Worth the paper it's written on? - The legal status of the Aarhus Convention in Irish litigation

Gary Fitzgerald BL
Director, Irish Centre for European Law

ICEL – EPA Environmental Law Conference 2016

Introduction

The Aarhus Convention[1] (hereafter "the Convention") has been described as "*quite possibly the most influential international agreement of its kind in the sphere of international environmental law*."[2] It has been referenced in over 50 Irish cases and 13 cases at a European level. The European Union (EU) has enacted two important directives[3] giving effect to the terms of the Aarhus Convention and these directives have been implemented into Irish law and have had a significant effect on the Irish legal system, and public decision making in environmental matters.[4] Yet the precise status of the Convention in Irish law is complex and confusing and has been the subject of a number of important Irish and European judgments, including a very recent decision of Advocate General Kokott in *LZ 2.*[5] Those judgments make it clear that the Convention has a two broad potential impacts on any case. It may have an indirect impact where the court has to interpret national law in compliance with the terms of the Convention, or it may have a more direct effect and be relied on directly by parties in a dispute. The legal justifications for each impact differ and each will be examined in turn, first by looking at the status of the Convention under Irish law, especially in light of the Environment (Miscellaneous Provisions) Act 2011 (hereafter "the 2011 Act), and then its status under EU law. This paper will then seek to give some practical advice as to how the Convention might be used in future litigation. But before this, it is necessary to set out the provisions of the Convention to put its potential legal impacts into context.

The key provisions of the Aarhus Convention

The purpose of the Convention, according to Advocate General Kokott in *LZ 2* is to create definite rights for individuals and environmental associations when decisions with a significant environmental impact are being made.[6] The primary right is the right to participate

[1] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

[2] Waterville Fisheries Development Limited v Aquaculture Licenses Appeals Board and The Minister For Agriculture, Food and the Marine [2014] IEHC 522 at para 6

[3] Directive 2004/3/EC on Access to Environmental Information and Directive 2003/35/EC on Public Participation

[4] By SI 133 of 2007 for the AIE Directive and 71 different legislative measures for the Public Participation Directive. See http://eur-lex.europa.eu/search.html?DB_NATURAL_DIRECTIVE=2003,35&DB_AUTHOR=IRL&qid=1474376947022&DTS_DOM=NATIONAL_LAW&type=advanced&lang=en&SUBDOM_INIT=MNE&DTS_SUBDOM=MNE for a full list of these measures.

[5] C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín* (also known as the Brown Bear case)

[6] At para 61

in those decisions. Recognising that participating in a decision is impossible without information, the Convention also gives a very broad rights of access to information on environmental matters. In addition, given that a right without a remedy is not really a right at all, the Convention contains provisions on access to justice in environmental matters. Therefore the Convention has three strands:

1. Access to environmental information;
2. Public participation in environmental decisions; and
3. Access to justice in environmental matters.

As set out in the introduction, the EU has enacted directives to give effect to the first two rights, but not the third.

According to Ryall, these three rights are interconnected and seek to allow all generations to live in an environment adequate to their well-being.[7] This is achieved by enhancing democratic decision-making in environmental matters. Including the public and environmental associations in the decision making process should have a dual benefit. Firstly the decision making process should lead to the most sustainable decision being made and secondly, where a decision is made it should gain popular acceptance and reduce expensive legal challenges. Both of these aims are set out in the Convention and were quoted by Baker J in *Minch v Commissioner for Environmental Information.*[8]

Given that both access to information and public participation are dealt with by way of directives and implemented into Irish law, there is little dispute or complexity about their legal status. But the access to justice provisions contained in Article 9 of the Convention have not been implemented by the EU by way of legislation and therefore it has been left to the European and national courts to determine the status of those rights. The Commission has proposed a directive based on Article 9 but this proposal was not acted on due to opposition by Member States.[9] Adding to this is the fact that Article 9 is vaguely written and controversial in that it relates to access to justice and the question of legal costs. Article 9(1) deals with access to justice in relation to access to information, a right that is implemented in the AIE Directive. Article 9(2) deals with access to justice where the right to public participation contained in Article 6 has been breached. This too have been implemented by a directive, this time in Article 11 of the Environmental Impact Assessment Directive, and the ECJ has said that that article has direct effect.[10]

[7] Ryall, A "Planning for access to justice in environmental matters" IPELJ V21 No 4 Winter 2014
[8] [2016] IEHC 91 at paras 53-54
[9] Foot note
[10] See Case C-243/15 Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (LZ 2), para 62

Articles 9(3) and 9(4) have not been implemented and have been the subject of detailed litigation:

> *"3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*
>
> *4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."*

Article 9(3) deals with a general right to challenge acts or omissions which contravene national environmental law while 9(4) the nature of the remedies available, and the cost of those remedies. The impact of these articles under EU law will be examined below, but first it is necessary to look at the status of the Convention under Irish law.

The Aarhus Convention in Irish law

There is little dispute about the status of the Convention in Irish law. Article 29.6 of the Constitution states:

> "*No international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas*."

This is a manifestation of the dualist theory of international law. The Convention only has a direct impact on the legal system as determined by the Oireachtas. If an international agreement is not incorporated by the Oireachtas, there is a presumption of statutory interpretation that the Oireachtas intended all following laws to be consistent with the State's international law obligations, as descripted by Hogan J in *McCoy v Shillelagh Quarries Ltd:*

> *"there is a general presumption that the Oireachtas intended to legislate in a manner consistent with the State's treaty obligations: see, e.g., O'Domhnaill v. Merrick [1984] I.R. 151, 159 per Henchy J. It likewise follows that the courts should, where possible,*

seek to interpret such legislation in a manner which is consistent with our international obligations: see Sweeney v. Governor of Loughan House Open Prison [2014] IESC 42, [2014] 2 I.L.R.M. 401, 417, per Clarke J." [11]

While the Convention was ratified by Ireland in 2005, the Oireachtas has not incorporated it into Irish law. The long title of the 2011 Act states that that act was designed to implement certain articles of the Convention. Section 8 of that act states that "*judicial notice*" shall be taken of the Convention. This was analysed by Hogan J in where he stated that "*It is clear that the 2011 Act did not, as such, make the Aarhus Convention part of our domestic law."*[12] He contrasted the effect of the 2011 Act with the incorporation into Irish law of the Lugano Convention by the Oireachtas:

"Unlike, therefore, the treatment of the Aarhus Convention in the 2011 Act . . . the [Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012] gave the Lugano Convention an autonomous, directly applicable status in Irish law, so that, for instance, the relevant provisions of the Convention could be invoked appropriately on a free standing basis in all categories of litigation without further ado."[13]

In a previous case Hogan J said of the 2011 Act that:

"While the Convention is not, as such part of the domestic law of the State, the nature of the declaration in the Long Title and the fact that the courts are required to take judicial notice of its terms compel the conclusion that the relevant provisions of the 2011 Act should be interpreted in a manner which best gives effect to the corresponding provisions of the Convention."[14]

Therefore the Convention has not been incorporated into Irish law and has only an indirect, interpretative impact. This indirect impact has two sources, the general presumption of statutory interpretation as set out above and as a consequence of the 2011 Act. It is submitted that there is unlikely to be any difference between the impact of the two sources. Thus in this respect the 2011 Act was unnecessary. As will be shown below, there is a 3rd source for this indirect effect flowing from the operation of EU law.[15]

[11] [2015] IECA 28 at paragraph 17
[12] At para 11
[13] At para 12
[14] *Kimpton Vale Developments Ltd v An Bord Pleanála* [2013] IEHC 442 at para 17
[15] Ryall, A "Beyond Aarhus Ratification: What lies ahead for Environmental Law" IPELJ Vol 20 No 1 2012 page 20

The status of the Aarhus Convention under EU law

The EU and the individual Member States are signatories of the Convention, and the EU ratified it by Decision 2005/370. According to the European Court of Justice (the ECJ) the provisions of the Convention now form an integral part of the legal order of the European Union.[16] The precise nature of this relationship is very important to understanding the impact of the Convention in the Irish legal system. Yet the case law of the ECJ arises from a series of *ad hoc* references from national courts and it can be difficult to drawn all the various strands together. Certainly the facts of cases can only be fully understood when put in the context of the precise procedural and costs rules applicable in the referring Member State. Thus questions about standing and judicial review under Slovak law that lead to the references in *LZ 1* and *2* are difficult to understand but the findings of the ECJ of the status of the Convention are relevant to all other Member States.

A number of important questions are raised by the statement that the Convention is an integral part of the EU legal order. Firstly, could its provisions have direct effect, just like the EU treaties and legislation? If so, under what conditions? Does the principle of indirect effect apply to the Convention? And could the terms of the Convention be used to annul acts of the EU institutions in an Article 230 TFEU procedure? In a series important cases the ECJ answered all these questions.

Direct effect of the Convention

The leading case on the status of the Convention in European law is *LZ 1*. Here the referring court asked, in essence, if Article 9(3) had direct effect. That article is set out above but relates to the question of access to an administrative or judicial procedure to challenge acts or omissions of private parties and public authorities which contravene provisions of national law relating to the environment.

According to the Court, the first consequence of the Convention being an integral part of the EU legal order is that the ECJ has jurisdiction to give a ruling on the interpretation of the Convention.[17] But there is an important qualification of the role of the ECJ in analysing the provisions of the Convention. It does not have an exclusive ability to interpret the terms of the Convention, and indeed in certain circumstances it may not have any jurisdiction at all. This is due to the fact that the Convention was signed by the EU in an area of joint competence between the EU and the Member States. Therefore the ECJ has jurisdiction to determine what the EU's obligations are and what obligations are the sole competency of the Member States. If an obligation is the sole competence of a Member State then it is for the national

[16] Case -240/09 Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (LZ 1), para 30
[17] At para 30

court to determine if an individual can rely on the Convention and this is not a question of EU law.[18]

Where there is an EU obligation, that obligation can only have a direct effect if the EU has "*exercised its powers and adopted provisions to implement"* it. According to the ECJ:

> *"it is appropriate to examine whether, in the particular field into which Article 9(3) of the Aarhus Convention falls, the European Union has exercised its powers and adopted provisions to implement obligations deriving from it."*[19]

Article 9(3) falls into the field of environmental protection, an area where the EU has explicit external competence. While it is true that the EU has not enacted legislation to implement Article 9(3), this does not mean that it is not part of EU law. According to the ECJ in *LZ 1* the test is whether the issue in question is "*regulated in agreements concluded by the European Union and the Member State and [the issue] concerns a field in large measure covered by [EU law]*."[20]

Furthermore, given that the Convention covers an area of joint competence between the EU and the Member States, its provisions fall within the scope of both national and EU law. In these circumstances it is desirable that there is a consistent approach to interpretation of any such areas.[21] Therefore the Court concluded that it has jurisdiction to determine if Art 9(3) had direct effect.

The court then set out the test for direct effect:

> *"a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."*[22]

---

[18] At para 32
[19] At para 40
[20] At para 36
[21] At para 42
[22] At para 44

Art 9(3) requires Member States to allow members of the public access to administrative or judicial procedures, but only if they meet criteria laid down by national law. The ECJ took the view that this made the obligation on the Member State subject to the adoption of a subsequent measure and therefore Art 9(3) did not have direct effect.

Therefore while the ECJ did not accept that Art 9(3) had direct effect in this case, it set the very important precedent that the Convention could have direct effect if certain conditions were met:

1. The provisions of the Convention contain an EU obligation;
2. The EU has exercised its powers to implement that obligation;
3. The obligation is clear and precise; and
4. The obligation is not subject, in its implementation or effects, to a subsequent measure.

The last two steps are the familiar general criteria for direct effect that were first introduced into EU law in *Van Gend en Loos* in 1963.[23]

In *LZ 2*, AG Kokott expanded on this to an extent by saying that courts had to have regard for the "*wording and to the purpose and nature of the [international] agreement, or its 'nature and broad logic'.*"[24] She further said that the purpose of the Convention was to create rights for individuals and environmental associations. At issue in *LZ 2* was whether Article 9(2) and Art 6(1)(b) had direct effect. She quite quickly concluded that since Article 6 and 9(2) were implemented by the EIA Directive that the ECJ has unlimited jurisdiction to interpret both of them. She also quickly concluded that since 9(2) was in identical terms to Art 11 of the EIA Directive, and that the ECJ has already concluded that Art 11 had direct effect, that article 9(2) also had direct effect.

The sole question was whether Article 6(1)(b) created a sufficiently clear and precise obligation on Member State that was not subject to a subsequent measure. Article 6 sets out the right of the public to participate in certain activities. Article 6(1)(a) refers to all activities in Annex 1 of the Convention while Art 6(1)(b) said that the public have rights to participate in decisions on activities not set out in the annex but which may have a significant environmental impact:

[23] Case 26/62 [1963] CMLR 105
[24] At para 60

> *"[Each party shall], in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions."*

The focus of the Advocate General's opinion was on the effect of the phrase "*in accordance with its national law*". Did this make the obligation subject to a subsequent measure? She examined the English, French and Russian versions of the Convention and concluded that the Member State had no discretion but to examine if a decision required public participation. Given that she concluded that Article 6(1)(b) had direct effect, it means that LZ now had a right under the Convention to challenge the refusal of the Slovak state to allow public participation in this environmental decision.

There is one further ambiguity in Art 6(1)(b) in that there is no definition of "*significant environmental impacts*". Does this mean that the article is unclear and imprecise? AG Kokott did not think so. She viewed the activities in *LZ 2* as clearly having such an impact, even if the precise definition of that phrase was unclear.

Therefore it is clear that the Convention can give rights to litigants in an Irish case if the criteria set out above are met. This could be very significant, as will be discussed below. But first is necessary to examine the possible indirect impacts of the Convention.

Indirect effect of the Convention

In *LZ 1* the ECJ ruled that Art 9(3) was too broadly drafted to have direct effect, but given that its aim was to ensure environmental protection, that it has some effect. In the absence of EU rules in the area of Article 9(3), it was for the Member States to adopt national procedural rules for actions safeguarding the rights of individuals which flow from EU law. Those national procedural rules must comply with the principles of equivalence and effectiveness. Therefore it is for the national court to interpret national procedural rules in the fullest possible way in accordance with Article 9(3) and other rights that applicants may have under EU law.[25] This is the principle of indirect effect, or consistent interpretation, first set out by the ECJ in *Von Coulson*[26]. It obliges the national court to interpret national law in light of EU law. This is a powerful tool, but its limitation is that it cannot be used to give national law an interpretation that is linguistically impossible. It is the view of this paper that this interpretive obligation is broadly the same as those which flow from national law, set out above.

[25] Paras 45-52
[26] Case 14/83 *Von Colson v Land Nordrhein-Westfalen* ECR 1891

The Aarhus Convention as a ground for judicial review

The Convention, as an international agreement entered into by the EU, is binding on the EU institutions when they enact secondary legislation, but not when they are acting in a primary legislative capacity, according to the ECJ in *Stichting Natuur*.[27] In that case the applicant challenged the validity of Regulation No 1367/2006 which implemented Article 9(3) of the Convention. The ECJ stated that since the Convention was approved by the Commission in 2005, it prevailed over secondary legislation.[28] In general, for an international treaty to affect the validity of secondary legislation, the treaty needs to be unconditional and precise and the invalidity can only be considered in light of the nature and broad logic of the international treaty. In other words the international treaty needs to have direct effect on the EU legal system.[29]

However, in *Stichting Natuur,* as regulation in question was adopted to implement Article 9(3) of the Convention, this step was not necessary:

> *"where a regulation is intended to implement an obligation imposed on the European Union institutions under an international treaty, the Courts of the European Union must be able to review the legality of that regulation in the light of the international treaty without first having to determine whether the conditions set out in paragraph 53 above are satisfied."*[30]

The relevance of this to Irish litigation can only be understood when the provisions of Article 263 TFEU and Art 267 TFEU are considered. Article 263 allows for any natural or legal person who has standing under that article to seek a judicial review of an act of the EU on a number of grounds. There is a restrictive and complex test for standing and while a full discussion of that test is outside the scope of this paper, there are circumstances where applicants whose rights have been affected by an act of the EU do not have standing. In these circumstances the ECJ has said that the correct procedure is for applicants to take a case in the domestic courts and then seek a reference under Article 267. Due to the supremacy of EU law the national courts cannot annul EU measures, this is the sole jurisdiction of the European Courts and the Irish courts have a mandatory duty to refer the question as to the validity of the EU measure to the ECJ. If the act is designed to implement a right in the Convention then there is no need for further analysis of the Convention. On the other hand, if the act is just a general secondary legislative act then it is necessary to show that the provisions of the Convention being relied upon have direct effect.

---

[27] Case T-338/08 *Stichting Natuur en Milieu v Commission* at para 51
[28] At para 52
[29] At para 53
[30] At para 54

Future developments – the *North East Pylon* case

The interaction between *LZ 1* and *2* is of particular importance when considering the recent judgment of Humphreys J in *North East Pylon Pressure Campaign Limited & anor -v- An Bord Pleanála & ors (No. 2).*[31] This case involved an application by all the parties for their costs. This followed the decision of the judge not to grant the applicants leave to judicially review the prohibition of a planning enquiry into the North-South interconnector on the grounds that that application was premature. Humphreys J referred seven detailed questions to the ECJ, the relevant one here being question five. In essence, he was asking about the direct effect of Article 9(3). In *LZ 1* the ECJ held that that article did not have direct effect as the obligations were dependent on subsequent action by the Member State[32]. The key phrase being "*where they meet the criteria, if any, laid down by national law*." This referred to the standing of a party to take an administrative or judicial review of a decision which contravenes provisions of national law relating to the environment.

In *North East Pylon* Humphreys J concluded that there were no criteria in Irish law and further that there was no question of the applicant not having standing. Does this deal with the concerns of the ECJ in *LZ 1* about the direct effect of Article 9(3)? AG Kokott in LZ 2 effectively said that it is not necessary to have a full definition of significant impact on the environment. What was important was that the particular facts of the case clearly had just such an impact. Humphreys J did not have any concerns about the standing of the applicant, and it is submitted that this should be sufficient to allow the ECJ to distinguish the findings in *LZ 1* and conclude that in the context of this dispute that Art 9(3) had direct effect.

The true importance of this finding is only clear when Article 9(4) is considered. That article applies to procedures under Article 9(1), 9(2) and 9(3) and states that any such procedures must provide adequate and effective remedies, be fair, equitable, timely and not be prohibitively expensive. Thus a finding that 9(3) has direct effect allows an applicant seeking to participate in environmental decision making to argue that Irish High Court costs are prohibitively expensive. This might oblige a court to exercise its discretion under either the special costs regimes in S50b of the Planning and Development Act 2000 (as amended) (hereafter "S50b") or the 2011 Act to award costs of the applicant, or oblige a court to ignore those provisions all together. It is to this possibility that we now turn.

[31] [2016] IEHC 490

[32] See above page 6

Direct effect and Irish law

The final issue to be considered is the impact on Irish law of the statement that Article 9(3) has direct effect. This discussion is based on the assumption that the ECJ answers question five posed by Humphreys J by saying that Article 9(3) has direct effect where there is no dispute about the standing of the applicant. As set out above, any review procedure under 9(3) shall not be prohibitively expensive. This requirement lead to the adoption into Irish law of the special costs regimes in S50b and the 2011 Act. A full explanation of that regime is beyond the scope of this paper but in summary they provide that in certain types of case then the normal rule that costs follow the event does not apply and that the default position is the each party pays their own costs.

In *Waterville Fisheries* Hogan J said that the 2011 Act sought to approximate Irish law to Article 9(4) but did not implement that article into Irish law. He concluded by saying that if there was a difference between Article 9(4) and the relevant provisions of the 2011 Act that the only option was for the Oireachtas to amend the 2011 Act.[33] This does not consider the possibility that the right to a review procedure might flow directly from the Convention itself, as is assumed above.

There are clear differences between the provisions of the Convention in relation to legal costs and provisions of the 2011 Act.[34] The special costs regime contained in both S50b and the 2011 Act means that an applicant can be required to pay only their own costs. This should mean that those costs are quantifiable in advance assuming an agreement is reached between the client and their lawyers. But the inability for a successful applicant to automatically recover costs from a respondent in case of a legal victory can reduce environmental protection as many lawyers operate their practices on the basis that one victory can subsidise several defeats.

There is nothing in the Convention that says that litigation should be free. The only requirement is that it is not prohibitively expensive. This is been implemented into English law in a more comprehensive manner. There costs recoverable by a defendant from a claimant are capped at £5,000 if that claimant is an individual and £10,000 in all other circumstances. In addition costs recoverable by a claimant from a defendant are limited to £35,000. These rules apply to all Aarhus Convention claims and not a long list of specific acts as exists in the Irish system.

[33] At para 11

[34] S Dodd "Costs in Environmental Litigation" IPELJ V21 Spring 2014

It would appeal that the English system is a much closer approximation of the Convention that the Irish one. What happens then if there is a conflict between a directly effective rights in the Convention and Irish law? EU law is clear in this regard. According to the ECJ in *Simmental* the national court should disapply the conflicting national provisions for the purpose of the dispute in question and only apply EU law.[35] Therefore the findings of the ECJ in North East Pylon could lead to a disapplication of the 2011 Act, or S50b.

Conclusion

The Convention contains many important rights in a vital area of law. Two of the three strands have been clearly implemented into EU law, and subsequently into Irish law. While there are difficulties in those areas (public participation and access to information), the question of the legal status of the access to justice strand of the Convention is much more complex. This is due to the lack of political action at an EU or national level to implement the provisions of the Convention. It is left to the courts then to fill this gap and they have done so in a piecemeal way, responding to the needs of each individual case.

The Convention has an indirect, interpretive impact on the Irish legal system but has not been incorporated into Irish law. Under EU law it can have direct effect if the conditions are met and then can be used in Irish courts. It can also be used to invalidate secondary legislative acts of the EU, with a potential for these cases to be initiated in domestic courts. Finally, two judgments of the ECJ, in *LZ 2* and *North East Pylon*, should clarify the status of certain rights in the Convention and potentially set in on a collision course with the special costs regime in Irish law. This regime is overly complex and not sufficient to give effect to the rights contained in the Convention.

[35] Case 106/77 *Amministrazione delle Finanze v Simmenthal SpA*