

Avosetta Annual Meeting on 29/30 May 2015 in Bremen

OVERVIEW OF SELECTED RECENT DEVELOPMENTS

IRELAND

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1. LEGISLATION

1.1 Climate Action and Low Carbon Development Bill 2015

The Government published its long-awaited Climate Action and Low Carbon Development Bill 2015 in January 2015. The Bill provides for the approval of Government plans in relation to climate change 'for the purpose of pursuing the transition to a low carbon, climate resilient and environmentally sustainable economy.' It sets out 'an unequivocal commitment' to the State's existing or future obligations under EU law and international law, including EU greenhouse gas mitigation targets for the period 2013-2020. It also provides for the establishment of a National Expert Advisory Council on Climate Change.

The Bill has attracted strong criticism from the NGO sector, in particular, due to: (1) the failure to set targets for reducing greenhouse gas emissions beyond Ireland's existing commitments under EU and international law; (2) the lack of specific provisions in the Bill to ensure the independence of the Expert Advisory Council; and (3) the failure to incorporate climate justice principles.

A coalition of NGOs, under the banner 'Stop Climate Chaos', recently commissioned Client Earth to provide a legal analysis of the Bill. Client Earth's analysis, published in May 2015, criticised the lack of binding long term targets in the Bill (in particular the lack of a 2050 reduction target) and stressed the importance of an independent Advisory Council as being fundamental to effective climate legislation.

At the time of writing, it remains to be seen whether the Government will propose any amendments to the text of the Bill at Committee Stage.

Text of the Climate Bill as initiated:

<http://www.oireachtas.ie/documents/bills28/bills/2015/215/b215d.pdf>

Text of the Client Earth analysis, *European Lessons for Ireland's Climate Law* (May 2015):

http://www.foe.ie/download/pdf/clientearth_critical_weaknesses_of_irish_climate_bill.pdf

1.2 Freedom of Information Act 2014 (FOI Act 2014)

The FOI Act 2014, enacted on 14 October 2014, strengthened the Irish FOI regime. It extended the range of public bodies that are subject to FOI and removed a number of regressive measures introduced in 2003, including the €15 FOI application fee.

1.3 Water Services Act 2014

The Water Services Act 2013 and Water Services (No 2) Act 2013 provided for the establishment of a new State-owned utility - Irish Water/*Uisce Éireann* - with responsibility for providing and managing public water and waste water services. The Water Services Act 2014 provides for a number of amendments to Irish Water's powers which were introduced in response to public outcry over water charges. In particular, the 2014 Act provides for the maximum level of charges that Irish Water/*Uisce Éireann* may impose on a person in respect of the provision of water services to a dwelling and prohibits it from disconnecting supply in the case of arrears in payment of water charges. From an environmental perspective, the 2014 Act provides for the payment of a grant to householders for the conservation of water (the 'water conservation grant').

1.4 European Union (Access to Review of Decisions for Certain Bodies or Organisations Promoting Environmental Protection) Regulations 2014 (SI No 352 of 2014)

These regulations amend a number of statutory provisions to provide *inter alia* that a body or organisation whose aims or objectives 'relate to the promotion of environmental protection' (i.e. environmental NGOs) does not have to satisfy the usual 'sufficient interest' standing test in order to be eligible to bring judicial review proceedings.

2. CASE LAW

There have been some interesting developments in the case law in recent months. The following are among the most significant judgments:

2.1 *Kelly v An Bord Pleanála* (the Planning Appeals Board) [2014] IEHC 400

The High Court quashed two decisions to grant planning permission for wind turbine developments at Dysart and Tobermacloughlin in County Roscommon. The court concluded that the Board had not lawfully carried out appropriate assessments in accordance with Article 6(3) of the Habitats directive that were capable of supporting its decisions.

2.2 *Ó Grianna v An Bord Pleanála* [2014] IEHC 632

The High Court quashed a decision to grant planning permission for wind turbine development at *Réidh na nDoirí*, Ballingeary, County Cork on the basis that the Board had failed to carry out a proper environmental impact assessment in relation to the overall project.

These two ruling provide encouraging signs that the Irish courts are becoming more demanding in their attitudes towards EU environmental law. The *Kelly* and *Ó Grianna* rulings are important precedents for subsequent cases. More significantly, these rulings send a clear message to public authorities charged with environmental decision-making that there are serious consequences for failure to comply with assessment obligations.

2.3 *McCoy v Shillelagh Quarries Ltd* [2015] IECA 28

The Court of Appeal provided important guidance on the principles to be applied where an applicant seeks an order from the court confirming that the special costs rules set down in Part II of the Environment (Miscellaneous Provisions) Act 2011 apply in a particular case. The special costs rules that apply in certain environmental cases are Ireland's legislative response to the obligation under Aarhus and EU law that the (judicial) review procedure must not be 'prohibitively expensive'.

3. POLICY DEVELOPMENTS

3.1 Department of Environment, Community and Local Government (DECLG), Public Consultation on Implementation of Article 9 of the Aarhus Convention on Access to Justice (July-September 2014) <http://environ.ie/en/Environment/AarhusConvention/PublicConsultation/>

The DECLG's public consultation, which was launched in late July 2014 and ran for 10 weeks, aimed to initiate discussion on a review of domestic provisions implementing Article 9 of the Aarhus Convention 'with a view to improving clarity and ensuring on-going effectiveness of the implementing measures'. The introductory text on the DECLG's website indicated that this consultation was triggered by 'recent legal advice' and engagement with various interested parties, including the Environmental Law Implementation Group (ELIG). A background document, 'Public Consultation: Access to Justice', together with a 'Response Template', were published on the DECLG's website and the public was invited to submit its views via an online survey format, the 'Response Template' or email. The background document set out the main provisions of Article 9 of the Aarhus Convention, followed by a brief summary of Ireland's legislative response to each provision and a set of 'discussion questions' designed to flag the main issues arising for consideration.

One of the discussion questions included in the background document, concerning the implementation of Article 9(2) of the Aarhus Convention, asked whether the review procedure (currently judicial review before the High Court) should be before 'a newly established specialist Environmental Court or a Regulatory appeal/review Court at either High Court or Circuit Court level?' The explicit reference to a

specialist Environmental Court is welcome and demonstrates that the DECLG is considering a range of mechanisms that could be adopted to improve oversight of environmental decision-making. However, it remains to be seen whether the idea of a specialist Environmental Court will gain any political traction and form part of the proposals to be developed on foot of the consultation.

It is anticipated that DECLG will publish a report which takes account of the various points raised during the public consultation process and sets out its thinking on implementation of Article 9 of the Aarhus Convention. It is also anticipated that an 'Aarhus Convention Bill' to 'consolidate and clarify the existing costs provisions in one piece of legislation, to provide a statutory basis for a number of other provisions of the Aarhus Convention and related EU Directives' will be published in the autumn (*Government Legislative Programme spring/summer 2015*).

3.2 REVIEW OF AN BORD PLEANÁLA (THE PLANNING APPEALS BOARD)

In October 2014, the Minister for Environment, Community and Local Government announced his intention to establish an expert group to review the operation of An Bord Pleanála. The expert group has not been established at the time of writing.

20 May 2015