in publications or on the internet was not sufficient to ensure that the public is aware of its rights on access to justice in environmental matters. Environmental law is technical and complex and people find it off-putting. The paper considers mechanisms by which Government could promote active environmental citizenship via EU law rights.

DRAFT Paper: still a work in progress and not to be quoted without author's permission

Introduction

This paper adopts a narrow approach to environmental citizenship. It focuses on a set of procedural rights that European Union (EU) law confers on individuals and NGOs to facilitate their engagement in environmental matters. This sharp focus is necessary to provide a critical account of how these rights operate in practice. For the purposes of the paper, 'environmental citizenship' involves individuals and NGOs taking an interest in environmental matters, contributing to policy/decision-making processes and identifying breaches of environmental law.¹ This activity provides a 'voice' for the environment; promotes deeper integration of environmental concerns in decision-making; and seeks to

¹ For a thought-provoking study of the many dimensions of environmental citizenship see: A Dobson and D Bell (eds) *Environmental Citizenship* (MIT Press, 2006).

uphold the Rule of Law. Particular attention is directed to the role of individuals and NGOs as ‘environmental watchdogs’ and the extent to which EU law supports this role. This theme is of considerable practical significance given the persistent difficulties with implementation and enforcement of EU environmental law at national level.² Within the Commission, the Environment Directorate-General continues to shoulder a heavy case load, with 451 open infringement files at the end of 2009.³ On average, Environment Directorate-General deals with 20% of Commission infringement actions.⁴ Using Ireland as a case study, the paper measures the effectiveness of a particular set of environmental procedural rights in promoting active citizenship and suggests how the current situation could be improved.

Aarhus Convention

The Aarhus Convention (1998) or, to use its full title, the Convention on *Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*⁵ is the appropriate starting point. Article 1 of the Convention provides that:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party [to the Convention] shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

The Seventh Recital to the Convention recognises that:

[E]very person has the *right* to live in an environment adequate to his or her health and well-being, and the *duty*, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations (emphasis added).

² See generally: *Communication from the Commission on Implementing European Community Environmental Law* COM(2008)773. Text available at: http://ec.europa.eu/environment/legal/law/pdf/com_2008_773_en.pdf.

³ <http://ec.europa.eu/environment/legal/law/statistics.htm>.

⁴ Ibid.

⁵ Text available at: <http://www.unece.org/env/pp/>.

The Eight Recital explains that:

[T]o be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in environmental decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights.

It follows that the three procedural environmental rights conferred by the Convention are intended to support the right to a healthy environment and the duty to protect and improve the environment in line with the principle of sustainable development. The Ninth Recital observes that these rights serve to:

[E]nhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take account of such concerns.

The Convention is alert to the need for the public to be aware of participatory procedures and to know how to use them (Recital 12). To this end, environmental education plays a crucial role ‘to further the understanding of the environment and sustainable development’ and ‘to encourage *widespread* public awareness of, and participation in, decisions affecting the environment and sustainable development’ (Recital 14, emphasis added). The media and electronic forms of communication are acknowledged as key tools to promote environmental awareness (Recital 15).

The Convention sets down a detailed framework governing the right to information on the environment held by public authorities (Article 4), the right to participate in decision-making (Articles 6, 7 and 8) and the right of access to a review procedure to enforce information and participation rights (Article 9). Article 5, which is linked to the right of access to information, requires Parties to the Convention to ensure that public authorities possess and update environmental information which is relevant to their functions. Article 3(2) obliges officials and authorities to assist and to provide guidance to the public in the exercise of their Convention rights. Article 3(3) requires Parties to promote environmental education and environmental awareness among the public, especially on how to deploy Convention rights. Article 3(4) obliges Parties to provide for appropriate recognition of, and support to,

environmental NGOs.⁶ At the time of writing (22 March 2010), there are 44 Parties to the Convention, including the EU and 26 of the Member States. Ireland stands alone as the only Member State that has failed to ratify the Convention to date (the Convention has a (limited) impact on national law via Ireland's membership of the EU, however). Article 15 provides for 'Review of Compliance' and the Aarhus Convention Compliance Committee was established in 2002.⁷ At the time of writing, this committee had received 44 communications from the public alleging breach of Convention obligations. The Committee's findings and recommendations in particular cases have provided valuable guidance on how Convention provisions fall to be interpreted. The Committee conducts its business in a very open and transparent fashion, with correspondence and other documentation relating to each communication posted on the Convention website.⁸ This practice stands in sharp contrast to the opaque nature of infringement proceedings instigated by the Commission under Article 258 TFEU (ex Article 226 EC). A range of material and guidance documents, including *The Aarhus Convention: An Implementation Guide* (2000) and *Guidance Document on the Aarhus Convention Compliance Mechanism* (2008) are available online with a view to making the Convention and related matters more understandable and accessible to lay persons.

EU response to Aarhus

The EU is a Party to the Aarhus Convention and a number of measures have been introduced to give effect to Aarhus obligations in the EU legal order.⁹ For present purposes, the most significant legislative measures are Directive 2003/4/EC¹⁰ on public access to environmental information and Directive 2003/35/EC¹¹ (usually described as 'the public participation directive') which amended *inter alia* the Environmental Impact Assessment (EIA) directive

⁶ Specific measures to support NGOs are essential if they are to play an active role in environmental matters. In Ireland, important developments have occurred of late as regards capacity building via the Irish Environmental Network (IEN): www.ienv.ie. Furthermore, the formation of an Environmental Pillar of Social Partnership in April 2009 is very significant in terms of facilitating a voice for environmental considerations in social partnership discussions. See: <http://www.environmentalpillar.ie/>.

⁷ <http://www.unece.org/env/pp/ccBackground.htm>

⁸ <http://www.unece.org/env/pp/pubcom.htm>.

⁹ Full details at: <http://ec.europa.eu/environment/aarhus/>.

¹⁰ Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26.

¹¹ Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.

(Directive 85/337/EEC)¹² in light of various requirements set down in the Aarhus Convention.

Directive 2003/4/EC strengthened the right of access to information on the environment held by public authorities. It repealed and replaced an earlier directive on freedom of access to environmental information.¹³ Under the new provisions, core definitions have been clarified, the grounds on which requests for access may be refused have been narrowed and there are stronger rules governing review procedures (or access to justice) where the right of access is delayed or denied. The directive obliges Member States to ensure that officials support the public in seeking access to information (Article 3(5)(a)). Public authorities must inform the public ‘adequately’ of the rights they enjoy under Directive 2003/4/EC and must, ‘to an appropriate extent’, provide information, guidance and advice to this end (Article 3). Furthermore, authorities must be proactive in disseminating environmental information (Article 7). Directive 2003/4/EC was due to be implemented in the Member States by 14 February 2005. The Commission is currently working to compile a report on how the directive has been applied in the Member States.

Directive 2003/35/EC amended the EIA directive by strengthening the public participation provisions and introducing new access to justice obligations. The public participation rules now mandate that ‘the public concerned’¹⁴ is given ‘early and effective opportunities’ to participate in environmental decision-making (EIA directive, Article 6(4)). Furthermore, ‘reasonable’ time-frames must be provided for the various phases of the decision-making process, ‘allowing sufficient time’ for ‘the public concerned’ to be informed and ‘to prepare and participate effectively’ (EIA directive, Article 6(6)). The access to justice provisions set down in Article 10a of the amended EIA directive are very significant. Individuals and environmental NGOs often complain that the high costs associated with judicial review procedures act as a deterrent to environmental litigation. The result is that an alleged breach of EU environmental law may never come before the courts due to fear of potential liability for substantial legal costs. Article 10a attempts to address this issue by providing that the

¹² Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40 as amended by Directive 97/11/EC [1997] OJ L73/5.

¹³ Directive 90/313/EEC on the freedom of access to information on the environment [1990] OJ L158/56.

¹⁴ Defined in Article 1(2) of the EIA directive (as amended) in the following terms: ‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedure referred to in Article 2(2) [of the EIA directive]; for the purposes of this definition, [NGOs] promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.’

review procedure (e.g. judicial review) must not be ‘prohibitively expensive.’ Not surprisingly, this obligation has generated considerable interest among individuals and NGOs. There is already an evolving body of jurisprudence from the Irish courts on the impact of Article 10a on national rules governing liability for costs (considered below). Beyond the question of costs, Article 10a also requires that national rules governing standing (i.e. *locus standi* or the interest required to qualify to bring legal proceedings) must provide ‘wide access to justice’. Furthermore, environmental NGOs that meet any requirements set under national law are *automatically* deemed to have standing. This special concession for environmental NGOs holds the potential to improve access to justice for these organisations in cases involving alleged breach of the EIA directive. Article 10a also obliges Member States to ensure that ‘practical information is made available to the public on access to administrative and judicial review procedures.’ Directive 2003/35/EC was due to have been implemented in the Member States by 25 June 2005. In July 2009, the Commission published a report assessing the effectiveness of the EIA directive across the Member States.¹⁵ This report painted a somewhat rosy picture of implementation, although it noted that experience in the application of the provisions introduced under Directive 2003/35/EC ‘is still limited’.

Irish transposition and implementation of Directive 2003/4/EC and Directive 2003/35/EC

Directive 2003/4/EC

Ireland purported to transpose this directive by means of the European Communities (Access to Information on the Environment) Regulations 2007 (SI No 133 of 2007) - hereafter ‘the AIE regulations’.¹⁶ These regulations, which came into force over two years after the deadline for transposition of Directive 2003/4/EC had passed, follow the text of the directive closely. There are a number of instances where the regulations appear to be at odds with the directive, however. These include the requirement that a request for access to information must be made in writing and the manner in which exceptions to the right of access are framed, in particular the rules governing information on emissions into the environment. The most significant innovation under the AIE regulations is the establishment of a new office of Commissioner for Environmental Information to determine appeals where requests for access

¹⁵ COM(2009) 378 final. Text available at: <http://ec.europa.eu/environment/eia/home.htm>.

¹⁶ Text of regulations and Guidance Notes available at: <http://www.environ.ie/en/AboutUs/AccessstoInformationontheEnvironment/>.

are refused.¹⁷ The Commissioner has already produced an interesting body of case law which is published online.¹⁸ It is clear that the Commissioner adopts a robust approach to the right of access and she has interpreted the AIE regulations in light of Directive 2003/4/EC. One particularly controversial issue in practice is the fact that the AIE regulations provide for a fee of €150 in order to lodge an appeal with the Commissioner. Anecdotal evidence indicates that this fee creates a financial barrier to some individuals who may wish to appeal. The OECD has recommended that this fee should be abolished.¹⁹ The Commissioner highlighted the deterrent effect of the appeal fee in her Annual Report for 2008.²⁰ She also drew attention to the low levels of awareness of the AIE regulations among the public and the need for public authorities to be more proactive in this regard.²¹ A report prepared by the Department of the Environment, Heritage and Local Government published in January 2010 reveals a relatively low volume of activity under the AIE regulations in the period 1 May 2007 to 31 December 2008.²² This finding is not surprising in light of the lack of knowledge of the AIE regulations among the public generally.

Directive 2003/35/EC (as it relates to the EIA directive)

Apart from special standing rules for certain environmental NGOs in EIA cases introduced under the Planning and Development (Strategic Infrastructure) Act 2006,²³ Ireland has not taken any other legislative steps to transpose Article 10a. The Irish authorities insisted that the system of judicial review met the requirements of Article 10a. The European Commission brought infringement proceedings in the Court of Justice against Ireland under Article 258 TFEU (ex Article 226 EC) alleging failure to transpose Article 10a in full. In Case C-427/07 *Commission v Ireland*, judgment delivered 16 July 2009, the Court of Justice determined that Ireland had failed to transpose the requirement in Article 10a that the cost of

¹⁷ <http://www.ocei.gov.ie/en/>.

¹⁸ <http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/>.

¹⁹ OECD Environmental Performance Reviews, *Ireland: Conclusions and Recommendations* (November 2009) p17. Text available at: <http://www.oecd.org/dataoecd/43/59/43988945.pdf>.

²⁰ <http://www.ocei.gov.ie/en/Publications/AnnualReports/>.

²¹ General information concerning the AIE regulations, including guidance notes, is available on the Department of the Environment, Heritage and Local Government website: www.environ.ie and also on the Citizen's Information Board website: <http://www.citizensinformationboard.ie/>.

²² *Review of Implementation of EU Directive 2003/4/EC on Public Access to Information on the Environment: Report by Ireland* (undated). Text available at: <http://www.environ.ie/en/AboutUs/AccessstoInformationontheEnvironment/>.

²³ Section 13 of the 2006 Act amended section 50 of the Planning and Development Act 2000 by introducing new provisions governing judicial review of planning decisions. The changes included new standing rules for certain environmental NGOs which are set down in section 50A(3)(b)(ii) of the 2000 Act, as amended. See further: Á Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Oxford, Hart Publishing, 2009) p243.

review proceedings should not be ‘prohibitively expensive.’ Under Irish law, the general rule is that costs follow the event (i.e. the loser pays). However, the court has a discretion on this matter and it may decline to order that an unsuccessful litigant pay costs, or, in ‘public interest’ cases²⁴ the court may order the winning party to pay (or contribute to) the loser’s costs. The Court of Justice noted that this was merely a discretionary practice on the part of the Irish courts. Drawing on established case law, the Court determined that a ‘mere practice’, which by definition is uncertain, cannot be regarded as valid implementation of the Article 10a prohibition on prohibitive costs. The Court also ruled that Ireland had failed to transpose the obligation in Article 10a to make practical information on review procedures available to the public. According to the Court of Justice, in the absence of ‘any specific statutory or regulatory provision’ concerning information on the rights offered to the public under Article 10a:

[T]he mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters (para 98).

To date, Ireland has not introduced any legislative measures in response to the adverse ruling from the Court of Justice in Case C-427/07. It is anticipated that Order 99 of the Rules of the Superior Courts, which governs costs, will be amended to accommodate the ‘not prohibitively expensive’ obligation – but there is no indication as to when this might happen.²⁵

Apart from the infringement proceedings in Case C-427/07, the impact of Article 10a for judicial review proceedings involving the EIA directive has surfaced in a number of decisions from the Irish courts.²⁶ To summarise this complex body of jurisprudence, there are doubts as to whether the following aspects of Irish judicial review law and practice are compatible with Article 10a: the strict standing test (which requires individual applicants for judicial

²⁴ Usually defined as a case where the legal issues to be determined have a wider significance, beyond the actual case in question, and so it is important in the public interest that the court rules on these issues.

²⁵ On 18 March 2010, the Commission announced that it was sending Ireland a first written warning under Article 260 TFEU (ex Article 228 EC) for allegedly failing to comply with the Court of Justice ruling in Case C-427/07 *Commission v Ireland*, judgment of 16 July 2009. See Commission Press Release IP/10/313 18 March 2010.

²⁶ Ryall, above, n 23, pp 243-256.

review to demonstrate ‘a substantial interest’);²⁷ the relatively weak standard of review applied by the courts when called upon to scrutinise contested planning decisions;²⁸ and the costs regime. There is some evidence, however, that the Irish High Court is prepared to interpret national law in light of the access to justice obligations set down in Article 10a. So, for example, in *Sweetman v An Bord Pleanála (No 1)* [2007] IEHC 153, Clarke J accepted that it was ‘certainly open to argument’ that it will be necessary to interpret the ‘substantial interest’ standing test in a manner that does not infringe Art 10a (at least in cases where Directive 2003/35/EC applies). There are also indications in the High Court jurisprudence that the prohibition on ‘prohibitively expensive’ legal costs is having an impact on how the courts approach liability for costs. See, e.g. *Sweetman v An Bord Pleanála (No 2)* [2007] IEHC 361 and *Hands Across the Corrib Ltd v An Bord Pleanála and Galway County Council (No 2)*, unreported, High Court, 21 January 2010.

In the absence of legislative intervention, it has fallen to the national courts to interpret and apply Article 10a of the EIA directive with a view to bridging the implementation gap. The case law to date demonstrates inconsistencies in the Irish courts’ approach to Article 10a, particularly in the context of standing and liability for costs. Some judges appear to be more willing than others to deploy the doctrine of consistent interpretation²⁹ with a view to aligning national rules with EU law requirements.³⁰ Only clear guidance from the Court of Justice on the meaning and implications of the various elements of Article 10a will provide any hope of legal certainty on the complex interaction between national law and EU environmental law. In the first reference for a preliminary ruling involving Article 10a of the EIA directive, Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, judgment of 13 October 2009, the Court of Justice took a robust approach to the right of access to judicial review in the specific context of environmental NGOs.

Conclusions

[1] EU environmental law has conferred important procedural rights on individuals and NGOs, including the right of access to information, the right to participate in decision-making and the right of access to justice where information and participation rights are

²⁷ Ibid, pp 202-206.

²⁸ Ibid, pp 102-111 and 211-224.

²⁹ The principle of consistent interpretation developed by the Court of Justice demands that national courts interpret national law in light of the wording and purpose of the directive concerned in order to achieve the result sought by the directive, at least in so far as this is possible: Case 14/83 *Von Colson and Kamann* [1984] ECR 1891 para 26 and Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835 para 113.

³⁰ Ryall, above, n 23 pp 243-256.

allegedly infringed. These rights have been strengthened of late following the Aarhus Convention (1998) and Directives 2003/4/EC and 2003/35/EC (which form part of the EU response to Aarhus).

[2] As is often the case with EU directives, implementation and enforcement at national level has proven problematic. Directives 2003/4/EC and 2003/35/EC leave a measure of discretion to Member States on a range of issues. It is therefore difficult to identify the precise scope of the obligations created in the directives. It falls to the national courts, and ultimately the Court of Justice, to interpret the directives with a view to ensuring their practical effectiveness. A number of references for preliminary rulings are pending before the Court of Justice concerning the correct interpretation of provisions in both directives. Only clear guidance from the Court will enable national courts to apply these directives with confidence at local level.

[3] Directive 2003/4/EC has improved access to environmental information in Ireland. The creation of the Office of Commissioner for Environmental Information is particularly significant. Nevertheless, a low level of awareness of the right of access to information has reduced the impact of the directive in practice.

[4] The impact of Directive 2003/35/EC on access to justice in EIA cases in Ireland has been disappointing so far.

[5] Directive 2003/4/EC and Directive 2003/35/EC mandate that Member States provide information to the public on their rights under these directives. The AIE regulations impose a similar obligation on public authorities (Article 5). Awareness of the rights conferred by the directive and the regulations remains low in practice, however. As regards Directive 2003/35/EC, the Court of Justice has already ruled that Ireland is in breach of Article 10a of the EIA directive by failing to provide practical information on access to administrative and judicial review procedures (Case C-427/07). Specific legislative measures must be introduced in response to this Court of Justice ruling. There is very limited information available to the public on the right of access to environmental justice at present. To give one stark example, it is often difficult to track judgments from the Irish courts on EU environmental law issues (a number of recent judgments from the High Court involving the habitats directive³¹ and aspects of Article 10a of the EIA directive are not yet available online).

Recommendations

[1] Greater efforts must be made by Government and public authorities to publicise and demystify EU environmental law rights. The duty to provide practical information on these rights is a firm EU law obligation under Directive 2003/4/EC and Directive 2003/35/EC. A public information campaign on EU environmental law rights is long overdue in Ireland. The aim of such a project should be to provide accurate and up to date information to the general public in clear and accessible language via a variety of media.

[2] Environmental education, training and awareness-raising activities are essential if citizens are to be in a position to invoke their rights under EU environmental law and to play

³¹ Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

an active role in promoting sustainable development. Events, including seminars and workshops, on the theme *Enforcing EU Environmental Law* have an important role to play in this context. The Department of the Environment, Heritage and Local Government should consider establishing a programme to fund proposals for specialised events that promote EU environmental law (along the lines of the *Communicating Europe Initiative*³² sponsored by the Department of Foreign Affairs). Initiatives that should be considered include: a dedicated website for EU environmental law in the Irish context; user-friendly guide(s) to core environmental legislation written in plain language; and a regular public seminar series on recent developments in environmental law (similar to the successful Climate Change Lecture Series 2007-2009 organised by the EPA).

[3] A revised National Sustainable Development Strategy is currently in preparation. This exercise provides a good opportunity to develop policy and to identify priorities to promote active environmental citizenship.

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³² Further details at: <http://www.eumatters.ie/>. Funding from the *Communicating Europe Initiative* supported a conference on *Enforcing European Environmental Law* held at the Faculty of Law, University College Cork in April 2008. This event attracted over 160 participants from a variety of backgrounds and included strong representation from environmental NGOs and community groups. Conference programme available at: http://www.ucc.ie/law/docs/ucc%20law%20environment_web.pdf.