The Transposition into Irish Law of Directive 2003/35/EC

Discussion Basis to Inform a Submission by Comhar, the National Sustainable Development Partnership, to the Department of the Environment on the Implementation in Ireland of Directive 2003/35/EC on Public Participation and Access to Justice.

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Introduction

This document looks at:

- the amendment of a number of Directives by Directive 2003/35/EC;
- some of the problems associated with the effective transposition of European Directives into Irish law;
- the experiences in Ireland of those trying to participate in decision-making on the environment;
- the experiences in Ireland of those trying to gain access to justice with regard to decision-making on the environment;
- the Directive in the light of the above and the Århus convention; and
- the factors that need to be incorporated into the new Regulations in order to take into account the factors highlighted in the previous chapters.

Much of this discussion document was informed by a workshop held in ENFO in June 2005 for practitioners in the environmental NGO sector that provided specific examples of the problems outlined in. There is no doubt that the lack of public participation has been a source of great frustration to those concerned in this sector with sustainable development in Ireland.

Directive 2003/35/EC is part of the EU process enabling ratification of the Aarhus Convention. The European Commission has recently ratified the Convention. Ireland as a signatory is working towards ratification, and in transposing this Directive must do so in the spirit of Aarhus. This international convention incorporates the three pillars of Principle 10 of the Rio Declaration, namely the rights to access to information and decision-making on the environment, and the right to access to justice to uphold the other two rights, when they are denied. The connection between this Directive and Aarhus is confirmed by Article 1 of the Directive which outlines its objective.

The opportunity offered by the implementation of this new Directive affords our legislators a unique chance to ensure greatly increased public involvement, coupled with openness and transparency in decision making, and so make a positive contribution to cooperation between the public, developers, and those who are given the statutory responsibility for protecting the environment.

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Prologue

It is the environmental NGO view that it is difficult to be confident that Directive 2003/35/EC will be meaningfully implemented in Ireland. The Directive's intention and purpose runs against the current grain of Irish administrative and judicial thinking.

The Planning and Development Regulations, 2001-2002 placed barriers to public participation through the imposition of a fee to engage in the EIA process, restrictions on those who could appeal decisions, and required an increase in the interest required to obtain leave to bring Judicial Reviews.

Meanwhile, the Courts, urged on by public opinion, unravelled the protection previously offered to community groups and concerned citizens through the use of limited companies to bring legal actions. These companies were formed to level the playing field between the corporate protection offered to multi nationals and national companies and the vulnerability of individuals. The Courts saw them differently, removing their director's veil of protection. Potential costs are a very real disincentive for those wishing to seek justice.

In fact it is hard not to feel that the Irish Judiciary has failed to grasp the principals of European law. This was particularly evident in the recent granting by the High Court of a stay in the proceedings against the fee imposed to participate in the EIA process[1]. The stay was granted because proceedings are being undertaken by the Commission in the ECJ. But national courts can not abnegate their responsibilities under European legislation – they are required to provide "effective judicial protection".

The Judgement does not acknowledge the relationship between the so-called "public" and "private" enforcement mechanisms - i.e. the Article 226 EC enforcement mechanism on the one hand and proceedings before the national courts on the other. As early as 1963, EU case law made clear that the fact that the Treaty enables the Commission and the Member States to bring before the ECJ a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court. "Public" and "private" enforcement mechanisms have well established different objects, aims and effects. Indeed, the failure of the Irish Courts to refer a single case to the ECJ supports this submission's recommendation that the education of the Judiciary would be one of the most important improvements in the implementation of all Directives.

It is not only in the courts that NGOs are frustrated. Environmental NGOs in Ireland are not recognised as partners in the development of civil society in anything like the manner anticipated by this Directive. An Taisce, the National Trust, recently lost the Government funding it had for its statutory role under the Planning Acts. Even when consultative roles are imposed on Ireland as the result of EU Court Judgements, such as the 1999 Judgement under the EIA Directive[2] in relation to forestry, the relevant

[1] Murphy J.'s decision of April 15, 2005 [No. 2004 1019 P]; *Friends of the Irish Environment and Tony Lowes vs. The Minister for the Environment, Heritage and Local Government, Ireland, the Attorney General and Galway County Council.*

[2] Case C-392/96 – Directive 85/337/EEC – Assessment of the effects of certain public or private projects – Setting of thresholds)

Minister refused to make funding available to enable these roles to be meaningful. Universities, increasingly dependent on corporate funding, shy away from ENGOs, afraid of the effect of being tarred with the same brush as these organisations.

At the same time, both NGOs and citizen's access to information has been substantially restricted by amendments to the Freedom of Information Act 1998, again accompanied by the introduction of a fee. As Friends of the Irish Environment argued in the commentary provided to Comhar on the implementation of the Access to Information Directive[3], such a fee could not be imposed when the information concerned the environment as this was guaranteed under a European Directive. If this is the case, then to impose such a fee for seeking information in other fields - public health, etc., - is equally against the fabric of current European thinking.

Some of these regressions are less well known but equally devastating for those concerned with protecting our environment through European law. The decision of the Department of the Environment to refer to the Attorney General the policy of releasing correspondence with the European Commission over complaints and the subsequent Reasoned Opinions is an example. Because of the long time span of cases through the European Courts, the Letters of Formal Notice and the Reasoned Opinions gave citizens the opportunity to see the thinking of the European judiciary on cases they had been pursuing. The value of these is nowhere more clearly shown than in the Reasoned Opinion on the €20 fee for commenting on Environmental Impact Assessments [Appendix III]. The Attorney General has now predictably ruled that these Reasoned Opinions are no longer to be released.

Behind this Directive lies, like a great behemoth, the Aarhus Convention. The Aarhus Convention has not been ratified or implemented in Irish law in spite of its critical and all pervasive importance. It is emerging only piecemeal. In a recent case, it did not even merit its own Press Release, instead being appended to a more topical announcement.[4] Ironically, as the NGOs at the FIE Workshop noted, it is the newer members of the European Community who have taken up the ideas behind the convention with the greatest enthusiasm – perhaps because they know how very vulnerable a free society is.

Thus it is particularly important that those who are entrusted with implementing this Directive ensure that Ireland's NGOs and citizens have the fullest protection of the law that is the cornerstone of their membership of the European community.

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[3] http://friendsoftheirishenvironment.net/pdf/access.pdf

[4] See the DoELG's Press Release of 20 June 2005 relating to the draft amendments to Schedule 2 of the Planning and Development Regulations 2001 de-exempting certain classes of peat extraction. Detailing the changes to the peat extraction exemptions, it states 'The proposed Regulations will also see the partial transposition of the "Aarhus Directive".' The Press Release was entitled '*Minister Roche tackles Spread of Off-Licences.'*

Public Participation in Decision-Making.

2003/35/EC deals with the second pillar of Aarhus, the right to participation in environmental decision-making. The third pillar, access to justice is also included in relation to pillar II.

This chapter looks at the way in which the relevant articles of 2003/35/EC should be interpreted in the light of:

a. The Aarhus Convention
b. International best practice
c. The inputs from those attending the FIE workshop.

As is outlined in the judgement of *Case C-494/01 Commission of the European Communities v Ireland of the European Court of Justice*, there are two phases to the transposition process the transposition phase and the operational phase. The former is legislative process and the latter is the capacity building measures required to enable the former to be effective. Both of these phases are essential to a full transposition of the Directive and both will be considered here.

The Aarhus Convention

One of the major problems highlighted by the workshop was the lack of capacity, in the relevant bodies, to provide for participatory processes. This can only be reversed by introducing the necessary trained and skilled personnel, together with changes in procedures and practices, to enable the fulfilment of Article 3(2) of the Convention. This is fundamental to the success of the operational phase of transposition.

'Article 3(2). Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters'.

The other main Articles relevant here are: Article 6 which covers public participation (PP) in decisions on specific activities, e.g. on the proposed locating, construction and operation of large facilities; Article 7 which deals with PP in the development of plans programmes and policies relating to the environment, which includes sectional or land use plans, environmental action plans, and environmental policies at all levels; and Article 9, which deals with Access To Justice.

In each of the Articles, 6 and 7, early involvement of the public is encouraged. Article 7 is less precise than Article 6. Article 6 provides for a high level of involvement adequately guaranteed by law[5]

Article 6 can apply to spatial planning decisions, development consents, operating permits, discharge permits, or any particular proposed activity where the decision making may have a potentially significant impact on the environment. Article 6 is not limited then, to activities where an EIA is required or to those activities listed in Annex 1 of the Convention, and this is clearly recognised in the Directive.

Article 7 of the Convention was in part implemented by the Water Framework Directive (2000/60/EC) and the SEA Directive (2001/42/EC on "the assessment of the affects of certain plans and programmes on the environment"). Article 2 of the Directive is designed to fill the gaps left in the European legislation, and refers to a series of Directives (as amended) listed in its Annex I. The Directive requires member states to take the necessary measures, to ensure that the public are given early and effective

[5] Stec, S. and Casey-Lefkowitz, S. (2000). The Aarhus Convention: An Implementation Guide. United Nations, New York and Geneva, 86.

opportunities to participate in the preparation (and review) of these plans and programmes. To that end, Member States are required to ensure that:

- the public are informed about any proposals for such for such plans or programmes and that relevant information about such proposals is made available to the public.
- the public are entitled to express comments and opinions before decisions on the plans and programmes are made;
- and that in making those decisions, due account is required to be taken of the results of the public participation.

Article 9 provides for the right to challenge the substantive and procedural legality of any decision, act or omission ,by means of adequate and effective remedies, including injunctive relief as appropriate, which are fair, equitable, timely and not prohibitively expensive

Directive 2003/35/EC

The relevant parts of the legislation are shown in italics.

Article 1

Objective

The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention, in particular by:

(a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

(b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.

Recommendations:

It was noted by the workshop participants that in other jurisdictions, and in the spirit of Aarhus, the draft legislation designed to implement 2003/35/EC was made available for public consultation prior to its final drafting, and that public input was taken into account in this latter stage. The question was asked as to why this was not the case in Ireland.

In future all Regulations to implement European Directives should be published in draft format, with sufficient time for considered and detailed submissions from the public.

2003/35/EC is an example of the difficulties inherent in legislation which is not consolidated. The Irish implementing Regulations for the EIA Directives require the reading of three sets of Regulations (including those being drafted for Directive 2003/35/EC) and effectively rule out participation by those without a sophisticated level of legal understanding. In stark contrast, the consolidation of the Planning Acts in the Planning Act 2002 and the consolidation of the Regulations were proactive steps that enable the public to easily apprehend the legislative requirements. In the UK, as part of the public consultation process regarding the transposition of this Directive, a consultation package was made available which included a consolidated, non legally binding, version of Directives 85/337/EEC, 97/11/EC and 2003/35/EC[6].

In future the DOEHLG should consolidate the Regulations relating to Environmental Impact Assessment and IPCC licensing, and keep the versions updated with future amendments.

[6] http://www.odpm.gov.uk/stellent/groups/odpm_planning/documents/page/odpm_plan_035976.pdf

Article 2

Public participation concerning plans and programmes

1. *For the purposes of this Article, 'the public' shall mean one or more natural or legal persons and their associations, organisations or groups.*

Recommendation:
This article should be transposed deleting the phrase*, in accordance with national legislation or practice* in order to maintain the spirit of Article 2(4) of the Convention.
The current list of prescribed bodies for consultation is not sufficient to avail of the expertise and experience of Ireland's non-governmental organisations because of the restrictive number of listed bodies. Ireland has now to identify the NGOs which may have an interest in a particular development. The Directive requires consultation with "NGOs meeting any requirements under national law". In Ireland no such register exists. Is it reasonable for the competent authorities to try to identify such bodies? The creation of a national ENGO Secretariat in 2002 funded by the DoELG with 24 registered environmental organisations[7] offers the planning and licensing authorities a one stop shop which can in turn filter the applications to the appropriate organisations, greatly increasing the extent of participation to those most concerned and qualified to comment on any individual development.
The opportunity to express an interest through electronic notification by the maintenance of a register by decision makers of interested parties should be available at every level of decision making to facilitate individuals and regional NGOs.

2. *Member States shall ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions listed in Annex I.*

Recommendation:
The words **early and effective** are seen as critical here and should be the underlying principles in both the transposition and operation of the Directive.

[7] The Workshop noted that the EENGO Secretariat only represents national bodies and so does not entirely satisfy the requirements for consultations with non-government organisations.

The Directives listed in Annex 1[8] all require the drawing up of plans on a regular cycle, and it was seen as very straightforward to establish public participation programmes in relation to them, as required in the remainder of this paragraph.

It was considered essential, as it should be in all the public participation programmes, that the relevant authority should proactively seek the involvement of as many members of the public as possible, at the point prior to the scoping of these plans or programmes, so that the public are involved in the establishment of the terms of reference of the process, as well as those of the public participation plan in which they are taking part. To this end, all the sub-paragraphs in paragraph 2 should be transposed in full.

Public Awareness/Acceptance of right to participate

Very few politicians not to mind members of the public are aware of these directives which create rights. Cultural and historical factors in Ireland have contributed to the current situation where comments on regulatory authorities and their decisions are seen in a negative light. Local Agenda 21 has been largely ineffective in Ireland. Consultation is interpreted as the act of informing, not the implementation of participation. It is neither progressive nor proactive.

Consultation is a one-off process to gather information, expertise and opinions that may or may not influence eventual decisions.

Participation is a process that enables individuals and organisations to be continuously or repeatedly involved in the development of decisions that affect them. It may also involve the development of relationships among the participants that will enable consensus decision-making. A participatory process may include consultation exercises. In other words, public

[8] Annex I

- Article 7(1) of the Framework Waste Directive (75/442/EEC) as amended, and Article 6(1) the Hazardous Waste Directive (91/689/EEC) as amended, which refer to the making of general waste management plans, and plans for the management of hazardous waste respectively.
- The Batteries Directive (91/157/EEC), Article 6, which relates to four yearly plans designed to reduce the toxicity of batteries and remove them from the household waste stream.
- The Agricultural Nitrate Directive (91/676/EEC), Article 5, relating to Nitrate action plans for designated vulnerable zones.
- The Packaging Directive (94/62) Article 14 requires the inclusion of a specific chapter on the management of packaging and packaging waste in the waste management plans required pursuant to Article 17 of Directive 75/442/EEC
- The Ambient Air Quality Directive (96/62)Article 8(3). This requires the making of plans to reduce air pollution for geographical areas with particular air pollution problems.

participation means a more intensive involvement than consultation, and a correspondingly greater sense of ownership of the eventual outcomes.
A national educational campaign about the value of decisions which incorporate public participation and the methods by which individuals can contribute, with special attention to the secondary curriculum of the Civic, Social, and Political Education course, and an outreach to the less vocal minority groups that have been shown in many parts of the world to be the ones most likely to suffer the consequences of environmental degradation.

To that end, Member States shall ensure that:

(a) the public is informed, whether by public notices or other appropriate means such as electronic media where available, about any proposals for such plans or programmes or for their modification or review and that relevant information about such proposals is made available to the public including inter alia information about the right to participate in decision-making and about the competent authority to which comments or questions may be submitted;

Recommendation:
In the Irish context, this means making the call for public participation known on the relevant Government websites and through the media, and contacting directly as many stakeholders, both individuals and organisations as is possible. This latter can be done by setting up electronic consultation lists, whilst not excluding those who are not part of the e-community. Despite the great potential of e-government there is still no single portal through which a person can make a search for environmental information when the department holding that information is not known. A single portal should be created and a single notice board be created for all calls for public participation.

(b) the public is entitled to express comments and opinions when all options are open before decisions on the plans and programmes are made;

Recommendation:
"*When all options are open*" should mean exactly that, and can only be translated into practice by including the public at the point prior to scoping the terms of reference. This principle should apply to all aspects of participation, without which the process becomes meaningless and the

source of frustration and cynicism amongst the public. This will be dealt with in more detail regarding the EIA process.

(c) in making those decisions, due account shall be taken of the results of the public participation;
(d) having examined the comments and opinions expressed by the public, the competent authority makes reasonable efforts to inform the public about the decisions taken and the reasons and considerations upon which those decisions are based, including information about the public participation process.

Recommendation:
Without these last two then the whole purpose of participation is discredited. It is essential that standard procedures are put into place for involving the public, recording their inputs, and including and incorporating their inputs in the rationales for decisions made by the relevant authorities. For rights to be guaranteed, a transparent and fair framework must be in place, both for decision-making itself and to afford affected members of the public the possibility to uphold the standards of decision-making processes by challenging procedures and decisions in the courts.

2. *Member States shall identify the public entitled to participate for the purposes of paragraph 2, including relevant nongovernmental organisations meeting any requirements imposed under national law, such as those promoting environmental protection. The detailed arrangements for public participation under this Article shall be determined by the Member States so as to enable the public to prepare and participate effectively. Reasonable time-frames shall be provided allowing sufficient time for each of the different stages of public participation required by this Article.*

Recommendation:
As previously mentioned, the identification of the public and involvement of same is a complex process and amounts to a great deal more than placing adverts in newspapers and holding public meetings. It requires the drawing up of a public participation plan with all stages clearly mapped out, and yet flexible enough to take on board the 'human element' which is common to all open processes.
What is meant by enabling the public "to prepare and participate effectively"? In the light of the Article 6 of the European Convention on

Human Rights this should be interpreted as meaning enabling equality between those taking part in a process. The New Zealand and Canadian systems of financially supporting participants to participate in their respective EIA processes is one part of the approach to provide "equality of arms". In New Zealand this support and good access extends throughout the resource licencing process that is the core of the Resource Management Act, 1991. The simplicity of this Act is also effective in enabling and encouraging public involvement, and this simplicity is something that should be at the core of the transposition and operation of the Directive. Consolidated versions of the Irish and European legislation should be made available and kept up to date to enable ease of interpretation by the public. Another part of the approach is to provide for the availability of independent and easily accessible expertise. Apart from the legal side, there are often complex technical and scientific issues involved, and the requirement in Irish law is that all sides be heard, it is the only basis on which environmental decision-making should be based, incorporating the precautionary principle, which is fundamental here.
"Reasonable time-frames" in all participatory processes are more easily provided for when the public become a part of the process at an early stage, rather than a tag on at the end. The net effect of involving the public in this way when properly organized can be to shorten the overall time spent in decision-making, when objections and local knowledge are a part of the process from the beginning.

3. *This Article shall not apply to plans and programmes designed for the sole purpose of serving national defence or taken in case of civil emergencies.*

Recommendation:
The key words here are "sole purpose". To exclude public participation because part of a plan refers to land occasionally used by the Defence Forces, or owned but not used by them is clearly incorrect.

4. *This Article shall not apply to plans and programmes set out in Annex I for which a public participation procedure is carried out under Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment or under Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.*

Recommendation:
This sub-paragraph is designed to avoid duplication as the above Directives already include provisions which are consistent with Article 7 of the Aarhus Convention, and should be included intact.

Article 3
Amendment of Directive 85/337/EEC

Directive 85/337/EEC is hereby amended as follows:

1. *in Article 1(2), the following definitions shall be added:*
   "the public" means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups; "the public concerned" means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;'

Recommendation:
These are as in the Convention and should be kept in transposition, however, NGOs are not required to register under Irish Law, and so that phrase should not be transcribed.

2. *in Article 1, paragraph 4 shall be replaced by the following:*
   '4. Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on these purposes.';

Recommendation:
To exclude a project which refers to land occasionally used by the Defence Forces, or owned but not used by them, from requiring EIA is clearly incorrect. This should be transposed in a very restricted form, so that it reflects the relevance of the project to national Security. In a hypothetical example, it would make no sense to exclude an army housing project on the Curragh from an EIA process if it would be required for any other

developer, or an open area of the Curragh where Golden Plover are present in great numbers.

3. *in Article 2(3), points (a) and (b) shall be replaced by the following:*
   '(a) consider whether another form of assessment would be appropriate;
   (b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it.';

Recommendation:
This screening process should be the initial part of the public participation process.

4. *in Article 6, paragraphs 2 and 3 shall be replaced by the following paragraphs:*
   '2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

Recommendation:
Article 6(2) of the Convention on which this is based reads "The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner" The words "or individually" are very significant here particularly in the light of civil rights of linguistic minorities and those members of the public with disabilities or literacy problems. Door to door notification of potentially significantly effected individuals is common practice in the planning processes in a number of jurisdictions.
In order for the use of electronic media to be effective: the individual government departments should be accessible through one e-portal; there should be an individual location for the posting of information regarding all participatory processes with links to the relevant departments and information resources; and notification regarding impending and current processes should be sent to all ENGOs and any person who wishes to receive said notification.

Planning authorities should be given the necessary resources and training to keep their web-site pages up to date. This is particularly important where the window of opportunity for participation is very short. It is for example totally unsatisfactory to have planning applications only listed on the authority website four weeks after they are received. The complete and up to date planning file should be available electronically to the general public. This latter would reduce time spent by officials dealing with over the counter enquiries, and this availability would also speed up the internal processing of planning files. The DoEHLG should monitor and police this service.

Early public awareness of projects and their implications for affected citizens is essential to effective participation. Large infrastructural and industrial projects in particular are many years in the planning and development stage. Under current legislation the publication of a notice and the erection of a sign (where required)[9] come, in fact, at a very late stage in the overall project timeframe. Early notification and specific notification, such as leaflets delivered to each house in the area, are critical to allow the public sufficient time to participate at a stage in the project in which changes can be incorporated for the least possible cost to the developer. The requirement to consult "when all options are open" requires that the public must be consulted before the EIA process has commenced i.e. at the screening stage (see Appendix I).

4. *The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.*

5. *The detailed arrangements for informing the public(for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.*

[9] While signage is required for development applications under the Planning Regulations, many areas of development which require development consent do not require this effective form of public notice. In particular, members of the workshop drew attention to forestry and aquaculture, both of which have significant impacts on property values and public amenity but neither of which require the election of a sign on the nearest public road. Representations in this regard have not been successful.

Recommendation:
The imposition of a fee to participate in the planning and licensing processes, in it self, sets an unacceptable barrier. The reasons are well set out in the current proceedings against Ireland by the European Commission.
Fees for commenting on planning applications should be removed.
Also see the comments re paragraph 2 above.
The publication of notices and the erection of signs should take place at the commencement of project design, and a compulsory public screening process should then take place. This would signal the start of the public participation process, leave the developer in no doubt as to the need for an EIS, in the case of sub threshold projects, and allow for environmental impact mitigation to be built into the design process, instead of being fought over at the end, wasting the time and energy of all involved.
Initial notices should be in the local papers for a two consecutive weeks, and when an EIS is prescribed, for a further two, calling for public input, and announcing the public participation plan, so that the public are involved in reviewing the alternatives and the scope of the EIA process. This is developed in some detail in Appendix I.
Forestry and aquaculture projects falling under the EIA Directive should have requirements for public signs. Where the geographical size of a forestry project is above one hectare or an aquaculture project is spread along a shoreline or across a lake or bay the signs should indicate the boundaries of the project concerned.

6. *Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.*

Recommendation:
Clearly the current time frame of 5 weeks, for public involvement in commenting on planning applications with an EIS attached, is woefully inadequate. Involving the public as outlined in Appendix I at the screening stage onwards will remedy this situation by making the contents of the EIS publicly available well in advance of any application for planning permission. This will be particularly critical where there is no appeals procedure, as at present regarding local authority projects, and as proposed with regard to major infrastructural projects.

5. Article 7 shall be amended as follows:

(a) paragraphs 1 and 2 shall be replaced by the following:

'1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public,

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken, and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to Article 6(3)(a) and (b).'

(b) paragraph 5 shall be replaced by the following:

'5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.'

6. Article 9 shall be amended as follows:

(a) Paragraph 1 shall be replaced by the following:

'1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

— the content of the decision and any conditions attached thereto,

— having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

— a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.'

(b) Paragraph 2 shall be replaced by the following:

'2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article. The consulted Member States shall ensure that information is made available in an appropriate manner to the public concerned in their own territory.'

Recommendation:

The previous two articles of 85/337/EEC, were originally amended by 97/11/EC to implement The Convention on Environmental Impact Assessment in a Transboundary Context (the ESP00 Convention), which was signed by the European Community in 1991. This initiated changes incorporated into the EIA Directive 97/11/EC and the IPPC Directive 96/61/EC, creating provision for cross border public consultation.

It would appear that Ireland had failed to implement fully the 1985 and 1997 EIA Directives with regard to Transboundary consultations, as ruled by the European Court (Case c-392/96 (1999) CMLR 727). Even now the Planning and Development Act, 2000, whilst it empowers the Minister for the Environment to make regulations regarding transboundary EIA, it does not give rights of consultations for the Irish public or that of other Member States[10] .

As can be seen from the above, there is a great lack of clarity on the issue of consultation with regard to transboundary environmental issues. This transposition process gives the opportunity to resolve these problems. The procedures for public participation in reviewing transboundary EIAs may have to be different to those operating for Irish EIAs, because even though the notifying member state is required to do so at the earliest possible time, this is interpreted in different ways in different jurisdictions. However, any differences should not impinge on the overall right for participation contained in the Aarhus Convention.

7. the following Article shall be inserted:

'Article 10a

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

[10] Macrory, R. and Turner, S. (2001). Participatory Rights, Transboundary Environmental Governance & EC Law. s.turner@qub.ac.uk. p17.

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.';

8. in Annex I, the following point shall be added: '22. Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.';

9. in Annex II, No 13, first indent, the following shall be added at the end: '(change or extension not included in Annex I)'.

Recommendation:

The requirement for "substantial interest" as a precondition to access to the Courts, in the, The Planning and Development Act, 2000, has been taken by the Courts, with notable exceptions, to mean economic or property interests. This restricts access to the Courts by denying it to all citizens and in particular requiring it of NGOs. This can no longer apply after the Directive is implemented.

In the Convention the wording reads '*substantive and procedural legality*' rather than '*substantive or procedural legality'*. The transposition should revert to the original wording.
With either of the above this clearly means that a person is entitled to a legal review on the basis of the validity of factual material used in decision-making, as well as the procedures used in reaching the decision.
'The public concerned within the meaning of this paragraph can challenge decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality). Mixed questions, such as the failure to properly take comments into account, are also covered'[11].
All of the above would suggest the need to amend The Planning and Development Act, 2000 to accommodate these changes.
'Any such procedure shall be fair, equitable, timely and not prohibitively expensive'. In order to be fair and equitable, all parties involved must have 'equality of arms', as prescribed by Article 6 of the European Charter on Human Rights. This would require the making available of some form of legal aid to all cases taken under this Directive as transposed, and this would logically include all cases relating to planning and development. The provision of an independent, free, and speedy administrative review procedure whose findings would be binding, unless a legal review is sought, would allow these requirements to be fulfilled.
As it stands at present, litigation may wait for months to be heard in the High Court, with many cases being repeatedly deferred. There are many examples of public interest cases where excessive costs have: prevented the case from being taken; left individuals with huge debts; or caused organisations to cease to exist.
Another requirement regarding access to justice is the need to train the judiciary in the provisions of the Directive, the Århus Convention and the new regulations. Experience shows that there is a great lack of clarity in the communal judicial thinking regarding the relationship between European and Irish legislation in general, and the 'direct effect' of European Directives in relation to the actions and omissions of the state and its agents. Training programmes such as that carried out by the EU Forum of Judges for the Environment(under UNEP)[12], should be introduced immediately.

Article 4
Amendment of Directive 96/61/EC

[11] Stec, S. and Casey-Lefkowitz, S. (2000). The Aarhus Convention: An Implementation Guide. United Nations, New York and Geneva, 86.
[12] http://www.unep.org/dpdl/law/Programme_work/Training/index.asp

Directive 96/61/EC is hereby amended as follows:

1. Article 2 shall be amended as follows:

(a) the following sentence shall be added to point 10(b):

'For the purposes of this definition, any change to or extension of an operation shall be deemed to be substantial if the change or extension in itself meets the thresholds, if any, set out in Annex I.';

(b) the following points shall be added:

'13. "the public" shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

14. "the public concerned" shall mean the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions; for the purposes of this definition, nongovernmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;'

2. in Article 6(1), first subparagraph, the following indent shall be added: the main alternatives, if any, studied by the applicant in outline.'

3. Article 15 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

'1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for: issuing a permit for new installations, issuing a permit for any substantial change in the operation of an installation, updating of a permit or permit conditions for an installation in accordance with Article 13, paragraph 2, first indent. The procedure set out in Annex V shall apply for the purposes of such participation.';

(b) the following paragraph shall be added:

'5. When a decision has been taken, the competent authority shall inform the public in accordance with the appropriate procedures and shall make available to the public the following information:

(a) the content of the decision, including a copy of the permit and of any conditions and any subsequent updates; and

(b) having examined the concerns and opinions expressed by the public concerned, the reasons and considerations on which the decision is based, including information on the public participation process.';

Recommendation:
The provisions for public participation in IPPC permitting (licencing) are broadly parallel to those for EIA, so that the same comments as those given previously apply.
Fees for commenting on draft IPCC licences should be removed.
Involving "the public concerned" should be a proactive process, and should begin prior to the process of scoping the terms of reference for a project licence in the case of a new applicant, or three months prior to the due date for application by the holder of a licence for its renewal. Everyone who has made comment on the operation of the licence to date should be included in the list of "the public concerned" to be notified of the participatory process.

4. the following Article shall be inserted:

'Article 15a
Access to justice
Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
(a) having a sufficient interest, or alternatively,
(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
Member States shall determine at what stage the decisions, acts or omissions may be challenged.
What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.
The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.
In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.';

Recommendation:
These provisions are the same as those for EIA, and the same recommendations apply as those given above.

5. Article 17 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:
'1. Where a Member State is aware that the operation of an installation is likely to have significant negative effects on the environment of another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the application for a permit pursuant to Article 4 or Article 12(2) was submitted shall forward to the other Member State any information required to be given or made available pursuant to Annex V at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between the two Member States on a reciprocal and equivalent basis.';
(b) the following paragraphs shall be added:
'3. The results of any consultations pursuant to paragraphs 1 and 2 must be taken into consideration when the competent authority reaches a decision on the application.
4. The competent authority shall inform any Member State, which has been consulted pursuant to paragraph 1, of the decision reached on the application and shall forward to it the information referred to in Article 15(5). That Member State shall take the measures necessary to ensure that that information is made available in an appropriate manner to the public concerned in its own territory.';

6. an Annex V shall be added, as set out in Annex II to this Directive.

Recommendation:
Article 17 of the IPPC Directive, drafted in parallel with the EIA Directive 97/11/EC is less explicit with regard to the provision concerning cross border public consultations and this Directive is designed to bring them both into line with the Aarhus Convention.

With regard to transboundary EIA, these proposed amendments will ensure equal rights of consultation for the public whether they live in the notifying or affected Member States. However, in the case of the IPPC permitting process, the public of the affected state will remain entitled only to access the IPPC application itself.[13]

Article 5
Reporting and review
By 25 June 2009, the Commission shall send a report on the application and effectiveness of this Directive to the European Parliament and to the Council. With a view to further integrating environmental protection requirements, in accordance with Article 6 of the Treaty, and taking into account the experience acquired in the application of this Directive in the Member States, such a report will be accompanied by proposals for amendment of this Directive, if appropriate. In particular, the Commission will consider the possibility of extending the scope of this Directive to other plans and programmes relating to the environment.

Recommendation:
In order to comply with this Article, and Article 10(2) of the Århus Convention, and in order to track the implementation and capacity building measures required so that effective resource targeting takes place, an internationally recognised system of monitoring, based on measurable and comparative indicators should be put in place. The most obvious example is The Access Initiative, established by the World Resources Institute, and recognised by the Aarhus Secretariat, UNEP etc.

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[13] Macrory, R. and Turner, S. (2001). Participatory Rights, Transboundary Environmental Governance & EC Law. s.turner@qub.ac.uk. p17.

Recommendations

1. In future all Regulations to implement European Directives should be published in draft format, with sufficient time for considered and detailed submissions from the public.

2. In future the DOEHLG should consolidate the Regulations relating to Environmental Impact Assessment and IPCC licensing, and keep the versions updated with future amendments.

3. The ENGO Secretariat should be added to the list of prescribed bodies for consultation under the new Regulations for EIA and IPCC licensing.

4. It is essential, as it should be in all the public participation programmes, that the relevant authority should proactively seek the involvement of as many members of the public as possible, at the screening stage or the point prior to the scoping of these plans or programmes, so that the public are involved in the establishment of the terms of reference of the EIA/IPPC process, as well as those of the public participation plan in which they are involved.

5. A national educational campaign about the value of decisions which incorporate public participation and the methods by which individuals can contribute, with special attention to the secondary curriculum of the Civic, Social, and Political Education course, and an outreach to the less vocal or isolated minority groups.

6. A single web portal should be created with a search engine covering all branches of government and its agents, to-gether with a single e-notice board be created for all calls for public participation.

7. Set up electronic consultation lists, whilst not excluding those who are not part of the e-community.

8. Put in place standard procedures for involving the public, recording their inputs, and including and incorporating their inputs in the rationales for decisions made by the relevant authorities.

9. Provision should be made to enable effective public participation by making available support in the form of funds and provision of independent sources of expertise.

10. The provisions in the Directive regarding National defence should be interpreted very strictly and in the light of the purpose of the Directive and the Århus Convention.

11. Government, Government Agency and Local Authority employees should all be given training in the Århus Convention and its daughter Directives, regarding their purpose, spirit and practical operation.

12. Fees for commenting on planning applications and draft IPPC Licence applications should be removed.

13. The publication of notices and the erection of signs should take place at the commencement of project design, and a compulsory public screening process should then take place. This will be particularly critical where there is no appeals procedure, as at present regarding local authority projects, and as proposed with regard to major infrastructural projects.

14. Initial notices regarding a proposed project should be in at least one local paper and one national paper circulating in the district in both Irish and English for two consecutive weeks prior to commencement of project design, and when an EIS is prescribed, for a further two, calling for public input, and announcing the development of a public participation plan.

15. Both forestry and aquaculture projects falling below the thresholds in the the EIA Directive should have requirements for public signs. Where the geographical size of a forestry project is above one hectare or an aquaculture project is spread along a shoreline or across a lake or bay the signs should indicate the boundaries of the project concerned. In general signs should indicate the proposed boundaries for any development .

16. Clearly defined and transparent procedures need to be set in place to enable the fulfilment of commitments made under the ESPOO Convention, and as included in this Directive.

17. The judiciary should be given training in the Århus Convention and its daughter Directives, regarding their legal purpose, spirit and practical operation, and in particular they should be made familiar with the following.
'The public concerned …. can challenge decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality).

Mixed questions, such as the failure to properly take comments into account, are also covered'
Extend the UNEP Programme to High Court Judges and senior administrative officials.

18. The Planning and Development Act, 2000 should be amended to accommodate these changes.

19. Involving "the public concerned" in IPPC Licencing should be a proactive process, and should begin prior to the process of scoping the terms of reference for a project licence in the case of a new applicant, or three months prior to the due date for application by the holder of a licence for its renewal. Everyone who has made comment on the operation of the licence to date should be included in the list of "the public concerned" to be notified of the participatory process.

20. In order to comply with Article 5 of the Directive, and Article 10(2) of the Århus Convention, and in order to track the implementation and capacity building measures required so that effective resource targeting takes place, an internationally recognised system of monitoring, based on measurable and comparative indicators such as the Access Initiative should be put in place.

21. The opportunity to express an interest through electronic notification by the maintenance of a register by decision makers of interested parties should be available at every level of decision making to facilitate individuals and regional NGOs.

22. Up to date and detailed electronic notice boards should be maintained regarding all planning files and IPPC licences. All the support documents normally available in the paper files should be available electronically.

23. Every EIS should be available in CD-Rom format and on-line.

24. The narrow gap between the individual interest required for Irish locus standi and having too much of an interest to qualify for protective costs order requires consideration.

25. Guidelines for the use of Protective Costs Orders should be issued.

26. Increase the resources available to the Court system in order to speed up litigation.

27. Establish a transparent, timely and effective administrative review system whose findings are binding on the relevant authority. The compliance mechanism provided for in the Århus Convention operates very effectively and could be a model on which to base this procedure.

28. Provide a system of legal aid for all cases taken under this Directive as transposed. This would logically include all cases relating to planning and development

29. Make public participation real by using the model laid down in Appendix III of this document as a template for EIS, IPPC and all other environmental decision-making processes

30. Implement Article 6 of the European Charter on Human Rights and provide 'equality of arms' in environmental decision-making processes.

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APPENDIX I

A Guide To The Amended EIA Process.

"EIA can be defined as: the process of identifying, protecting evaluating and mitigating the biophysical, social and other relevant effects of development proposals, prior to major decisions being taken and commitments made"[14]
The World Bank expands this definition and describes EIA as a procedure that; "evaluates a projects potential environmental risks and impacts in its area of influence; examines project alternatives; identifies ways of improving project selection, siting, planning, design, and implementation, by preventing, minimizing, mitigating or compensating for adverse environmental impacts and enhancing positive impacts"[15] The main aim of the process is to stimulate thinking, and encourage action, and not just the ticking off of boxes just to get another report[16]
The Institute of Environmental Assessment[17] identifies two sets of principles, 'basic' and 'operative'. The basic set applies to all stages of EIA as well as to Strategic Environment Assessment (SEA) of policies, plans and programmes. One of these states that the EIA process should be participative; providing appropriate opportunities to inform and involve the interested and affected public, and, that their inputs and concerns should be explicitly addressed in the documentation and decision-making"
In a review of 25 years of National Environmental Policy Act (NEPA) the Council on Environmental Quality (CEQ)[18] stated "the success of a NEPA process heavily depends on whether an agency has systematically reached out to those who will be most affected by a proposal, gathered information and ideas from them, and responded to the input by modifying the proposal or adding alternatives, through the entire course of the planning process".

The following diagrams illustrate the amendments to Directive 85/337/EEC and where public participation should take place.

[14] Saddler, B. et al. (1999) Principles of Environmental Impact Assessment Best Practice. Institute of Environmental Assessment U.K. www.greenchannel.com/iea/
[15] Klees, R. (2002) Environmental Impact Assessment Systems in Europe and Central Asia Countries. World Bank. www.worldbank.org/eca/environment

[16] Verheem, R. (2002) Recommendations for sustainability assessment in The Netherlands. Netherlands Commission for EIA.

[17] Saddler, B. et al. (1999) Principles of Environmental Impact Assessment Best Practice. Institute of Environmental Assessment U.K. www.greenchannel.com/iea/

[18] C.E.Q. (1997) The National Environmental Policy Act. – A Study of its Effectiveness After Twenty-Five Years. Council on Environmental Quality, http://ceq.eh.doe.gov.

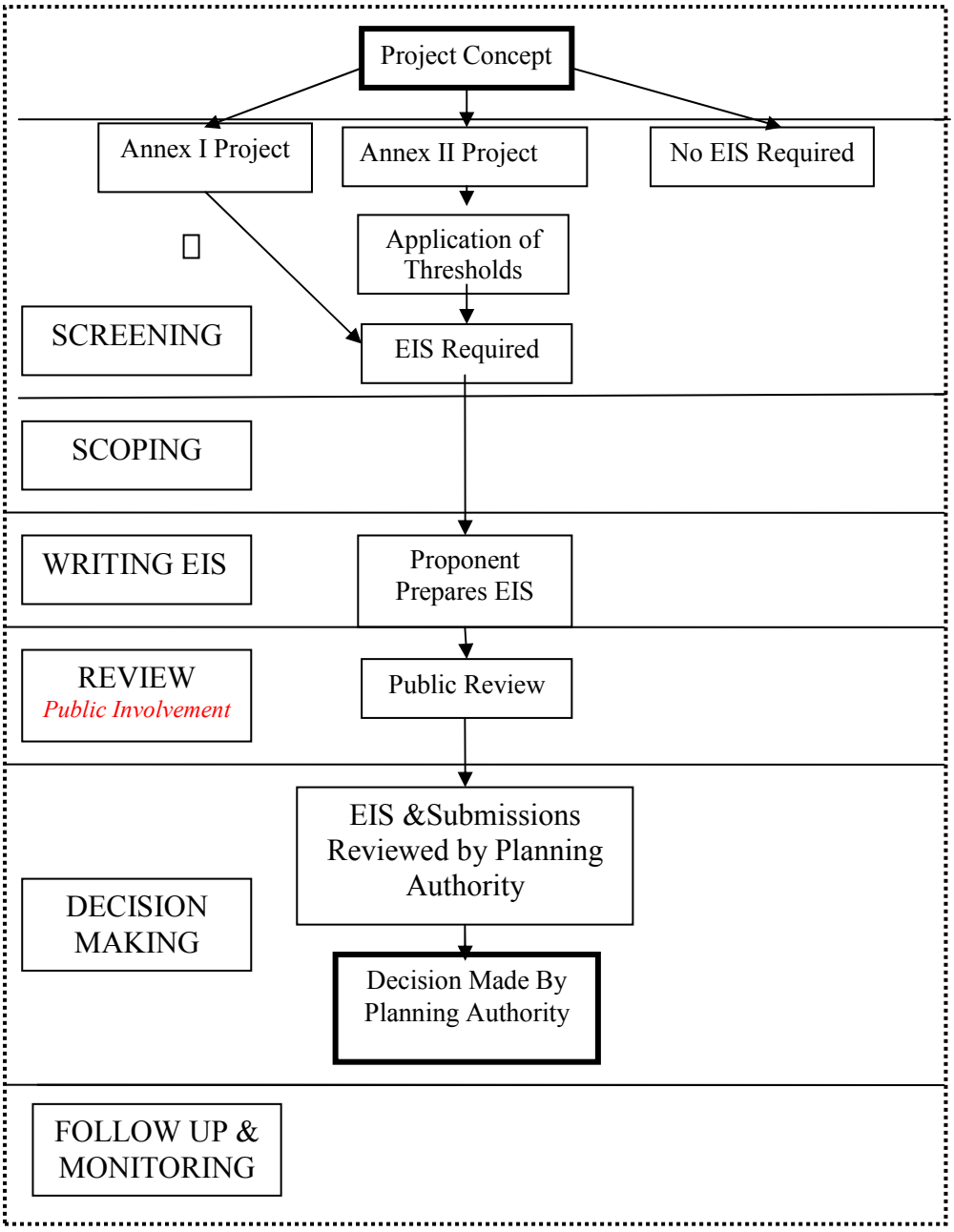

Diagram. Showing the EIA process, following Directive 85/337/EEC.

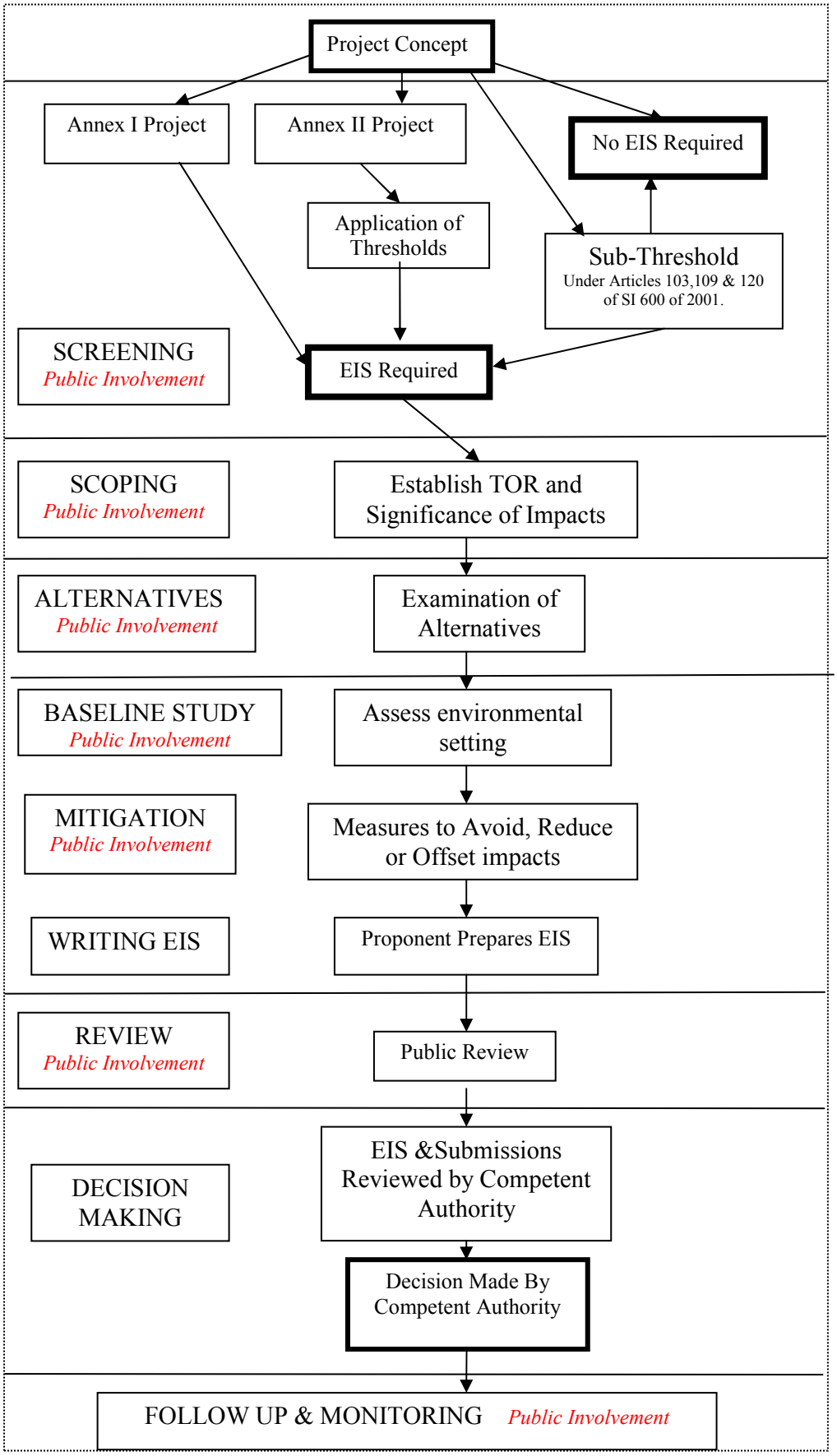

Diagram. The EIA Process, Incorporating Directives 97/11/EC and 2003/35/EC

The EIA Cycle and Public Involvement

The EIA process should be applied as early as possible in decision making for a project, providing for the involvement and input of communities and industries affected, as well as the interested public[19]

The EIA cycle, shown above, as part of the planning system and on the next page as part of the project cycle should provide for the following stages[20].

Screening.

Screening determines whether or not a proposal should be subject to EIA, and if so, at what level of detail. Consultation with potentially effected parties here will improve understanding of the nature and significance of potential impacts using 'local' knowledge, together with that of 'experts'.

The objectives here should be: to obtain a complete understanding of how the issue is viewed by all the relevant stakeholders; and to identify the future levels of interest in public participation activities on this issue. Techniques that could be used here are a available in a participation tools list[21]. Eccleston, C.H. [22]has a checklist of tasks to consider as part of the pre-scoping phase. Added to this should be the preparation of a public participation plan, which includes a publicly available record of the process. The use of exploratory thinking techniques such as brainstorming and snow-storming at this phase helps stimulate the creativity need to seek alternatives.

Scoping

This is a very early exercise in an EIA in which an attempt is made to identify the attributes of the components of the environment for which there is likely to be significant impacts based on public (and professional) concerns and upon

[19] Saddler, B. et al. (1999) Principles of Environmental Impact Assessment Best Practice. Institute of Environmental Assessment U.K. www.greenchannel.com/iea/

[20] European Commission (2000). Public Participation and Consultation. Environmental Integration Manual: Good Practice in EIA/SEA. Gibb Ltd., p.239 (www.gibbltd.com)

[21] Ewing, M.K. (2003). Public Participation In Environmental Decision- Making. www.gdrc.org/decision/participation-edm.html pp.34-60

[22] Eccleston, C.H. (2000) Environmental Impact Statements. John Wiley and Sons. p.65

Public involvement in environmental assessment and relationship with the project cycle (*Based on World Bank (1993)*)

Public involvement	Project Cycle Phase	Environmental Assessment
Identify relevant stakeholder groups and determine appropriate ways to disseminate information	**Identification**	Environmental screening
Early consideration of mode of public consultation and as appropriate participation	**Formulation (appraisal)**	Determine ToR and scheduling of EA
Release preliminary information on proposal and potential environmental effects		Scoping
Extent and mode of consultation and participation finalised		
Draft EA report made available to stakeholders, including effected parties and local NGO's		Draft EA submitted (additional information requested if necessary)
Consultation about draft EA		
Outcomes from consultations recorded in final EA report		EA submitted and reviewed. (Results integrated into project design)
EA team ensures concerns identified are addressed in project design and mitigation plans		
Participation plans developed -as appropriate - for implementation and evaluation		
Findings from consultation and participation reflected - as appropriate - in financing agreement	**Financing**	Environmental requirements, based on EA findings, included in financing proposal
Implementation of participation measures / select suitable short-term and long-term monitoring indicators (i.e. Attitude survey)	**Implementation**	Implementation and montioring of agreed mitigation. Adapt project as necessary
Post-hoc evaluation, including consideration of effected peoples views about project impacts	**Evaluation**	Evaluation of environmental aspects in completion and evaluation reports

European Commission: October 2000: version 1.0
Prepared by GIBB Ltd (www.gibbltd.com)

Public Participation in the EIA process shown as part of the project cycle. (European Commission, 2000).

which the EIA should be focused[23] Good scoping is the key to a successful EIA process. Public involvement here ensures that all the significant issues are identified, local knowledge about the area is incorporated, and alternatives are identified and considered.

The principal objectives of public scoping are[24]:

- Identify public concerns and the expertise needed to investigate same.
- Identify alternatives to be examined
- Identify significant issues that need to be analysed, eliminating the unimportant.
- Identify problems and potential solution early in the process.
- Identify problems with the participation process and address same.
- Ensure that both the positive and negative aspects of the proposal are identified and studied.
- Identify potential mitigation measures.

A scoping information package should be put together to promote public involvement and to inform the scoping delegates. It should include:

- An invitation to participate showing how, when and where.
- A brief description of the working of the EIS process and the opportunities for participation.
- A description of the proposal, such that the objectives of the proponent are clearly laid out with maps, diagrams, figures etc.
- A description of the known potential impacts. A public notice should then be issued using any of the methods deemed necessary from Level 1.[25]

Public meetings, whilst commonly used are not the best method, unless they are based on small group sessions and workshops. Public opinion surveys, citizen advisory committees or any other methods listed in Level 2. Simple methods may suffice for describing, synthesizing and communicating information on the pre-project environment and the potential impacts e.g. using checklists, matrices and networks. Eccleston, C.H. (2000. p.75) and the Australian EIA Network, (1996)[26] both give a check lists for planning a public scoping meeting, and warn that "outside entities that participate in scoping generally do so because they are opposed to the proposal; the remaining participants who support the proposal often do so because they stand to gain from it. Not surprisingly numerous public scoping efforts have dissolved into sessions of frustration, dissension or outright confrontation. So it is essential to plan well and use professional facilitators or neutral moderators where debates are likely to be heated.

Alongside the general public scoping, it can be of value to conduct focus group/workshop meetings with stakeholders having special interests or expertise, in order to examine more

[23] Singleton, R., Castle, P. and Short, D. (1999) Environmental Assessment. Thomas Telford.p.103
[24] Eccleston, C.H. (2000) Environmental Impact Statements. John Wiley and Sons.p.72.
[25] Ewing, M.K. (2003). Public Participation In Environmental Decision- Making. www.gdrc.org/decision/participation-edm.html pp41-52
[26] Australian EIA Network. (1996) International Study of the Effectiveness of Environmental Assessment. EPA, Canberra, Australia www.ea.gov.au/assessments/eianet

detailed or complex issues. The results of these meetings should be made public, and so become part of the general 'responsible authority' scoping session. This can consider issues including technical ones, using in-house expertise, and in greater depth than might otherwise be possible in a public setting. scoping process. Eccleston, C.H.[27] gives a methodology for handling the potentially voluminous, or complex scoping input, followed by an internal 'responsible authority' scoping session. This can consider issues including technical ones, using in-house expertise, and in greater depth than might otherwise be possible in a public setting.

The body conducting the EIA process, together with stakeholder representatives should then produce a post scoping document, summarising the scoping process, its findings and the reasons for decisions taken in reaching the scope for the resultant EIS Implementation Plans.

Impact Assessment/Mitigation

"Public involvement here can serve to ensure that the analysis and mitigation, necessary to avoid, minimize or offset predicted adverse impacts is relevant to local concerns, and accurately reflects local value and preferences".[28]

Both impact mitigation, and the evaluation of significance are complex and time consuming processes, which cannot be dealt with by large groups. It is necessary, therefore, to use stakeholder representatives to work with the experts, reviewing the finding of the experts in workshop sessions or other facilitated small groups.

Regular reporting of progress in the process, to the wider publics will maintain their 'ownership' and sense of involvement.

The Evaluation of Significance

This is a difficult issue to resolve even between specialists. It is, however, essential that the public be involved and their perspective included, as the interpretation of significance occupies a fluid boundary between science and politics[29]

The Canadian EA system of impact assessment is based solely on scientific, credible technical and other relevant information[30]. The resulting determination of significance must be 'objective' and reasonable so as to withstand court challenge. By comparison in the US system, under NEPA, public opinion and the controversiality of the proposal help to identify and determine significance. Ultimately, however, the relevant authority will decide, taking all inputs on board.

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[27] Eccleston, C.H. (2000) Environmental Impact Statements. John Wiley and Sons.

[28] European Commission (2000). Public Participation and Consultation. Environmental Integration Manual: Good Practice in EIA/SEA. Gibb Ltd., 239 (www.gibbltd.com)

[29] Australian EIA Network. (1996) International Study of the Effectiveness of Environmental Assessment. EPA, Canberra, Australia www.ea.gov.au/assessments/eianet

[30] C.E.A.A. (2001) Environmental Assessments. www.ceaa.acee.ga.ca

Evaluation of significance is subjective, contingent on values and dependent on the environmental and community context The intrusion of wider public concerns and social values, into the significances evaluated by scientists is inevitable, as discussed elsewhere. The challenging nature of this part of the process is, therefore, one in which the use of facilitated small groups would be essential for the more contentious issues. More information, on the technical aspects of the evaluation of impacts. is given by Lein, K.L. (2003)[31].

Preparation of EIS

It is essential to document clearly and impartially the impacts of the proposal, as well as those of the identified alternatives, the proposed mitigation methods, the significant effects and the concerns expressed by the public and communities affected by the proposal, as well as how those concerns were addressed.

The draft EIS, following internal review by the relevant body, should be made available for public review, and should include a non-technical summary.

Review of the EIS

The review of the EIS should determine whether the report; meets its terms of reference, provides a satisfactory assessment of the proposal(s); and contains the information required for decision making. Involvement of the public can ensure the quality and comprehensiveness of the assessment and help to reduce any bias in the analysis.

Before the public review, the EIS should be complete in every aspect, except this final opportunity for public feedback. Any major changes resulting from this public review would probably trigger a second public review, though good public participation early on should make this unlikely.

Proposals for electronic transmission of the document along with public access through libraries, site offices, public displays, information repositories, and presentations, should give wide availability. Methods of feedback should be widely publicised. One method could be an interactive web-site page for this purpose.

All those who made major contributions to the process should receive a copy (finance permitting) or have access to a copy, along with the statutory bodies and the proponent.

The draft should be available and publicised at least 15 days before any stakeholder meetings to discuss it.

The final EIS should then include the changes based on the relevant feedback in the draft, together with the responsible body's reasons for not including any other issues raised.

Eccleston, C.H. (2000) gives useful guidelines on dealing with this stage of the process.

Decision Making

It is generally the role of the regulatory authority to approve or reject the proposal and, if it is approved, to establish the terms and conditions of its implementation, taking into account the EIS, and its public input.

[31] Lein, K.L. (2003) Integrated Environmental Planning. Blackwell.

Follow-up, Implementation and Monitoring

The participation of local representatives and NGO's in monitoring the operational impacts of a project can lead to the early identification of problems, and can foster a sense of public partnership. The setting up of a community/stakeholder panel to review the operation of the project, in the light of the EIS and the planning permission as well as any IPPC licence, is one way of doing this.

Continual assessment of the EIA process

Continuous assessment of the process itself can ensure the implementation of the public participation plan, provide public transparency and strengthen the effectiveness of future EIAs.

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APPENDIX I I

FIE Workshop on Directive 2003/35/EC

The FIE Workshop on Directive 2003/35/EC was held on 14 June, 2005 in Dublin. The following core issues were identified as critical for effective implementation of the Directive

- **Publication of draft implementing regulations;**
- **The training of the Judiciary and the decision makers;**
- **Sufficient time for submission by the public;**
- **Funding to ensure effective public participation.**

WORKSHOP INDEX

Workshop Part 1: Effective Public Participation

The workshop considered that the current decision making process did not enable effective participation. The following issues were identified in preventing decision markers from benefiting from public input and impeding the effectiveness of the widely admired Irish third party rights.

1. Involvement in drafting of implementing regulations

Best practise elsewhere for the implementation of European Directives includes a consultative process for draft national Regulations. Regulations in Ireland never are published in draft. The faults therefore emerge, if they emerge at all, through litigation, with the consequent cost to the State. The workshop felt that its efforts would have been significantly amplified if draft Regulations had been available. The UK documentation in relation to their Regulations are attached to this Report.

Recommendation:
All Regulations to implement European Directives should be published in draft format, with sufficient time for considered and detailed submission from the public.

2. Consolidation of legislation

2003/35/EC itself is an example of the difficulties inherent in legislation which is not consolidated. The Irish implementing Regulations for the EIA Directives require the reading of three sets of Regulations [XXX] and effectively rule out participation by those without a sophisticated level of legal understanding. In stark contrast, the consolidation of the Planning Acts in the Planning Act 2002 and the consolidation of the Regulations were proactive steps that enable the public to easily apprehend the legislative requirements.

Recommendation:
Consolidate the Regulations relating to Environmental Impact Assessment and IPCC licensing.

3. Public Awareness/Acceptance of right to participate

Very few politicians not to mind members of the public are aware of these directives which create rights. Cultural and historical factors in Ireland have contributed to the current situation where comments on regulatory authorities and their decisions are seen in a negative light. Local Agenda 21 has been largely ineffective in Ireland. Consultation is interpreted as the act of informing, not the implementation of participation. It is neither progressive nor proactive.

Recommendation:
An national educational campaign about the value of decisions which incorporate public participation and the methods by which individuals can contribute, with special attention to the secondary curriculum of the Civic, Social, and Political Education course.

4. Early public awareness of projects

Early public awareness of projects and their implications for affected citizens is key to the ability to benefit from effective opportunities to participate. Large infrastructural and industrial projects in particular are many years in the planning and development stage. The publication of a notice and the erection of a sign (where required)[32] come, in fact, at a very late stage in the overall project timeframe. Early notification and specific notification, such as leaflets delivered to each house in the area, are critical to allow the public sufficient time to participate at a stage in the project in which changes can be incorporated for the least possible cost to the developer. The requirement to consult "when all options are open" requires that the public must be consulted before the EIS is submitted to the decision making authority, as at that point alternative sites have been eliminated.

Recommendation:
Publication at the initial stages – to include scoping and screening - of the EIS process of the proposal rather than at the time of the submission of the completed EIS.
Forestry and aquaculture projects falling under the EIA Directive should have requirements for public signs.

5. Participation fees

The imposition of a fee to participate in the planning and licensing processes in itself sets an unacceptable barrier. The reasons are well set out in the current proceedings against Ireland by the European Commission.

Recommendation:
Fees for commenting of planning applications or comments on draft IPCC licences should be removed.

6. Support for the public to participate

[32] While signage is required for development applications under the Planning Regulations, many areas of development do not require this effective form of public notice. In particular, members of the workshop drew attention to forestry and aquaculture, both of which have significant impacts on property values and public amenity but neither of which require the election of a sign on the nearest public road.

The principal of 'equality of arms' illustrates the difficulties individuals face when confronted with large corporations or Government Departments. Simply to keep up with advances in the various disciplines is extremely difficult. XXX New Zealand

Recommendation:
The provision of resources to enable ENGOs and the public to avail of appropriate expertise when examining planning and licensing applications in which they have an interest.

7. Prescribed Bodies

The current list of prescribed bodies for consultation is not sufficient to avail of the expertise and experience of Ireland's non-governmental organisations because of the restrictive number of listed bodies. Ireland has now to identify the NGOs which may have an interest in a particular development. The Directive requires consultation with "NGOs meeting any requirements under national law". In Ireland no such register exists. Is it reasonable for the competent authorities to try to identify such bodies? The creation of a national ENGO Secretariat in 2002 funded by the DoELG with 24 registered environmental organisations[33] offers the planning and licensing authorities a single stop shop which can in turn filter the applications to the appropriate organisations, greatly increasing the extent of participation to those most concerned and qualified to comment on any individual development.

Recommendation:
Add the ENGO Secretariat to the list of prescribed bodies for consultation under the Regulations for EIA and IPCC licensing.

The opportunity to express an interest through electronic notification by the maintenance of a register by decision makers of interested parties should be available at every level of decision making to facilitate individuals and regional NGOs.

8. Reasonable time-frames

The existing time frames are too short to allow affected citizens to obtain the necessary professional expertise to make positive contributions to the development of projects and plans. The standard 5-week time limit is not adequate, especially for major projects when the information to be considered can run to many volumes and cover many disciplines. Early public awareness of the screening and scoping stages is critical to effective participation. Even the later notification of applications received by certain local authorities in no way conforms to the existing Regulations.[34]

[33] The Workshop noted that the EENGO Secretariat only represents national bodies and so does not entirely satisfy the requirements for consultations with non-government organisations.

Recommendations:
Public notification and availability for comment should extend to the screening and scoping stages of the EIS.

DoELG to ensure that authorities conform to existing regulations for informing consultative bodies, posting applications accepted to their website, and producing public lists on time.

Workshop Part II: Effective Access to Justice

The workshop considered that the current judicial process did not evidence equality of arms, a concept supported not only by European legislation but by our own constitution. The following issues were identified in preventing access to justice and undermining citizen's intervention to obtain their rights under European and Irish law.

9. Training of Judiciary

The reluctance of the Irish Courts to engage in constructive referrals to the ECJ is indicative of the failure of this sector of Irish society to accept its role under the European Constitution. Courts of last instance (such as the Irish Supreme Court) are obliged to make a reference in appropriate cases. Accelerated procedures are available.

A recent decision by the High Court[35] to permit a stay on the action brought against the €20 euro planning fee in the national Courts until the ECJ had ruled on the matter in effect disenfranchised the Irish citizen, who can not take part in ECJ litigation. One could go further and argue that the ruling fails to appreciate the distinct, yet complementary roles, played by the "public" and "private" enforcement mechanisms (i.e. the Article 226 EC enforcement mechanism on the one hand and proceedings before the national courts on the other).

In turn, the failure of the Irish Courts to refer a single case to the ECJ effectively isolates Ireland's legal regime from the ECJ and denies the judiciary the positive fertilisation evident through this process in neighbouring jurisdictions. Workshop participants drew particular attention to the ratification of Aarhus by eastern European countries and the progress made towards participation through the associated mechanism. They reported considerable surprise in neighbouring jurisdictions over Ireland's position.

[35] Murphy J, *ops cite.*

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Ireland's problems relate to a failure in understanding of the positive legal benefits from full integration, and are stubbornly imbedded in the current Judiciary and administrative regimes who largely regard European initiatives as interfering in sovereign rights.[36]

The main aim of proceedings before the national courts it to seek to protect specific legal rights that it is claimed derive from Community law - as opposed to a desire to bring a defaulting Member State into line, which is the main objective of Article 226 EC infringement proceedings. The national courts are, in effect, acting as "Community courts" when called upon to apply and enforce Community law at national/local level. Murphy J.'s decision does not recognise this role of the Irish Courts.

Recommendation:
Extend the UNEP Programme to High Court Judges and senior administrative officials.

10. Substantial Issues vs. Procedural Issues

The current Planning Act 2002 requires "substantial interest", as a precondition to access to the Courts has been taken by the Courts (with notable exceptions) to mean economic or property interests. This restricts access to the Courts by denying it to all citizens and in particular requiring it of NGOs. This can no longer apply after the Directive is implemented. While the Aarhus Convention uses the wording 'substantial or procedural', this Directive uses 'substantial and procedural', giving rise to a lack of clarity.

Recommendation:
Anticipate the ratification of Aarhus by using the conjunction 'or'.

11. Locus Standi

The Directive highlights the rights of NGOs to undertake litigation but is less clear on the rights of individuals.

Recommendation:
The narrow gap between the individual interest required for Irish locus standi and having too much of an interest to qualify for protective costs order requires consideration.

[36] The main advantage of an Article 234 EC reference over Article 226 EC proceedings is that in the case of an Article 234 EC reference the ECJ will be presented with the question at issue in the context of a specific factual scenario. This point is not considered at all by Murphy J.

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12. Litigation Cost

Costs in public interest cases are a huge issue in access to justice. The *pro-bono* principle is undeveloped in Ireland.

The high cost of litigation together with the fear of costs has had three results:

- cases which have not been taken;[37]
- case in which individuals have been pursued for costs they were patently unable to discharge;[38]
- legal entities set up for the protection of communities which have ceased to exist.[39]

To an equal extent, effective participation at oral hearings, particularly when the applicant is represented by a legal team, flies in the face of "Equality of arms".

Both Article 6 of European Convention on Human Rights and our own constitution requires that this issue be addressed.

Recommendation:
Guidelines for the use of Protective Costs Orders should be issued.[40]

The use of legal aid should be extended to environmental cases in the public interest for those who pass a merit test. This legal aid should not be mean-tested as it is given not to alleviate the poverty of an applicant, but in order to meet public interest goals.

Recommendation:
Consideration should be given to funding for professional as well as legal expertise, particularly of NGOs, in order to ensure equality of arms[41].

13. Timely litigation

Litigation can wait for many months in the High Court for hearing; repeated deferrals of Hearings through lack of Judges are common and involve plaintiffs, who are often from rural areas, in substantial disruption and expense. The creation of special Courts was not considered to be a better option than the resourcing of the existing High Court and the advancement of law reform, addressing such matters as the elimination of the Leave stage, clear decision to limit the use of Motions to Dismiss, etc.

Recommendation: Increase the resources available to the Court system.

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Dublin, 4 June, 2005

[37] Old Head of Kinsale and the Blessington Dump
[38] Collete O'Connell, David Healy, Clare Watson. Eileen ní Éilí, and John McBride]
[39] Malahide Community Council, Lancefort, and the Village Residents vs McDonalds
[40] See the 5 principals in the recent UK Judgement (*R on the application of Corner House Research v Secretary of State for Trade and Industry*)
[41] The New Zealand approach was quoted by participants.

Rappateur: Tony Lowes

Appendix III

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

21/01/2003

2000/4078
C(2003) 352

REASONED OPINION

addressed to Ireland under Article 226 of the Treaty establishing the European Community, on account of its failure to fulfil obligations under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC

PROVISIONS OF DIRECTIVES

1. Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment ("Directive 85/337/EEC") as amended by Council Directive 97/11/EC of 3 March 1997 ("Directive 97/11/EC"), hereinafter referred to as "the Impact Assessment Directive" sets out a framework for the environmental impact assessment of certain projects.

Article 2(1) of the Impact Assessment Directive defines a basic duty to ensure the prior environmental impact assessment of environmentally significant projects.

Article 4 of the Impact Assessment Directive defines the projects to be made the subject of an environmental impact assessment.

Articles 5 to 10 of the Environmental Impact Assessment Directive set out requirements to be respected with regard the conduct of environmental impact assessments. These requirements *inter alia* include an obligation to consult the public concerned (Article 6) and to take information, including information derived form public consultation, into account in the decision-making process (Article 8).

By virtue of Article 12 of Directive 85/337/EEC, the measures necessary to comply with this directive were due by 3 July 1988.

Article 3 of Directive 97/11/EC requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with it by 14 March 1999 at the latest, and to forthwith inform the Commission thereof.

Article 3(2) of Directive 97/11/EC provides that, if a request for development consent is submitted to a competent authority before 14 March 1999, the provisions of Directive 85/337/EEC prior to these amendments shall continue to apply.

2. In 2000, the Commission registered two complaints against Ireland under numbers P2000/4078 and P2000/4188 concerning then proposed legislation which *inter alia* provided for payment of fees by members of the public as a pre-condition for considering their opinions in development consent procedures. The principal legislation – which has since been adopted – is the Planning and Development Act, 2000. This provides for payment of participation fees at local authority level. Earlier legislation provides for the payment of participation fees at other tiers of decision-making. The complaints *inter alia* argued that the requirement of payment of a fee was contrary to the provisions of the Impact Assessment Directive.

2.1. By letter dated 29 August 2000 (ref D(0)432590), the Commission requested the Irish authorities to comment on the complaints referred to in the previous paragraph.

2.2. By letter dated 6 December 2000 (ref. DGENV 813803), the Irish authorities responded.

They stated that: "*For administrative purposes, and in keeping with the provisions of Article 6(3) of the EIA Directive which provide that determination of "the detailed arrangements" is a matter for individual Member States, the Act enables regulations to be made to require an administrative charge or fee for making a submission or observation on a planning application."*. They also noted that there was existing provision for fees in relation to certain development consent procedures in Ireland.

2.3. On 23 October 2001, the Commission addressed a Letter of Formal Notice to Ireland (SG(2001)D/260437) *inter alia* in respect of the subjecting of rights under the Impact Assessment Directive to payment of participation fees.

2.4 By letter dated 7 March 2002 (ref. DGENV802296A), the Irish Authorities responded, referring the Commission to new Irish regulations concerning participation fees adopted pursuant to the said Planning and Development Act, 2000. They contended that the Impact Assessment Directive did not debar the imposition of such fees and that Article 6 of the Impact Assessment Directive left the detailed arrangements for the consultation of the public to Member States. They argued that the new fee (set at € 20.00) would contribute to an enhanced service under the new legislation, that it would not discourage participation, that it would not apply to certain non-governmental organisations or to persons merely seeking information in an EIA process, and that only a minority of developments would attract separate participation fees.

LAW

3. The Commission considers that it is contrary to the Impact Assessment Directive to make the right to express an opinion or have that opinion taken into consideration in a development consent procedure involving EIA subject to payment of a participation fee. Its reasons are set out at paragraphs 3.1. to 3.24. below.

3.1. Firstly, the Impact Assessment Directive contains no express provision allowing for such participation fees. The Commission would submit that, had the Community legislator intended to allow the possibility of such a fee, it would have made express provision for them. In support of this, it would cite Council Directive 90/313/EEC on the freedom of information on the environment. In subject-matter, this is closely related to the Impact Assessment Directive in as much as it creates rights for the public with regards to information on the environment. In its Article 5, it expressly allows for a charge which may not exceed a reasonable cost. The Commission would content that, *a contrario*, the absence of such express provision in the Impact Assessment Directive supports the argument that Member States are not entitled to constrain the right to express an opinion or have that opinion taken into account by reference to payment of such fees.

3.2. Secondly, the Commission considers that participation fees run contrary to the scheme and purpose of the Impact Assessment Directive.

3.3. The third recital of Directive 85/337/EEC provides:

"Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;"

3.4. This indicates that a fundamental purpose of an EIA is to ensure that decisions on environmentally significant projects are adequately informed in terms of information emanating from relevant information sources. Information from the public concerned represents one of these information sources, as is expressly recognised by Article 6(2) of the Impact Assessment Directive. Consequently, to see the role given to the public concerned under Article 6(2) only in terms of an entitlement to have a service rendered to them by the authorities is, in the Commission's view, misplaced. On the contrary, that role can be considered in terms of the public providing a service to the decision-making authorities, i.e. providing supplementary information that can help these authorities make a fully informed decision. In an Irish context, such supplementary information can be particularly important, especially when it comes from expert non-governmental organisations, given that many Irish decision-making bodies lack specific expertise to judge environmental impacts (see also paragraphs 3.7 and 3.16 below).

3.5. In this regard, it may be noted that the role of the public under Article 6(2) is intended to be exercised with reference to specific projects. The general interest of having

environmentally informed decision-making with regard to specific projects is paramount. In the context of this general interest, the Commission would submit that the imposition of participation fees on the public concerned is inappropriate, since it cannot be justified by reference to this interest. On the contrary, it works against the interest by making it less likely that one specified information-source, i.e. the public, will contribute to decision-making on such projects as intended. In contrast, Directive 90/313/EEC is not concerned with specific projects but with the general interest of giving the public access to environmental information. Because Directive 90/313/EEC does not set any conditions as to the reasons for seeking information (which may be entirely a private matter), and because those obtaining information under it do not necessarily render a service or contribute to a public-interest procedure related to the precise information requested, a charge for providing information is not similarly inappropriate. In any case, Directive 90/313/EEC makes specific provisions for a charge whereas the Impact Assessment Directive does not.

3.6. The Commission understands that the role of the public in helping decision-makers to make informed decisions was highlighted in many submissions to the Irish government opposing participations fees prior to their introduction at local authority level.

3.7. Fourteen local authorities, including the General Council of County Councils, passed motions to request that the fee would not be implemented, *inter alia* highlighting the poorer decisions that would result as members of the public had consistently supplied these authorities with information that was useful and relevant.

3.8. The relevant professional bodies, the Irish Planning Institute and the Royal Town Planning Institute (which represent professional town and country planners), together with a number of statutory consultees, the Heritage Council and An Taisce, advanced similar arguments against participation fees. The Heritage Council noted: "*The introduction of a fee which would be payable by third parties to make submissions or observations on applications for planning permissions is not in line with one of the key principles of sustainable development, that of public participation. Given the current lack of specialised expertise amongst planning authorities in relation to a number of areas of sustainable development, the submissions of observations from third parties provides an invaluable service to planning authorities in their attempts to assess applications in a comprehensive manner.*"

3.9. Key non-governmental organisations concerned with the protection of Ireland's environment also voiced concern that the participation fees with make it more difficult for them to inform decision-makers of environmental impacts. The IrishGeorgian Society, which is concerned with the protection of Ireland's architectural heritage noted that the provision for charging in the proposed Irish legislation "*is of particular concern, in that charging people to make submissions to local planning authorities will discourage public participation, and, in regard to conservation, will be adverse as local historical and archaeological societies, as well as bodies like the Irish Georgian Society, will be penalised financially for trying to encourage the authorities, and others, to respect our architectural heritage.*"

3.10. Thirdly, the Commission considers that the precise wording of Article 6(2) and (3) of the Impact Assessment Directive does not allow for the latitude in interpretation that the Irish authorities seek to give it.

3.11. Article 6(2) itself sets no qualification on the duty of authorities to provide information to the public "*in order to give the public concerned the opportunity to express an opinion before the development consent is granted.*"

3.12. While Article 6(3) allows Member States to determine the detailed arrangements for information and consultation under Article 6(2), the Commission would submit that the scope of the Member States role must be considered as delimited by what is reasonably necessary to give meaning to the basic duty set out in Article 6(2). Support for this interpretation is found in indented particulars set out in Article 6(3), all of which relate to what is needed to make the duty in Article 6(2) effective in practice, and none of which advert to the possibility of fees.

3.13. In contrast, the imposition if participation fees by way of "detailed arrangements" cannot be considered as coming within the ambit of what is reasonably necessary to give effect to Article 6(2), a point reinforced by the fact that Ireland is the sole Member State to resort to such fees.

3.14. Furthermore, the Commission would submit that the imposition of participation fees by way of "detailed arrangements" runs contrary to the polluter pays principle, one of the principles on which Community environmental law is founded, and a principle which should not be overlooked in any interpretation of Article 6(3). In particular, the Commission considers that the principle is not adhered to if costs properly attributable to those proposing to create environmental impacts are instead allocated to those who may be affected by them. With reference to environmental charges, it may be noted that Council Recommendation 75/436/Euratom, ECSC, EC regarding cost allocation and action by public authorities on environmental matters states "*the costs to be borne by the polluter (under the "polluters pays principle") should include all the expenditure necessary to achieve an environmental quality objective, including the administrative costs directly linked to the implementation of anti-pollution measures."* In contrast, although any administrative costs arising from public participation are a consequence of initiatives taken by developers, the charges that Ireland imposes by way of participation fees fall on the public.

3.15. In this regard, and with reference to the equity of participation fees, the Irish General Council of County Councils has pointed out that it is developers who seek to change the status quo: "*A householder, for example, is quite happily living in his or her house when an applicant applies to build an intensive pig unit in the field across the road. Naturally the householder is concerned and wants to make an observation to the planning authorities on this. Why should the householder the be forced into expense, no matter how nominal, because of a third party's unsolicited proposals?*"

3.16. Furthermore, it appears form the submissions of local authorities and the General Council of County Councils that, as a matter of general policy in Ireland, developers are not

expected to properly defray the administrative costs that result from their development proposals, and that *inter alia*, as a consequence, local authorities are discouraged from engaging the professional expertise that is needed to properly consider such proposals. This further underscores the potential contribution that the public, including expert individuals and organisations, can make to decision-making, by supplying a deficit in the expertise available to local authorities.

3.17. Fourthly, and without prejudice to the preceding arguments, the Commission considers that in the legislative provision it has made for charges, Ireland has exceeded the scope for making detailed arrangements given by Article 6(2) of the Impact Assessment Directive.

3.18. Section 33(1) provides that "*The Minister shall by regulations provide for such matters of procedure and administration as appear to the Minister to be necessary or expedient in respect of applications for permission for the development of land.*" Section 33(2)(c) provides that, without prejudice to the generality of subsection (1), regulations under this section may make provision for…."*enabling persons to make submissions or observations on payment of the prescribed fee and within a prescribed period.*" Leaving aside questions of principle, the Commission takes the view that this gives the Minister a very broad latitude to set participation fees at a level which is prohibitive or dissuasive in cost terms, and cannot be considered compatible with the scope given to the Member States to determine detailed arrangements under Article 6(2).

3.19. Fifthly, and without prejudice to the preceding arguments, the Commission considers that, in the charges it has actually provided for to date, Ireland has proceeded in a manner that impedes or potentially impedes the rights given to the public concerned under Article 6(2) of the Impact Assessment Directive. The Commission considers that the level of participation fees which currently obtain in Ireland are such as to inhibit the public participation fore seen by Article 6(2) of the Impact Assessment Directive, especially with regard to a number of categories of persons. The fees are set at € 20.00 for participation in an EIA where the decision is determined at local authority level, and € 45.00 where, following an appeal, the decision is determined at the level of Ireland's Planning Appeals Board. Decisions on major projects requiring a consent from Irish local authorities are commonly appealed to the Board. Even if they pay the initial € 20.00 participation fee at the local authority level, and do not themselves make the appeal (the developer may appeal, for example), members of the public who wish to express an opinion are obliged to pay a further € 45.00 participation fee in order for their submissions to be taken into account by the Board. Further fees may arise where a decision involves the Environmental Protection Agency.

3.20. In the first place, the participation fees are especially prohibitive in relation to persons dependent on social welfare payments (including recipients of unemployment benefit and disability allowance). The standard rate of payment currently stands at €118.80 a week. Recipients represent 8.6% of the population nationally, rising to 11.1% in Counties Leitrim and Wexford. In specific locations, the public concerned by individual projects requiring EIA may include a higher percentage of social welfare

recipients. The cumulative participation fees of € 65.00 which will very often arise in an EIA amount to over 50% of an already exiguous weekly income.

3.21. In the second place, the participation fees are prohibitive in relation to persons or organisations which, because of a concern for the environment and/or a particular area of environmental expertise, wish to participate in a multiplicity of different development consent procedures. It should be noted that participation fees are not limited to procedures involving EIA, but apply to all planning procedures. This means that the potential cumulative burden may be considerable. In a submission opposing participation fees, the Barra Salmon Angling Association, County Mayo, stated: "*The proposed fee may not be excessive in a once-off situation. However, our group and I assume many others around the country have occasion to lodge objections to various applications on a regular basis. Our only concern for doing so is to try and protect and preserve our unique environment in the West. The pressure, especially in recent years and the experience in all kinds of developments is making it more and more difficult to preserve what we have. Objections, appeal to An Bord Pleanala, and Oral Hearings are for a voluntary body with no outside funding time-consuming and financially draining. Your proposal if implemented will add to that burden and will result in restrictions on the number of objections we would normally make.*" It may be noted that this voluntary body operates in an area that has seen a steady decline in water quality, and a deterioration in game fisheries. The environmental concerns that underlie its wish to participate in decision-making procedures are therefore well-founded.

3.22. With reference to Ireland's submission that participation fees do not apply to certain non-governmental organisations or to persons merely seeking information in an EIA process, the Commission would observe that the exception for non-governmental organisations is of very limited extent (it understands that only one non-governmental organisation currently benefits and then not under all circumstances), and that the obligations contained in Articles 6 and 8 of the Impact Assessment Directive *inter alia* relate to the expression of opinions by the public as well as to the information of the public.

3.23. In the third place, the participation fees are especially prohibitive in relation to the public concerned by developments involving a multiplicity of separate development consent procedures. Citizens wishing to express an opinion on any separate EIAs that result will incur separate participation fees. This situation is described in relation to the re-development of Ballymun in a Commission Reasoned Opinion of 6 August 2001 (SG(2001)D/290823).

3.24. A consequence of the imposition of participation fees contrary to Article 6 is that Ireland also fails to comply with Article 8 of the Impact Assessment Directive. This is because Ireland fails to ensure that opinions expressed by members of the public who do not pay participation fees are taken into account in the development consent procedure.

FOR THESE REASONS

THE COMMISSION OF THE EUROPEAN COMMUNITIES

after giving Ireland the opportunity to submit its observation by letter dated 23 October 2001
(ref. SG(2001)D/260437) and after taking account of information provided by the Irish authorities in a letter dated 7 March 2002 (ref. SG(2003)A/00670),

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

under the first paragraph of Article 226 of the Treaty establishing the European Community that Ireland, by making the full and effective participation of the public in certain environmental impact assessments subject to prior payment of participation fees, has failed to comply with its obligations under Article 6 and 8 of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment as amended by Directive 97/11/EEC.

Pursuant to the first paragraph of Article 226 of the Treaty establishing the European Community, the Commission invites Ireland to take the necessary measures to comply with this Reasoned Opinion within two months of receipt of this Opinion.

Done at Brussels, 21/01/2003

For the Commission

Margot WALLSTRÖM
Member of the Commission

IN CONFORMITY WITH

COMMISSION

DECISION
For the Secretary-General

Sylvain BISARRE
Director for the Registry

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