



ARTHUR COX

2020 Environment Ireland Conference

The Outlook for
European Environment
Legislation – the Irish
Perspective.

15 & 16 October 2020

Deborah Spence

Head of Environment & Planning
Arthur Cox

The Past and the Present ...



Living well, within the limits of our planet

7th Environment Action Programme

7th Environment Action Programme

The **7th Environment Action Programme of the EU**, entitled '**Living well, within the limits of our Planet**' came into force in 2014 and runs to the end of 2020.

It contains the environmental policy which has driven European Environment Legislation.

3 priority action areas:

- To protect, conserve and enhance the EU's natural capital
- To turn the Union into a resource-efficient, green, and competitive low-carbon economy
- To provide financial support for environmental projects

The Future of European Environment Legislation

The 8th Environment Action Programme 2021 – 2030 - 'Turning the Trends Together'

In October 2019 The European Council adopted a number of conclusions. The conclusions built on the strategic agenda adopted by the European Council in June 2019, which recognised the urgent need to build a **climate-neutral, green, fair and social Europe** and identified the following priority areas of focus:

- climate change
- pollution
- accelerating demands on natural resources
- biodiversity restoration with ambitious targets
- strategy for a non-toxic environment fully addressing endocrine disruptors, the combined effects of chemicals and nanomaterials and
- a new circular economy action plan.

European Green Deal

In **January 2020** the European Commission published its work programme making a first priority, '**A European Green Deal**' and announced its intention to launch a legislative proposal for its 8th Environmental Action Programme (EAP).

In turn Ireland's Programme For Government of June 2020 incorporated an ambitious set of targets under the '**Green New Deal**'.

Anticipating the key drivers from the 8th EAP Ireland's focus policy area which will drive national European based Environment Legislation will be:

- **climate change** and all things related to it;
- protecting and enhancing our **natural resources**;
- **accessing information on the environment**, and
- the **circular economy**.

Irish Government's Autumn 2020 Legislative Programme

The most recent legislative programme (the "Autumn Programme") was published on 16 September 2020 in the teeth of the COVID-19 pandemic and BREXIT.

Announcing 30 areas of intended particular legislative focus including:

Energy and Climate Action

- The **Climate Action and Low Carbon Development (Amendment) Bill 2020** just issued to regulate in detail the ambitious 'Green New Deal' targets set out in the June 2020 Programme for Government.
- The **Agriculture Appeals (Amendment) Bill** is intended to align forestry licensing and appeals processes.

Renewable Energy

- Building on the Marine Policy Planning Statement and the National Marine Planning Framework - the **Marine Planning and Development Management Bill**, is intended to allow for the sustainable development of up to 5GW of offshore wind energy before 2030.
- The **Maritime Jurisdiction Bill** is intended to consolidate and bring up to date our maritime jurisdiction legislation.

Government's Legislative Programme, cont.

Housing and Land Use Planning

The **Housing and Planning and Development (Amendment) Bill** – promises to update Land Use Development Planning and might also potentially address the issue of substitute consent.

The **Affordable Housing Bill** introduces a State-backed home purchase scheme and prioritises the development of social and affordable housing.

The **Land Development Agency Bill** will further provision for the role, status and powers of the Land Development Agency.

Water, Waste and the Circular Economy

Compliance with the Water Framework Directive requires Ireland to put in place a regime for the control of the abstraction of water on a risk-based approach. The **Water Environment (Abstractions) Bill** has been published and is to be progressed as a priority.

Circular Economy – contained in both the 7th and 8th EAP - the **Waste Management (Circular Economy) Bill** is in the early stages of drafting.

Ambitious targets include halving Irish food waste by 2030 and the banning of certain single-use plastics.

Government's Legislative Programme, cont.

Natural Heritage and Biodiversity

The **Wildlife (Amendment) Bill** will give effect to revised designations as per the Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs' proposed establishment of a reconfigured raised bog Natural Heritage Area network.

.....

Slow pace of Irish legislative change

v

Increasing pace of (European Environment Legislation based) Irish caselaw change

The Aarhus Convention – a key to open wide Courts' doors

The United Nations Economic Commission for Europe (**UNECE**) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (commonly referred to as the Aarhus Convention) was adopted on 25 June 1998.

The Convention originates in the 1992 Rio Declaration, specifically Principle 10 on the Environment and its three fundamental rights as key pillars of sound environmental governance.

Ireland ratified the Aarhus Convention on 20 June 2012.

Note: in the Autumn 2020 Legislative Programme the **Aarhus Convention Bill**, draft legislation to update and more fully implement the Convention.

The Three Pillars of the Aarhus Convention

- **Access to environmental information:** This includes information (1) on the state of the environment; (2) on human health issues, and (3) on policies and measures taken.
- **Public participation in environmental decision making:** Members of the public have a right to participate in a range of decisions where there may be an environmental impact. These include planning matters and other environmental licensing decisions, such as foreshore licences, waste licences, Integrated Pollution and Industrial Emissions licences.
- **Access to justice in environmental matters:** Members of the public and environmental non-governmental organisations have the right to seek a review of decisions that have been made which may affect the environment. The review procedures must provide *"adequate and effective remedies ... and be fair, equitable, timely and not prohibitively expensive"*.

In Ireland, the requirement to provide a mechanism to challenge the substantive and procedural legality of a decision of a public body is ultimately met by way of **Judicial Review**.

Routes into Irish law for EU Environment Legislation

Some routes for implementation of EU Environmental Legislation:

The Aarhus Convention Complaints Committee;

Complaints made **to the European Commission** resulting in Commission cases initiated in the CJEU against Ireland by it;

Legislative instruments (Acts and SIs) being passed in Ireland directly implementing EU environmental legislation;

References made by **Irish High or Supreme Court Judges to the CJEU;**

Directly applicable **EU Regulations**.

The Irish Courts are proving to be a very fertile ground for the implementation of European Environment Legislation **via Judicial Review**.

UNECE Key Areas of Work

The United Nations Economic Commission for Europe (**UNECE**) was set up in 1947 by ECOSOC. UNECE's major aim is to promote pan-European economic integration. UNECE includes 56 member States in Europe, North America and Asia. Ireland has been a member since 14 December 1955.



Clean Air



Safe & Shared
Water



Safe industry



Environmental
Assessment



Public
participation



Green
economy



Environmental
Monitoring &
Assessment



The PEP – the
Transport,
Health and
Environment
Pan-European
Programme



Education for
Sustainable
Development



Environment
for Europe



Environmental
Performance
Reviews

Sample J.R. Case Law – over the last 6 months

Irish cases

O'Connor -v- Offaly County Council and Tag-a-Bin Limited [2020] IECA 72 (20 March 2020) (Murray J)

The Court of Appeal upheld the High Court's decision that parties to judicial review proceedings involving the **special costs rules under the Environment (Miscellaneous Provisions) Act 2011 may be required to bear their own costs in a J.R. case involving breach of a waste permit and the Habitats Directive**. A party in these circumstances must establish a stateable case that damage to the environment is occurring or likely to occur has been made, for the special costs rules to apply.

Redmond -v- The Commissioner for Environmental Information and Coillte Teoranta [2020] IECA 83 (3 April 2020) (Collins J)

The Court of Appeal held that the Commissioner was wrong in his conclusion that information sought on the sale of lands by Coillte was not environmental information.

The Commissioner's decision was overturned as: He addressed the wrong question when determining whether the information sought was environmental information; **He failed to have regard to evidence which was clearly relevant to determining whether the sale of the Lands was a measure likely to affect the environment**; He failed to carry out appropriate investigations.

Sample J.R. Case Law – over the last 6 months

Friends of the Irish Environment CLG -v- The Government of Ireland & Ors [2020] IEHC 225 (24 April 2020) (Barr J)

The High Court dismissed FIE CLG's application for an order quashing the adoption of the National Planning Framework and the National Development Plan for reasons including:

The Minister made the necessary AA determination prior to the meeting adopting the Plans.

As a strategic policy document, the level of assessment of the reasonable strategic alternatives in the NPF did not need to be comparable to the level of assessment carried out for the preferred strategic approach.

An SEA and an AA were not required for the NDP because it was neither a plan nor a programme within the meaning of the SEA Directive.

The Supreme Court subsequently refused to grant leave to FIE CLG to appeal the High Court's decision because there were no exceptional circumstances justifying such an appeal. Instead, the Court was of the view that an appeal to the Court of Appeal was the appropriate course of action. **The Court of Appeal decision on leave to appeal is awaited.**

Balz and Anor -v- An Bord Pleanála and Anor [2020] IESC 22 (5 May 2020) (O'Donnell J)

The Supreme Court stayed an order quashing the Board's decision provided the Developer undertook not to continue to operate a windfarm, pending the Board determining a substitute consent application. The case involves **renewable energy, the Wind Energy Development Guidelines, the REFIT price support scheme, development of a modified windfarm in the teeth of litigation, and the discretion of the Court to stay an order or postpone the making of one to do justice in an individual case** and a jurisdiction to cure an error, particularly a procedural one.

Sample J.R. Case Law – over the last 6 months

An Taisce -v- An Bord Pleanála, An Taisce -v- An Bord Pleanála & Ors and Sweetman -v- An Bord Pleanála & Ors [2020] IESC 39 JR (Mr. Justice McKechnie) (1 July 2020)

The Supreme Court held that certain aspects **of the substitute consent procedure are inconsistent with and in breach of the application of the EIA Directive as they fail to provide for (1) an exceptionality test and (2) public participation on the issue of exceptionality**, thus quashing those parts of the provisions of Section 177 of the Planning & Development Acts 2000 as amended.

Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General [2020] IESC 49, Clarke C.J. (31 July 2020)

A full sitting of the Supreme Court quashed the National Mitigation Plan for climate action on the basis that it does not meet the specificity required by the Climate Action and Low Carbon Development Act, 2015.

M50 Skip Hire & Recycling Limited -v- Commissioner for Environmental Information [2020] IEHC 430 (Heslin J)(2 September 2020)

The High Court upheld the Commissioner's decision to permit an **individual access to commercially confidential waste destination information**, even where that individual was an employee of a competitor waste management company.

Sample J.R. Case Law – over the last 6 months

Friends of the Irish Environment CLG -v- The Legal Aid Board, Ireland and the Attorney General 2020 IEHC 454, High Court (Hyland J) (15 September 2020)

The High Court rejected FIE CLG's application for a declaration that they are entitled to apply for legal aid, as a legal person.

EU Cases

Friends of the Irish Environment CLG ("FIE CLG") v An Bord Pleanála, Shannon LNG Limited (Notice Party), Case C-254/19 (Simons J)

The CJEU held on a referral from the Irish High Court that the grant of an extension to planning permission is subject to the requirements of the Habitats Directive in circumstances where the original permission, having lapsed, ceased to have legal effect and the works had not been undertaken.

Sample J.R. Case Law – The Climate Ireland Case

Friends of the Irish Environment CLG (“FIE CLG”) v The Government of Ireland, (the Government”) Ireland and the Attorney General [2020] IESC 49, Clarke C.J. (31 July 2020)

A full sitting of the Supreme Court quashed the 2017 National Mitigation Plan for climate action on the basis that it did not meet the specificity required by the Climate Action and Low Carbon Development Act, 2015.

Background:

- The National Mitigation Plan (the “**Plan**”) was adopted by the Government in 2017 pursuant to the Climate Action and Low Carbon Development Act, 2015 (“the **2015 Act**”). Under the 2015 Act, the purpose of the Plan is to enable the State to pursue and achieve the objective of transitioning to a low carbon, climate resilient and environmentally sustainable economy by the end of 2050 i.e. the National Transition Objective (“**NTO**”).
- FIE CLG took a case against the State alleging, amongst other things that **the Plan was ultra vires the 2015 Act** because the Plan envisages an increase, rather than a decrease, in emissions over the initial period of the Plan, albeit generally committing to achieve the NTO.
- The High Court dismissed FIE CLG’s proceedings. FIE CLG petitioned an appeal to the Supreme Court.
- The Supreme Court granted leave for a ‘leap frog appeal’ directly to it.

Climate Ireland Case: when vagueness became unlawful.

- On 31 July 2020 the Supreme Court HELD that the Climate Action and Low Carbon Development Act, 2015 Act required the National Mitigation Plan of 2017 to “*specify*” how it is envisaged that the National Transition Objective is to be achieved by 2050.
- The Court characterised certain aspects of the Plan as “*excessively vague or aspirational*”, specifically where the plan referred to the Government’s endeavours to “*improve [their] understanding*”.
- The Court noted the importance placed on the policies of public participation and transparency in the 2015 Act and held that the level of specificity required is such that a “*reasonable and interested member of the public*” would know how the government intends to achieve the NTO so that they can take any action as they see fit in light of that policy.

Climate Ireland Case: when vagueness became unlawful.

- The Chief Justice commenced his judgment with the following words:
"Climate change is undoubtedly one of the greatest challenges facing all states. Ireland is no different. There are many issues at the level of both policy and practice as to how the problems associated with climate change can, or should, be tackled. However it is important to emphasise that these proceedings are concerned with whether the government of Ireland ("the Government") has acted unlawfully and in breach of rights in the manner in which it has adopted a statutory plan for tackling climate change. It is important at the outset to emphasise that the role of the courts generally, and of this Court in particular, is confined to identifying the true legal position and providing appropriate remedies in circumstances which the Constitution and the laws require."

Climate Ireland Case: when vagueness became unlawful.

- The Court was careful not to say that the plan was unconstitutional but it found that it repeatedly failed to specify how the National Transition Objective of transitioning to a low carbon climate resilient and environmentally sustainable economy is to be achieved by 2050.
- And in making these findings the Supreme Court was very clear that this was a finding of substance rather than process in this case.
- The Chief Justice said *"whether the plan does what it says on the statutory tin is a matter of law and clearly justiciable "*.
- FIE CLG also (but unsuccessfully) contended that it was entitled to claim both under the Constitution and under the Human Rights Convention that the Plan failed to vindicate the human rights concerned. It was held that it had no standing to assert such claims.
- The question was also raised whether there is a so-called unremunerated Constitutional right to an environment consistent with human dignity. The Judgement confirms there is no such Constitutional right.

Climate Ireland Case: when vagueness became unlawful.

The Supreme Court specifically went on to observe that **there may be circumstances where other parties in an appropriate case could establish standing as individuals** and that there was no reason why such an individual or individuals could not then pursue a Constitutional or human rights type of challenge.

- The Government's **Climate Action and Low Carbon Development (Amendment) Bill 2020** just published will amend the 2015 Act. Its final wording as an amending Act, and the new plans and programmes to be made under it are forged in part in the fire of this successful legal challenge. But if implemented as promised, this essential piece of legislation will place legally binding statutory obligations on not only the relevant Government departments required to deliver on the specific goals contained within it, and not only on the relevant sectors, but also ultimately on each and every one of us individually living in and doing business in this State.



ARTHUR COX

Thank you

Deborah Spence

October 2020