Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

fieldfisher

Research Report on

Legal Costs in Planning and Environmental Judicial Reviews

December 2023

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Acronym List

ACCC	Aarhus Convention Compliance Committee
CFAs	Conditional Fee Agreements
CJEU	Court of Justice of the European Union
CPRs	Civil Procedural Rules 1998
CSSO	Chief State Solicitor's Office
ECPR	Environmental Costs Protection Regime
EIA	Environmental Impact Assessment
EMPA	Environment (Miscellaneous Provisions) Act 2011
eNGO	Environmental Non-governmental Organisation
EPA	Environmental Protection Agency
EPRT	Environment and Planning Review Tribunal (Malta)
EU	European Union
EWNI	England, Wales and Northern Ireland
EY	Ernst & Young
IIDMA	Instituto Internacional de Derecho y Medio Ambiente (Spanish) (International Institute For Law and Environment)
IPC	Integrated Pollution Control
IPPC	Integrated Pollution Prevention and Control
JC	Junior Counsel
KC	Kings Counsel
LASPO	The Legal Aid, Sentencing and Punishment of Offenders Act 2012
LCA	Legal Costs Adjudicator
NEPPC	North East Pylon Pressure Campaign
NGO	Non-governmental Organisation
NPE	Not Prohibitively Expensive
OPR	Office of the Planning Regulator
PCO	Protective Costs Order
PQE	Post-qualification Experience
PO	Producer Organisation
RCS	Rules of the Court of Session
RSC	Rules of the Superior Courts
SCCO	Senior Courts Costs Office
SEA	Strategic Environmental Assessment
STAB	Stichting Advisering Bestuursrechtspraak (Dutch) (Administrative Courts Advisory Foundation)
T.A.R	Tribunali Amministrativi Regionali (Italian) (Regional Administrative Court)
UK	United Kingdom
UNECE	United Nations Economic Commission for Europe
UNTC	United Nations Treaty Collection
VAT	Value-added Tax

Executive Summary

Introduction

- The Minister for Housing, Local Government and Heritage requested the Office of the Planning Regulator (the OPR) to develop a synthesis of evidence on legal costs in Judicial Review proceedings of environmental matters in order to inform proposed changes to the existing rules on costs in environmental litigation under Section 50B of the Planning and Development Act 2000. Following this request, the OPR engaged Fieldfisher Ireland LLP (Fieldfisher) to provide an overview of the operation of the legal costs system in Ireland in environmental litigation having regard to Ireland's obligations under the Aarhus Convention and EU law.
- This report provides an overview of Ireland's obligations under the Aarhus Convention and EU law in respect of the requirement that certain proceedings are not prohibitively expensive (NPE). It brings together data, information and legal research, including an overview of actual costs incurred in environmental Judicial Reviews with a comparative analysis of how NPE is applied in other countries.

Aarhus and the Background to Costs Protection

- The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention or the Convention) provides the public with a number of rights relating to the protection of the environment including the right of access to environmental information, public participation in environmental decision-making and access to justice in environmental matters.
- The Convention has been ratified by 47 parties including Ireland and the EU.
- The access to justice provisions (Articles 9(1) to 9(3)) provide the right to review a decision on access to information and the right to review the substantive or procedural legality of any decision, act or omission by public authorities and private individuals falling within the scope of Article 6 of the Convention.
- Article 9(4) requires that the procedures in Articles 9(1) to 9(3) shall provide adequate and effective remedies and must be fair, equitable, timely and NPE.
- The Convention sets an obligation, which allows the parties great discretion in how to implement the provisions, but limited discretion in what to achieve. Unsurprisingly, there is a significant divergence in approach to implementation across the parties' legal systems.
- The NPE requirements have been implemented in different ways by the parties to the Convention. Ireland has implemented the provisions via Section 50B of the Planning and Development Act 2000 (the 2000 Act) and via Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 (EMPA). The Courts also exercise discretion to implement the NPE principle where the statutory framework does not otherwise provide for costs protection.
- Domestic implementation of an international convention is a matter for the Oireachtas, however as the EU is a party to the Convention, it forms part of the EU legal order and implementation must therefore be consistent with EU law. The Court of Justice of the European Union (CJEU) has delivered a number of judgments in relation to the interpretation of the NPE provisions of the Convention.

- The Aarhus Convention Compliance Committee (ACCC) reviews the parties' compliance with the Convention and makes findings and recommendations where issues of non-compliance arise. The ACCC has issued a number of findings and recommendations to the parties in relation to the NPE provisions of the Convention.
- Both the judgments of the CJEU and the findings and recommendations of the ACCC assist the parties in understanding their obligations under the Convention.

Ireland's Obligations and Implementation of the Convention

- The NPE principle applies to the Leave Stage of Judicial Review proceedings where that is a pre-requisite to bring a challenge.[1]
- In transposing EU law, which gives effect to the Aarhus Convention, discretionary powers of the Courts to make costs awards will not alone be sufficient to ensure that procedures are NPE.[2]
- It is permissible for national Courts to award reasonable costs in judicial proceedings[3] and it is permissible to distinguish between grounds benefitting from NPE under the Aarhus Convention and those which do not.[4]
- Member States cannot derogate from the NPE requirements even where a challenge is deemed frivolous or vexatious or where there is no link between the alleged breach of national environmental law and damage to the environment.[5]
- There is nothing preventing a party to the Convention going further than the requirements of the Convention.[6] An example of this would be applying no order as to costs as opposed to costs that are NPE.
- Article 9(2) applies where there is a challenge to the legality of a *'decision, act or omission'* as to proposed activities listed in Annex I of the Convention, any other activity where public participation is provided for under an Environmental Impact Assessment (EIA) procedure in accordance with national legislation or where Article 6(1)(b) of the Convention applies (i.e. proposed activities not listed in Annex I which may have a significant effect on the environment).
- Article 9(2) has been given effect in EU law via amendments to the EIA Directive and what is now the Industrial Emissions Directive has also been found by the CJEU to apply to decisions under Article 6(3) of the Habitats Directive.[7]
- Unlike, Article 9(2), Article 9(3) has not been transposed into EU law through secondary legislation, although the CJEU alluded to national environmental law attracting EU costs protection in some respect.
- Article 9(4), insofar as it applies to Article 9(2), appears to be limited to challenges that relate specifically to the public participation provisions.[8]

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1 *NEPPC*, C-470/16, paragraphs 31 and 34.

2 *Commission v Ireland* C-427/07, paragraphs 93 – 94.

3 Article 3(8) of the Aarhus Convention.

4 *NEPPC* paragraph 44.

5 *NEPPC* paragraph 65.

6 Article 3(5) of the Aarhus Convention.

7 Case C-243/15 *Lesoochranárske zoskupenie VLK ("LZ II")*, paragraph 56.

8 *NEPPC* paragraph 44.

- Article 9(4), insofar as it applies to Article 9(3), must be regarded as applying to any procedures contesting a development consent process on the basis of national environmental law.
- Article 9(3) does not refer to *'decisions'* and expressly extends to the activities of private persons and public authorities which contravene provisions of its *"national law relating to the environment"* thereby providing a very broad scope to the application of the NPE principle.
- Article 9(3) does not have direct effect in EU law. However, national Courts applying national environmental law (in a field covered by EU environmental law) will be required to interpret it in a way which, to the fullest extent possible, is consistent with the objectives laid down in Articles 9(3) and 9(4) of the Aarhus Convention.[9]
- The Supreme Court in *Heather Hill v An Bord Pleanála* [2022] IESC 43 *(Heather Hill)* interprets the reference in *North East Pylon Pressure Campaign (NEPPC)* to *'national environmental law'* as meaning the interpretative obligation in relation to Articles 9(3) and 9(4) arises in fields covered by EU environmental law and this arises where it is *"functioning within a zone that has been significantly regulated by EU law"*. The Court noted however that the law is not *acte clair* in relation to the precise application of this principle.
- Aside from the interpretative obligation as a result of EU law, it is clear that Article 9(3) of the Convention includes a purely domestic law challenge (i.e. not in a field covered by EU environmental law). It provides for procedures *"to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"*.[10]
- The combined effect of Articles 9(2) and 9(3) as interpreted by the CJEU in *NEPPC* is that NPE under the Convention extends to any proceedings based on national environmental law challenging a development consent process irrespective of whether it comes within Article 9(2) or Article 9(3).[11] This includes challenges to decisions based on non-compliance with environmental laws on *'classic'* Judicial Review grounds.[12]

Consideration of the Legal Costs Data of An Bord Pleanála (the Board)

- In order to undertake an analysis of trends over time in relation to the costs of planning and environmental Judicial Review cases where costs have been awarded to applicants or where respondents have not recovered costs (due to costs protection being in place), the Board, following a request from the OPR, provided information on legal costs incurred by the Board in Judicial Review cases over the period 2012 to 2022.
- The Board provided a dataset comprising 46 cases on legal costs paid to its own legal advisers and paid to applicants who were successful in all or part of a challenge to a decision of the Board.

[9] *NEPPC* at paragraphs 57, 58 and 66(3).

[10] *North East Pylon Pressure Campaign Ltd v an Bord Pleanála No. 5* [2018] IEHC 622,[2018] 10 JIC 3009 (*NEPPC* no. 5 High Court).

[11] *Heather Hill v An Bord Pleanála* at paragraph 171.

[12] *Heather Hill v An Bord Pleanála* at paragraph 176.

- For the purposes of this report, the case stages were separated into 'Leave Stage', 'High Court Hearing Stage' and 'Appeal/CJEU Reference Stage'. This was to enable analysis of the data and comparison between the stages. The Leave Stage typically incurs costs on the applicant's side, as it is an ex parte process where the applicant has to satisfy a judge of various matters - such as standing, substantial grounds and adhering to time limits - without the Board's legal advisers being involved. However, as can be seen from the Board's data, the cases included at the Leave Stage here also include some costs for the Board's legal advisers. This reflects that pleadings are shared at an early stage in the process, enabling the Board's legal advisers to consider the case, and, if appropriate, to advise the Board on concession. Costs may also be incurred by the Board's legal advisers in engaging with the applicant's legal advisers at this stage and in agreeing final orders. However, it also reflects that most of the Leave Stage cases are conceded after leave is granted, but generally before a hearing date is fixed. The High Court Hearing Stage and the Appeal/CJEU Reference Stage include Leave Stage costs, and are generally dependant on the nature and complexity of the case; as discussed in this report.
- The Board's costs data, considered for the purposes of this report, relates almost entirely to cases in which the Board has been unsuccessful at hearing or has conceded the case at an earlier stage. The conclusions drawn are therefore only valid in respect of cases which the Board has lost or conceded and not reflective of applicants' costs in cases in which the applicant is unsuccessful.
- Bearing in mind the limitations on the size of the Board's individual case dataset, the average cost to the Board of each of the stages is as follows:
    - The Leave Stage is c.€40,000 per case, of which 70% (c.€28,000) is made up of payment to the Judicial Review applicant and the remaining 30% (c.€12,000) is made up of payment to the Board's legal advisers.
    - The High Court Hearing Stage is c.€280,000 per case, of which approximately 64% (c.€180,000) of the total cost is made up of payment to the Judicial Review applicant and the remaining approximately 36% (c.€100,000) is made up of payment to the Board's own legal advisers.
    - The Appeal/CJEU Reference Stage is c.€462,000 per case, of which approximately 58% (c.€270,000) of the total cost is made up of payment to the Judicial Review applicant and the remaining approximately 42% (c.€192,000) is made up of payment to the Board's own legal advisers.
- The Board's individual case dataset also contains data for two cases in which the Board was successful. This illustrates that there is a cost to the Board in defending cases even when it is successful, and cost recovery from Judicial Review applicants in planning and environmental cases is limited (if at all).
- The data on types of applicants in the Board's individual case dataset shows that commercial applicants for development or commercial third parties that bring Judicial Review proceedings incur costs at a similar level (albeit higher at Leave Stage) to other applicants for Judicial Review. Where commercial entities are unsuccessful in planning and environmental cases and avail of costs protection or are eligible for a legal aid scheme, significant legal costs (of the nature outlined above) will be incurred.
- For the purposes of this report, a basic calculation was carried out to determine the average cost per day of a hearing simply by dividing the total costs by the number of hearing days. Again, bearing in mind the limitation in size of the Board's individual case dataset, there was a range of average costs per day's hearing, from €34,000 per day for an uncomplicated case in the High Court up to €214,000 per day for a complex case that reaches Appeal Court/CJEU

Stage. The average total cost per day, combining all the data for High Court hearings and Appeal Court/CJEU hearings, was €90,760 per day. These figures include the Board's own costs and the Judicial Review applicant's costs.

- The analysis of the Board's overall legal spend dataset showed the following:
  - The number of cases issued against the Board in 2022 (95 cases) was over five times what it was in in 2012 (17 cases).
  - The Board's overall legal spend has increased year on year during the period 2012 to 2022 (except for a flat-line period during 2016 to 2019).
  - The Board's overall legal spend increased from €1,067,818 in 2012 to €10,012,496 in 2022 (these figures are not adjusted for inflation).
- The Legal Costs Adjudicator's (the LCA) costs breakdown for two planning and environmental Judicial Review cases – *Friends of the Irish Environment v An Bord Pleanála* 2018/734 Judicial Review[13] and *Peter Sweetman v Environmental Protection Agency* 2017/644 Judicial Review[14] – are, on the whole, consistent with the breakdown of stages in equivalent cases in the Board's dataset and suggest that the conclusions drawn from the Board's data are reliable. In addition, the Environmental Protection Agency (EPA) (as opposed to the Board) was a respondent in the *Sweetman* case, so it provides an additional assurance that the results for the Board's dataset are reliable. The remaining LCA determinations that were obtained in respect of Judicial Reviews were useful, but not as closely comparable to the Board's dataset. The figures suggest that a respondent might expect to pay between €150,000 - €320,000 where it loses/concedes a complex 3 - 4 day hearing in the High Court, whereas the loss/ concession of a less complex 1 day hearing in the High Court might incur costs <€65,000. A reference to the CJEU might add upwards of €30,000 to the costs claimed by a Judicial Review applicant (and similar in respondent's costs).
- In the United Kingdom there is no equivalent publication of adjudication decisions, however a sample of costs decisions from the UK Administrative Division of the High Court was analysed. This revealed that the costs caps in planning and environmental Judicial Review cases (£5,000 for an individual applicant, £10,000 for a commercial applicant and £35,000 for a respondent) are routinely applied, but depending on the circumstances can be revised upwards or downwards. For example, in two cases the Court found that individual claimants had *"substantial resources"* and *"considerable wealth"* and the costs caps were revised upwards to c.£25,000 – £30,000. In another case, a claimant did not object to the costs cap being revised upwards on account of a pledge from neighbours that exceeded the costs cap. In addition, there is a recommended scale of fees which solicitors charge depending on the grade of fee earner and their location. There is no public scale of solicitors' fees to compare this with in Ireland. The Senior Courts Costs Office (the SCCO) also provides a scale of fees (for appeals) for counsel in the UK, which suggests slightly higher figures to what is seen in LCA decisions in Ireland.

[13] Adjudication reference number H: LCA: OLCA: 2022:00520.

[14] Adjudication reference number: H: LCA: OLCA: 2021:000014.

Analysis of Legal Costs in Comparative Jurisdictions

For ease of comparison, the jurisdictions assessed have been summarised in the Table below.

Jurisdiction	Costs Regime in Planning and Environmental Cases	Summary Note
United Kingdom (England, Wales, Scotland, Northern Ireland)	Cost capping of £5,000 for an individual applicant, £10,000 for a commercial applicant and £35,000 for a respondent, but these can be varied up or down by the Court.	1. In the United Kingdom, there are procedural rules for civil cases that involve an *"Aarhus Convention Claim"*, which are broadly similar across England, Wales, Scotland and Northern Ireland. 2. An Aarhus Convention Claim means a claim brought by one or more members of the public by Judicial Review or review under statute, which challenges the legality of any decision, act or omission of a body exercising public functions and which is within the scope of Article 9(1), 9(2) or 9(3) of the Convention. 3. The UK Courts have also held that the imposition of some kind of reciprocal limit upon a respondent's liability for costs is not necessarily inconsistent with Article 10a of the EIA Directive (which implements NPE). 4. The UK Courts have considered the test for what is NPE and decided (with the assistance of a reference to the CJEU) that it is not purely subjective. The cost of proceedings must not exceed the financial resources of the person concerned nor *'appear to be objectively unreasonable'*. This phrase was not defined, but it seems that it is applied to the particular circumstances of the applicant in a case and based on any financial evidence provided. The Court can also take into account the merits of the claimant's case, including the prospect of success, the importance of the case for the environment, the complexity of the law and the potentially frivolous nature of the claim.

Jurisdiction	Costs Regime in Planning and Environmental Cases	Summary Note
Belgium	Losing party bears costs (flat rate contribution to Court fees and lawyers' fees are variable).	1. In Belgium, an appeal of a regional decision is brought to the Council of State and generally the losing party in a case taken at that level has to pay a flat-rate for the Court fees. The lawyers' fees of the successful party are variable. 2. The Court takes into account the individual's financial capacity, the complexity of the case and the reasonable nature of the situation when deciding on the level of costs to award. 3. Claims before the ordinary Courts in Belgium (such as actions against private individuals or entities) are subject to a scale of fees measurable by the value of the claim in monetary terms. The ACCC has found that this flat-rate contribution towards costs, which can be adjusted between a maximum and minimum by the judge, was not in contravention of Article 9(4) of the Convention.
Netherlands	Losing party does not have to bear costs unless *"manifestly unreasonable"*.	1. Court fees for administrative cases range from €131 to €532 depending on the Court. 2. Legal counsel is not mandatory. 3. The losing party does not have to bear the costs in administrative cases, unless in the case of a *"manifestly unreasonable"* action.
Spain	Losing party bears costs, but judicial discretion to grant exemptions.	1. Legal costs depend on the value of the object of the case and NPE is not expressly stated in law, but it does form part of the legal order and there is judicial discretion to grant exemptions from the obligation to pay costs. 2. Typically, the losing party bears the costs if their claim is dismissed, unless there are circumstances justifying the contrary. 3. The ACCC has found that it would be contrary to the Spanish legal order for a Non-governmental Organisation (NGO) with recognised legal aid status to pay Court fees. 4. The ACCC also found that Spanish thresholds that allowed public utility companies to avail of legal aid was contradictory.

Jurisdiction	Costs Regime in Planning and Environmental Cases	Summary Note
Malta	Losing party bears the costs, but judicial discretion to vary.	1. The losing party typically bears the costs, which in administrative cases can be €150 to €3,500 (€1,000 for NGOs) for Court fees and €2,500 to €10,000 for lawyers' fees depending on the complexity of the case. 2. The judge has discretion to award and apportion costs as they deem fit.
Italy	Losing party bears the costs, but judicial discretion to vary.	1. Losing party in administrative cases generally required to bear the costs. 2. Costs can vary widely (from €4,000 to €150,000 depending on the subject matter and lawyers' fees). 3. There is no express implementation of NPE, but there is judicial discretion to limit the losing party's liability where the costs claimed are *"excessive or unnecessary"*.
Sweden	Losing party does not have to bear costs.	1. No obligation to pay an opponent's costs whether it is an administrative appeal or it is in Court. 2. The responsibility for making a decision lies with the administration and the environmental Courts, which both have technicians participating in the decision-making. 3. It is an inexpensive and easily accessible process for the public.
France	Losing party bears the costs, but judicial discretion to vary.	1. In administrative cases the payment of legal costs is at the discretion of the judge and whilst typically the losing party bears the costs, this can be adjusted according to equitable principles and the economic situation of the parties. 2. Often NGOs that lose cases are not required to pay costs. 3. Barrister's fees are the responsibility of each party and are generally required for higher Courts and Judicial Review.

Legal Aid and Assistance Mechanisms in Ireland and Other Jurisdictions

Jurisdiction	Legal Aid / Assistance Mechanisms	Summary Note
Ireland	The Court has discretion to depart from the normal rule that costs follow the event. Legal aid is available for natural persons in planning and environmental cases.	The Court can award costs to an unsuccessful applicant *"having regard to the particular nature and circumstances of the case"*. In Ireland, there is a high bar to an unsuccessful litigant seeking to persuade a Court to exercise its jurisdiction to award costs in their favour and only happens in exceptional circumstances. Applicants must meet stringent requirements for qualification including an assessment of the merits of the case. Legal aid is means tested and in order to qualify, a person must have an annual disposable income of <€18,000 and disposable assets of <€100,000. There is a limited budget for civil legal aid in Ireland with the vast majority of applications relating to family law and international protection matters.
UK	Legal aid is available for natural persons in planning and environmental cases.	Applicants must meet strict financial eligibility criteria (<£8,000 capital, <£2,657 gross income per month, <£733 disposable income per month or in receipt of certain state benefits). An applicant for legal aid must also demonstrate that the proceedings benefit them, their family or the environment.
Belgium	Legal aid is available for natural persons in environmental cases.	Applicants with insufficient financial resources may be appointed barristers to assist with proceedings. The Belgian system also contains provisions to exempt such persons from the payment of Court costs.
Netherlands	Legal aid is available for natural persons in environmental proceedings.	Applicants of limited means may be granted legal aid including representation by a lawyer in litigation. Persons may be required to pay a contribution depending on their financial circumstances.
Spain	Legal aid is available for natural persons, public interest associations and certain registered foundations in environmental proceedings.	Applicants must demonstrate a lack of sufficient economic resources to initiate litigation. The Courts have recognised a right to legal aid for qualified NGOs regardless of their economic resources.

Jurisdiction	Legal Aid / Assistance Mechanisms	Summary Note
Malta	Legal aid is available for natural persons.	Applicants must satisfy a merits test and a means test (property and disposable money no greater than €6,988 for the preceding 12 months and income for previous 12 months cannot exceed the national minimum wage for persons over 18).
Italy	Legal aid is available to natural and legal persons (non-profit) for environmental proceedings.	Applicants with an annual income of less than €11,493 can avail of legal aid which can cover Court fees and lawyers' fees.
Sweden	Legal aid is available to natural persons for environmental proceedings.	Legal aid can cover advice and Court fees. Grants are available from state bodies to NGOs for environmental legal action.
France	Legal aid is available to natural and legal persons for environmental proceedings.	Applicants are subject to an assessment of the merits of the claim and their financial resources. In 2021, reference taxable income could not exceed €11,262 for full legal aid and €16,890 for partial legal aid. The financial assessment also takes into account moveable (e.g. savings) and certain immoveable (e.g. property which is not the main residence) assets and the income and assets of other members of the applicant's household.

1.0 - Introduction

1.1 Context and Scope of Report

Fieldfisher was engaged by the Office of the Planning Regulator (the OPR), pursuant to the OPR's powers under Section 31Q(3) of the 2000 Act to conduct research into legal costs in environmental litigation. This arises on foot of a request from the Minister for Housing, Local Government and Heritage to undertake research to develop a synthesis of evidence on legal costs in Judicial Review proceedings of environmental matters. The OPR set the research objectives to collate data, information and legal research, including an overview of the costs incurred in environmental Judicial Reviews currently and a comparative analysis with other countries.

By way of context to the request, the current draft Planning and Development Bill 2022 (the 2022 Bill), as of mid-October 2023, proposes to change the existing rules of costs in environmental litigation under Section 50B of the 2000 Act, such that:

a) The Court shall make no order as to costs in any proceedings relating to non-compliance with national or EU law relating to the environment, unless the Court considers that the proceedings are frivolous or vexatious or an abuse of process; and

b) The Minister for the Environment, Climate and Communications shall establish an administrative scheme to deal with the costs of such Judicial Review proceedings.

With this in mind, the OPR has specifically requested the following:

- An overview of the operation of the legal costs system in Ireland in the context of Ireland's obligations under the Aarhus Convention and EU public participation policy, with specific regard to the existing protected costs provisions under Section 50B of the 2000 Act as regards Judicial Review cases.
- Data gathering and analysis of trends over time in relation to the costs of planning and environmental Judicial Review cases between 2012-2022 where applicants have received costs and where respondents have not recovered costs (due to protected costs orders being in place).
- A comparative analysis of the operation of relevant common law jurisdictions in relation to the obligations above.
- An examination of protected costs mechanisms from a small sample of other relevant jurisdictions and a summary of relevant precedents noting their efficacy and transferability to an Irish context.
- Conclusions from the above in relation to effective operation of public participation in the protection of the environment in the planning process.

1.2 Research Methodology and Data Sources

Fieldfisher has undertaken a detailed quantitative and qualitative assessment of data and information relating to costs in environmental litigation from a range of sources, including:

- The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention or the Convention).
- Relevant judgments of the Superior Courts of Ireland, England & Wales, Scotland, Northern Ireland and Spain.
- Relevant judgments of the Court of Justice of the European Union (CJEU).
- Recommendations of the Aarhus Convention Compliance Committee (ACCC).
- Data on costs in respect of concluded Judicial Review proceedings provided by An Bord Pleanála (the Board).
- Publicly available judgments relating to Judicial Review proceedings from the website of the Office of the Legal Costs Adjudicators (the LCA) of the High Court of Ireland and the Senior Courts Costs Office in England & Wales.
- A range of academic texts, judgments, ACCC recommendations, and other literature, relating to Ireland, UK, Belgium, Netherlands, Spain, Malta, Italy, Sweden and France. Sources of information for these jurisdictions were also gathered with the assistance of lawyers in the Fieldfisher Belgium office in relation to that jurisdiction.

2.0 - Costs Protection Background

2.1 The Aarhus Convention

The Aarhus Convention was made under the auspices of the United Nations Economic Commission for Europe (UNECE) and it was signed by Ireland on 25 June 1998 and ratified on 20 June 2012. The Convention has been ratified by 47 parties[15] mainly countries from Europe and Central Asia. The EU is also a party to the Convention and formally approved it on 17 February 2005. Before this, measures required to incorporate Article 9(2) and Article 9(4) of the Convention into European Community Law were adopted by Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (the 2003 Directive). The 2003 Directive described itself as contributing to the implementation of the obligations arising under Aarhus and transposed the NPE requirement of Article 9(4) of the Aarhus Convention into EU law.

The 2003 Directive introduced a number of Aarhus Convention provisions relating to public participation and access to justice by way of amendment to the EIA Directive.[16]

In relation to access to justice, the provisions required Member States to ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law or another impartial body to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive and that any such procedure shall be fair, equitable, timely and NPE.

A similar provision was introduced into Directive 96/61/EC concerning integrated pollution prevention and control (IPPC).[17]

These legislative provisions introduced by the 2003 Directive reflect the import of Article 9(2) of Aarhus, but not Article 9(3).

Member States, including Ireland, were required to bring the provisions of the 2003 Directive into force in domestic law by June 2005. Ireland's compliance with these obligations was the subject of enforcement proceedings by the European Commission resulting in a decision by the CJEU in *Commission v Ireland* as to Ireland's compliance.[18] This decision is considered further below.

[15] United Nations Treaty Collection, Chapter XXVII, UNTC

[16] This version of the EIA Directive (85/337/EEC) was repealed and replaced by Directive 2011/92/EU. It was subsequently amended by the 2014/52/EU Directive. The NPE provisions are also contained in the extant version.

[17] Later codified in the IPC Directive (2008/1/EC) which was then absorbed into Directive 2010/75/EU (the Industrial Emissions Directive).

[18] The Commission's enforcement proceedings also related to Ireland's non-compliance with aspects of the EIA Directive in relation to private roads development, the definition of *'the public concerned'* and the timely transposition of certain other provisions of the 2003 Directive but these matters are not directly relevant for the purposes of this report and are not considered further.

2.2 The Three Pillars of the Aarhus Convention

One of the key objectives of the Convention is to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, guaranteeing the rights of access to information, public participation in decision-making, and access to justice in environmental matters. The three main pillars of the Convention can be found in the following articles:

1) Articles 4 and 5 - access to environmental information,

2) Articles 6, 7 and 8 - public participation in decision-making, and

3) Article 9 - access to justice (set out in full form in Annex A to this report).

2.3 The Access to Justice Pillar

This report primarily focuses on the access to justice pillar. There are, broadly, three categories of case that are covered by the access to justice provisions.

First, under Article 9(1), a review of a decision on access to environmental information under Article 4. These types of decision are not the focus of this report, nonetheless it is important to note that statutory appeals of such decisions would be covered by the Convention.

Secondly, under Article 9(2), a review of the substantive or procedural legality of any decision, act or omission that is subject to the provisions of Article 6 (i.e. decisions on whether to permit projects listed in Annex I to the Convention, other activities where public participation is provided for under an EIA procedure in accordance with national legislation and to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment). Article 9(2) is subject to the members of the public concerned having a sufficient interest or showing the impairment of a right in accordance with the requirements of national law (although any NGO meeting the requirements of Article 2(5) shall be deemed sufficient).

Thirdly, under Article 9(3), access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. This category is not limited to challenges in respect of decisions on projects of the kind specified in Annex I or Article 6(1)(b) of the Convention and provides for a broader overlapping right vested in all members of the public. However, it is subject to meeting criteria laid down in national law.

Article 9(4) then provides that the procedures referred to in Articles 9(1), 9(2) and 9(3) shall provide adequate and effective remedies (including injunctive relief) and must be fair, equitable, timely and NPE. For the purposes of this report, NPE is the key provision.

In summary,[19] Article 9(4) applies NPE to two different forms of review procedure as described in Articles 9(2) and 9(3). Generally speaking, Article 9(2) operates where there is a challenge to the legality of a *'decision, act or omission'* as to proposed activities that may have a significant effect on the environment coming within the scope of Annex I or Article 6(1)(b) of the Convention. Persons with an interest or maintaining an impairment of a right must be allowed to challenge the substantive or procedural legality of such a decision. Article 9(3), in contrast does not refer to *'decisions'* and expressly extends to activities of private persons. It requires that the public have access to procedures to challenge *"acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"*.

[19] See *Heather Hill v An Bord Pleanála* [2022] IESC 43, paragraphs 166-171.

The combined effect of Article 9(2) and Article 9(3), however, is that NPE applies to any proceedings based on national environmental law challenging a development consent process, irrespective of whether that comes in whole or in part within the narrow scope of Article 9(2) or the broader scope of Article 9(3).

Ireland is a dualist legal system, which means that international agreements, such as the Aarhus Convention, do not have the force of law unless they are implemented into national law, usually by means of an Act of the Oireachtas.[20] International agreements do not have higher status than ordinary legislation, but the legal status of the Aarhus Convention is complicated by its adoption and partial transposition via EU law, given that EU law does have a higher status in domestic law.[21]

In Ireland (and in the UK) Judicial Review is a fundamental cornerstone of public administration enabling the High Court to ensure that administrative decisions, including those made by public bodies that affect the environment, are made in accordance with law. The common law legal tradition has, by contrast with civil law tradition systems, historically favoured a *"party-led"* approach both to the preparation for trial of a civil dispute – in identifying the facts relevant to the dispute and the legal issues deriving from those facts – and to the conduct of the trial itself, including the nature and extent of the evidence to be offered, and the extent to which expert witnesses will be relied upon.[22] In civil law jurisdictions, the mechanism for judicial oversight of the decisions of public bodies is varied and different, with the result that the cost of availing of judicial oversight of such a decision can be very different in those jurisdictions (on the whole much lower as discussed in the comparative jurisdiction see section 4 below).

2.4 The Aarhus Convention Compliance Committee (the ACCC)

The ACCC was established in October 2002, pursuant to Article 15 of the Convention, for the purpose of reviewing compliance with the Convention on a non-confrontational, non-judicial and consultative basis. Therefore, findings and recommendations of the ACCC are not legally binding in the same way as a judgment of a national or EU Court, however they are binding on the parties to the Convention to whom they are addressed.

The compliance mechanism may be triggered in a number of ways, including by way of a submission by a party to the Convention about another party or about itself, a communication from a member of the public, a referral by the secretariat, or a request for a meeting of the parties to the Convention. The ACCC may also examine compliance issues on its own initiative and make recommendations.

[20] Article 29.6 of the Constitution of Ireland *"No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas"*.

[21] Article 29.4.6 of the Irish Constitution.

[22] Review of the Administration of Civil Justice Report, The Hon. Mr Justice Peter Kelly, Chairperson, October 2020, p.10.

If the ACCC adopts a finding of non-compliance it can either make a recommendation directly to the party concerned, or transmit the recommendation to a meeting of the parties. The meeting of the parties will make a decision on the measures aimed at bringing about full compliance, and thereafter the non-compliant party is requested to implement the decision and make progress reports on compliance at regular intervals. The ACCC prepares periodic progress reviews, which are considered at subsequent meetings of the parties and the party concerned and other observers may be invited to participate in discussions on the progress made and the remaining challenges. Once the party concerned is found to have fully met the ACCC's recommendation, the meeting of the parties will be invited to endorse the ACCC's findings and the matter will be at an end. If the party concerned fails to fully address an outstanding non-compliance, the meeting of the parties may, in exceptional circumstances, issue a caution to that party.

2.5 Different Implementation by Aarhus Parties (including the EU)

The provisions of the Aarhus Convention have been implemented by the parties in different ways. The Aarhus Implementation Guide[23] notes at pp. 203 that *"the Convention sets an obligation of result, which allows the parties great discretion in how to proceed, but limited discretion in what to achieve"*. The guidance notes that various mechanisms, including waivers and cost-recovery mechanisms, are available to the parties to meet the NPE obligation. Given the drastically different legal systems across the parties to the Convention and the wide discretion afforded to parties in implementing the NPE requirements, it is unsurprising that there is a significant divergence in approach to implementation across the parties' legal systems.

The ACCC has held that when assessing costs under the Article 9(4) requirements, *"it considers the costs system as a whole and in a systematic manner"*.[24]

2.6 Difference Between Civil and Common Law Jurisdictions to Judicial Review of Planning/Environmental Decisions and How This Affects Legal Costs (including the Costs of Running the Legal Service)

The Review of Administration of Civil Justice Report, October 2020[25] (the Peter Kelly Report) states *"Ireland is a very high-cost litigation jurisdiction, especially by European standards"* and notes that *"the high cost of litigation is a matter of far greater concern to litigants in Ireland than in most other European countries with which we have been compared on this criterion"*.[26] These conclusions are however strongly contested in a report[27] entitled *'Analysis of the impact of proposals to reduce legal costs in Ireland'* prepared by Ernst & Young (EY) on behalf of the Bar of Ireland and the Law Society of Ireland (the EY Report). The EY Report states at p. 11 *"although a range of assertions have been made in a number of state sponsored reports over two decades about the high cost of litigation in Ireland, the evidential basis for such claims is limited and dated"*. The EY Report notes that care should be taken when attempting to rank countries by the direct cost of litigation, without considering the indirect cost to the taxpayer of funding the legal system in place.

[23] Aarhus_Implementation_Guide_interactive_eng.pdf (unece.org)

[24] ACCC/C/2008/33 (United Kingdom of Great Britain and Northern Ireland).

[25] https://www.opr.ie/wp-content/uploads/2023/10/100652_b58fe900-812e-43f2-ad8d-409a86e7c871.pdf

[26] Peter Kelly Report, p. 317

[27] https://www.lawlibrary.ie/app/uploads/securepdfs/2022/07/EY-Report-on-Legal-Costs.pdf

In this regard, the EY Report notes that the EU average for professional judges per 100,000 inhabitants is 21.5 whereas the figure is 3.4 in Ireland and 3.1 in the UK. It is further noted that the justice system expenditure per inhabitant in Germany and the Netherlands is approximately double that in Ireland.[28]

Whilst there are evidently competing views between the Peter Kelly Report and the EY Report as to whether Ireland is a high-cost litigation jurisdiction, the data contained in the EY Report in relation to the comparison between the number of judges in certain common and civil law jurisdictions suggests that the wider costs of litigation may be greater elsewhere in the legal system in civil law jurisdictions compared with Ireland.

Therefore, comparing civil and common law jurisdictions solely on the basis of legal costs may not provide a full picture of the comparative costs of administering justice in different jurisdictions. If Ireland was to implement the kinds of administrative law procedures found in civil law jurisdictions, this would likely require systemic changes to the judicial system and the nature of the litigation.

2.7 Current Application of Article 9 of the Convention in Ireland

The starting point in any application for legal costs in Ireland's domestic system is that costs follow the event.[29] However, the principle that costs follow the event can be modified in a number of ways including by domestic legislation where more specific rules apply, by EU-based rules on costs in environmental matters and in the exercise of the Court's discretion under Order 99 of the Rules of the Superior Courts.[30]

Significant litigation in relation to Protective Costs Orders (PCOs) in environmental cases has taken place in recent years culminating in the Supreme Court's decision in *Heather Hill v An Bord Pleanála* [2022] IESC 43 *('Heather Hill')* in November 2022. This brought some clarity to matters albeit that decision primarily related to how the State has implemented certain provisions of Aarhus rather than determining what is the required level of costs protection under International and EU law. There have been several significant CJEU decisions predating *Heather Hill,* following references from the Irish Superior Courts including *Commission v Ireland*[31] and *North East Pylon Pressure Campaign*[32] (*NEPPC).* These are crucial to understanding Ireland's obligations under the Aarhus Convention and EU law and are referred to extensively in the Supreme Court's judgment in *Heather Hill.* These decisions are considered briefly below.

2.7.1.1 Commission v Ireland C-427/07

The Commission contended that Ireland had failed to properly implement, *inter alia*, the NPE provisions of the 2003 Directive which inserted certain provisions into the EIA Directive and the IPPC Directive. The State had made no express provision in domestic law to give effect to the relevant provisions but argued that the discretionary power of the Courts to exempt a party from costs orders arising from Order 99 of the Rules of the Superior Courts was sufficient to enable effect to be given to the 2003 Directive.

[28] EY Report, p. 33.

[29] *Dunne v Minister for the Environment* [2007] IESC 60 [2007] 1 I.L.R.M. 264 [2008] 2 I.R. 775.

[30] Superior Courts Rules | The Courts Service of Ireland, Order 99, effective 3 December 2019

[31] Case C-427/07 *Commission v. Ireland* ECLI:EU:C:2009:457.

[32] Case C-470/16 *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála* ECLI:EU:C:2018:185.

The Commission argued that, in relation to the Irish Courts' discretionary power, there was no applicable ceiling as regards the amount that an unsuccessful applicant will have to pay, as there was no legal provision that requires the procedure to be NPE. The CJEU decided that such provision only gave rise to *"merely a discretionary practice"* which it found did not suffice to ensure that such proceedings were NPE for the purpose of Article 10a of the 2003 Directive as the discretionary powers lacked certainty for applicants. The CJEU indicated however that the requirements introduced by the 2003 Directive did not prevent the Courts from making an order for costs provided that the amount of those costs complies with the NPE requirement.

2.7.1.2 North East Pylon Pressure Campaign Ltd v An Bord Pleanála – Case C-470/16

The preliminary reference to the CJEU related to proceedings in the High Court concerning a challenge to the development consent process for an application for permission to erect electricity pylons. The parties disagreed as to whether the costs protection provisions under the Aarhus Convention and EU law applied. Humphreys J referred a number of questions to the CJEU arising from the interrelationship between Article 11(4) of Directive 2011/92,[33] the Aarhus Convention and the provisions of Irish law implementing same. One of the questions addressed the scope of the requirement in Article 11(4) that the procedure provided was NPE.

The following principles of relevance can be taken from the CJEU judgment:

- The NPE requirement also applies to the Leave Stage of Judicial Review proceedings.
- Where an applicant raises both pleas under Article 11(4) of the Directive 2011/92 alleging infringement of the rules on public participation and pleas alleging infringement of other rules, the NPE requirement applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation[34] (i.e. costs splitting as between grounds of challenge is permissible).
- Where the application of national environmental law is at issue in a field covered by EU environmental law, it is for the national Court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and 9(4) of the Convention so that judicial procedures are NPE.
- A Member State cannot derogate from the requirement that certain judicial procedures be NPE where a challenge is deemed frivolous or vexatious or where there is no link between the alleged breach of national environmental law and damage to the environment.
- The CJEU in *NEPPC* suggests that Article 9(4) insofar as it applied to Article 9(2) was limited to challenges that related to the public participation provisions in Article 6.[35]
- Article 9(3) has been given an expansive interpretation by the CJEU, finding that Articles 9(3) and 9(4) had the effect that NPE *"must be regarded as applying to a procedure intended to contest, on the basis of national environmental law, a development consent process"*. This reflects the interpretation suggested in the Aarhus Implementation Guide (at pp. 197-199).

[33] *NEPPC and Anor v An Bord Pleanála and Ors (no. 2)* [2016] IEHC 300.

[34] The Court indicated that by making an express reference solely to the public participation provisions of that Directive in Article 11(1) of the EIA Directive, the EU legislature must be regarded as having intended to exclude from the NPE requirements challenges based on any other rules set out in that Directive and on any other legislation whether of the EU or Member States. It is for a national Court to distinguish on a fair and equitable basis between the costs relating to each of the two types of arguments so as to ensure that the NPE requirements are satisfied in relation to the part of the challenge based on the rules on public participation – *NEPPC* C-470/16, paragraphs 39 – 43.

[35] This was contrary to the Advocate General's Opinion and the CJEU's reasoning was described by the Supreme Court in *Heather Hill* as *"cryptic"*.

2.7.2 Domestic Legislation Giving Effect to the Convention

The NPE provisions of the Aarhus Convention are given effect in the State's domestic law primarily in the following manner:

- Section 50B of the Planning and Development Act 2000, as amended
- Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011

These provisions are considered in turn below together with a consideration of the Court's discretion under Order 99 of the Rules of the Superior Courts which is relevant to the Court's interpretative obligation where there would otherwise be a lacuna in the domestic legal framework.

2.7.2.1 Section 50B of the 2000 Act

Section 50B of the 2000 Act imposes a default rule of no order as to costs for proceedings to which it applies. Section 50B(2A) of the 2000 Act provides for an applicant to be awarded costs to the extent that the applicant succeeds in obtaining relief and any of those costs are to be borne by the respondent or notice party, or both, to the extent that their actions or omissions contributed to the applicant obtaining relief.

The costs protection provisions in Section 50B apply to any challenge to a decision made pursuant to a statutory provision which gives effect to the listed Directives.[36] This includes any decisions made pursuant to Section 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016 as well as decisions under Sections 34 and 37 of the 2000 Act.

Following the Supreme Court's judgment in H*eather Hill v An Bord Pleanála* [2022] IESC 43, it is clear that in Ireland the costs protection provisions of Section 50B apply to the entirety of the relevant proceedings and not just those individual grounds of challenge relating to certain EU environmental law Directives.

2.7.2.2 Environment (Miscellaneous Provisions) Act 2011 (EMPA)

The Environment (Miscellaneous Provisions) Act 2011 was intended to make provision for the costs of certain proceedings but also to give effect to certain Articles of the Aarhus Convention.

Sections 3 and 4 of EMPA are the relevant provisions in respect of the costs of certain environmental proceedings. Section 3(1) provides that, subject to certain exceptions, in applicable proceedings there is no order as to costs. In common with Section 50B of the 2000 Act, costs may be awarded in favour of the applicant or plaintiff to the extent they retain relief against the Respondent, defendant or any notice party. The scope of Section 3 (i.e. the applicable proceedings) is defined in Section 4(1) of EMPA as civil proceedings[37] instituted–

[36] *Heather Hill v An Bord Pleanála* [2022] IESC 43 at paragraph 213.

[37] Section 3 of EMPA does not apply to the authorisations listed in Section 4(3).

> *"4(1)(a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement specified in or attached to a licence, registration, permit, permissions, lease, notice or consent specified in subsection (4), or*
>
> *(b) in respect of the contravention of, or the failure to comply with such licence, registration, permit, permission, lease, notice or consent*
>
> *and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b) has caused, is causing or is likely to cause, damage to the environment."*

In summary, proceedings are covered under (a) or (b) where *"as a matter of reality and substance, the proceedings are for the purpose of ensuring compliance with or enforcement of either a statutory provision or condition"*.[38]

If an action falls within the scope of Section 3, at the conclusion of the proceedings one of the following things may occur depending on the circumstances:

i. If the applicant for the relief succeeds in his/her claim he/she may recover some or all of his/her costs (Section 3(2) of EMPA).

ii. If the case is one of exceptional public importance, the applicant for such relief may also recover his/her costs in accordance with established case law even if unsuccessful (Section 3(4) of EMPA). [Emphasis Added]

iii. If the applicant's claim or counter-claim is frivolous or vexatious or if the applicant conducts the proceedings in a way that justifies an order for costs against him/her or if he/she is in contempt of court, an order may be made against him/her (Section 3(3) of EMPA).

In all other cases, the Court must make no order as to costs pursuant to Section 3(2) of EMPA and has no discretion in this regard.

The requirement in Section 4(1) of EMPA that an applicant demonstrate that the contravention or non-compliance has caused, is causing or is likely to cause environmental damage is contrary to EU law.[39] This does not mean that the provision must be treated as invalid. The Court's preferred approach[40] is to apply the section to the cases covered by the relevant legislation, and for those cases where the provisions cannot be applied, the Court should take the policy of those sections into account in implementing the NPE rule and in exercising the discretion as to costs, so as to produce a similar result as if those sections did apply but for the link to environmental damage.

The NPE provisions of EMPA were considered by the Court of Appeal in *O'Connor v Offaly County Council* which is considered further in section 2.7.3.2 below.

[38] Per Finlay Geoghegan J. in *CLM Properties Ltd v Greenstar Holdings Ltd & Ors* [2014] IEHC 288.

[39] *NEPPC*, C-470/16, paragraph 65 and *NEPPC* No. 5 High Court paragraph 16.

[40] *NEPPC* No. 5 High Court paragraph 47(ii).

Order 99 Rules of the Superior Court and the Interpretative Obligation:

The interpretative obligation arises where grounds of challenge concern European environmental law or national environmental law within the field of European environmental law and require a Court, as far as possible, to achieve a *"not prohibitively expensive"* outcome pursuant to Article 9(3) and 9(4) of the Convention.

The question of whether a national law is a *"law relating to the environment"* for the purposes of Article 9(3) of the Convention must be determined as a matter of substance rather than form. The measures sought to be enforced can properly be said, in any material and realistic way, to relate to the environment.[41]

Order 99 of the Rules of the Superior Courts, together with Sections 168 and 169 of the Legal Services Regulation Act 2015, provides the general framework for the Superior Courts to allocate costs in applicable proceedings.

Paragraph 2(1) of Order 99 provides that *"[t]he costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."*

This provides the Superior Courts with the necessary discretion to give effect to the NPE requirement where it arises pursuant to the interpretative obligation, where that is not otherwise provided for in domestic legislation.

The Court's discretion under Order 99 should be exercised to make no order as to costs in those cases which fall within the scope of EMPA but where the applicant is unable to satisfy the environmental damage requirement.

2.7.3 Key Domestic Case-Law Relating to Section 50B, EMPA and Order 99

2.7.3.1 Heather Hill Management Company CLG & Anor v An Bord Pleanála & Ors [2022] IESC 43

In the substantive proceedings, the applicants successfully challenged a decision of the Board to grant permission for a strategic housing development in Galway. The challenge was made on a number of grounds including the Habitats Directive, EU Floods Directive, material contravention of the Development Plan and issues with landowner consent.

The applicants argued that the entire proceedings attracted the protective costs rules under Section 50B of the 2000 Act. The Board and notice party accepted that costs protection applied to certain grounds but disputed that a Protective Costs Order (PCO) should be granted in relation to the remaining grounds. The applicants brought a motion seeking orders that:

- Section 50B applies to the entire proceedings;
- Sections 3 and 4 of EMPA apply to the proceedings; and
- Pursuant to Order 99 of the Rules of the Superiors Courts (RSC), as amended, and/or pursuant to the inherent jurisdiction of the Court, the Court should limit the sum to which the applicants shall be liable in the event they are unsuccessful in obtaining relief in the proceedings.

[41] *Conway v Ireland* [2017] 1 IR 53.

Mr Justice Simons in the High Court concluded that Section 50B applied to all grounds in the proceedings and that if he were wrong in this regard, having regard to the language of EMPA, costs protection under that legislation was subject to the restriction that it applied only where a failure to ensure compliance with or enforcement of a statutory requirement has caused, is causing or is likely to cause environmental damage. He was of the view that this would represent an incomplete implementation of the Aarhus Convention and therefore, if necessary, in cases that were not within the wording of that Act (EMPA), the solution was to use the Court's inherent jurisdiction as to costs under Order 99 to apply a similar approach to the costs protection provided for by EMPA.

The High Court's decision was appealed to the Court of Appeal. The Court of Appeal reversed the decision of Simons J, concluding *inter alia* that the special costs rules in Section 50B were intended to apply to those grounds of challenge which alleged a breach of the requirements of the Directives specified in the provision, but not to any other grounds in the proceedings. The Court of Appeal also determined that the interpretative obligation did not apply to the disputed grounds as they did not involve issues of *'national environmental law'*.

The Court of Appeal's decision was appealed to the Supreme Court which delivered a detailed judgment setting aside the Court of Appeal decision and reinstating the High Court's decision, to the effect that the provisions of Section 50B applied to the entirety of the proceedings and not just to individual grounds of challenge. This was based primarily on a literal interpretation of the provisions of Section 50B.

There is an acceptance by the Supreme Court that the provisions of Section 50B go further than the State is required to do so under the Convention and EU law. The Supreme Court notes that *"the State has clearly decided that the appropriate way in this jurisdiction to implement NPE is a no costs rule (as opposed to a rule that limits or enables the quantification of costs), and having done so there are strong reasons why it might conclude that a blanket rule is the easiest, most certain and (ultimately) least costly mechanism by which these debates can all be avoided."*[42]

Separately, the Supreme Court found that, even if Article 9(2) is subject to the limitations suggested by the CJEU in *NEPPC* (i.e. *"only applies to grounds relating to public participation"*), there is nothing in Article 9(3) to warrant a limitation of NPE by reference to grounds that invoke either the listed Directives, or other provisions of EU law. The Court held that insofar as the criterion of *'national law relating to the environment'* is a clear requirement of Article 9(3), that grounds alleging a material contravention of a development plan, the contravention of Ministerial guidelines regarding flood risk management or issues of landowner consent, are issues of national law relating to the environment. The Court found that whilst these grounds would not be covered by Article 11(4) of the EIA Directive, they are clearly within the scope of Article 9(3) of the Convention.

The Court went on at paragraph 175 to state *"The concept of 'national law relating to the environment' referred to in Article 9(3) is autonomous and intended to be given a broad, not a strict interpretation as evidence – if nothing else – from the use of the wide and general term 'relating to'"*.

[42] *Heather Hill* paragraph 151.

The Supreme Court considers the *'classic grounds of Judicial Review'* and concludes that these types of grounds are dependent upon and an inherent part of each statutory regime to which they are applied.[43] The Court went on to find that when the statutory scheme to which those classic grounds are attached is itself part of the State's environmental law, it follows that these Judicial Review grounds arise from that same body of law. Therefore, in the Supreme Court's view, if classic grounds of Judicial Review[44] challenge decisions under national law relating to the environment, those grounds fall within the scope of Article 9(3) of the Convention.[45]

The Supreme Court also considered one of the conclusions of the CJEU in *NEPPC* that there would be certain circumstances in which national Courts applying national environmental law would be required to give an interpretation to national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and Article 9(4) of the Convention.

The Supreme Court identified three possible versions of what those circumstances are:

a) that all issues of national environmental law trigger this obligation,

b) that it only applies to those issues arising from national legislation giving effect to EU law, and

c) that the obligation will apply more generally to national law in an arena in which the EU had legislated.

Having considered the relevant paragraphs of the CJEU decision in *NEPPC*, the Supreme Court stated that the interpretative obligation is one that arises only within those parts of national law that are in a *"[field] covered by EU environmental law"*. The Court noted that as the language used by the CJEU in *NEPPC* and the holding in *Slovak Brown Bear*[46] show, the question is not whether the specific ground engages a provision of a Directive per se, but whether it is functioning within a zone that has been significantly regulated by the EU.

The Supreme Court agreed with the analysis of Mr Justice Simons in the High Court that matters such as development plans and flood guidelines which are respectively matters which EU law regulates (by virtue of the Strategic Environmental Assessment (SEA) Directive and Floods Directive) but which are not themselves EU law provisions implemented into national law, are grounds within the field of EU environmental law. However, the Court acknowledged that the law was not clear and if it had to determine these matters, a reference would be required to the CJEU under Article 267. The Supreme Court's conclusions in relation to Section 50B meant that a reference was not necessary.

[43] *Heather Hill* paragraph 176.

[44] For example, a failure to take into account relevant considerations, acting unreasonably, failing to afford fair procedures and so forth (see *Heather Hill v An Bord Pleanála* [2022] IESC 43 paragraph 176).

[45] The Supreme Court also notes at paragraph 177 that this analysis reflects decisions of the Aarhus Convention Compliance Committee and the analysis of the UK Court of Appeal in *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ. 1539.

[46] Case C-240/09 *Lesoochranárske zoskupenie v. Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255.

2.7.3.2 O'Connor v Offaly Co. Co. [2020] IECA 72, [2021] 1 IR 1 (*O'Connor*)

The somewhat complicated provisions of Sections 3 and 4 of EMPA were considered by the Court of Appeal in *O'Connor*.

In the substantive proceedings, the applicant challenged, by way of Judicial Review, a decision of Offaly County Council to renew and/or not revoke a waste collection permit despite alleged past breaches of the permit and resultant pollution. The applicant sought a declaration to the effect that the respondent had failed to apply certain requirements of the Waste Management (Collection Permit) Regulations 2007. The applicant argued that Section 3 of EMPA applied to the proceedings while the respondent alleged that the threshold required under Section 4(1) of EMPA had not been met as no compliance or enforcement of the statutory requirement was in issue while the permit was granted.

The High Court held that the special costs provisions of Section 3 applied to the proceedings, finding that the scope of Section 4(1) was broad enough to include the proceedings, which sought to ensure compliance with a statutory requirement even where there was no permit issued under a statute, the conditions of which were claimed to have been breached.

The respondent appealed the costs decision to the Court of Appeal.

The Court of Appeal (Mr Justice Murray) held:

- Section 3 of EMPA applies to Judicial Review and the issue is not the form of the proceedings, but the nature of the relief claimed. However, not every Judicial Review will fall within the scope of EMPA.
- Section 4 of EMPA is limited by the object of the proceedings – they must be directed to ensuring compliance with those statutory requirements or must seek to enforce them.
- There is an important distinction between Sections 4(1)(a) and (b) of EMPA. Section 4(1)(a) is forward-looking and relates to claims intended to ensure compliance with, or to enforce a statutory requirement or a condition or other requirement in a specified authorisation.[47] Section 4(1)(b) of EMPA is directed to proceedings which are in respect of the contravention of or the failure to comply with a specified authorisation (but unlike Section 4(1)(a), not a statutory requirement).

In *Heather Hill*, Mr Justice Murray reiterated and endorsed his findings in *O'Connor* in relation to EMPA.

[47] A condition or other requirement specified in or attached to a licence, registration, permit, permission, lease, notice or consent specified in Section 4(4) EMPA.

3.0 - Legal Costs Data

In order to undertake an analysis of trends over time in relation to the costs of planning and environmental Judicial Review cases where costs have been awarded to applicants or where respondents have not recovered costs (due to protected costs orders being in place), the OPR requested information on legal costs incurred by the Board in managing these matters over the period 2012 to 2022. The Board was established in 1977 as an appellate body for decisions of local authorities and is the primary respondent to many planning and environmental Judicial Review proceedings in the High Court. Consequently, it holds a large amount of relevant data.

3.1 Methodology

The Board, very helpfully, in a short timeframe, provided a dataset comprising information from 46 cases[48] on legal costs paid to its own legal advisers and paid to applicants who were successful in all or part of a challenge to a decision of the Board (the individual case dataset).

The data received from the Board was in excel spreadsheet format. It included the following information about each of the 46 cases in the individual case dataset:

- The year the case was concluded;
- The stage of proceedings the case was concluded;
- The type of applicant for Judicial Review;
- The number of days the case was at hearing for (if it went to hearing);
- Whether the Board conceded, lost or won the case;
- The total costs paid to the Board's legal advisers (including counsels' fees, solicitors' fees and outlay); and
- The total costs paid to the Judicial Review applicant (including counsels' fees, solicitors' fees and outlay).

The individual case dataset mainly[49] contains data for cases that the Board has been unsuccessful in defending, because of the costs protection rules that now apply, but also the Board has noted that there has been limited costs recovery in recent years.[50]

The individual case dataset cases were split across three different stages of the Judicial Review process, as follows: A (Leave Stage), B (High Court Hearing Stage), C (Appeal or CJEU Reference Stage). The dataset comprises 17 Leave Stage cases, 21 High Court Hearing Stage cases, and 8 Appeal/CJEU Reference Stage cases. The purpose of dividing the data into these three stages was to assess average costs for each stage.

[48] Note, this was reduced to 44 cases as two cases were removed from the analysis as they were Leave Stage cases that had been contested, therefore incurring a hearing cost at Leave Stage and skewing the results.

[49] There are two cases in the individual case dataset where the Board was successful.

[50] Public Accounts Committee debate 27 April 2023 - Oonagh Buckley stated: *"Costs recovered are relatively limited. In 2018, we recovered a little over €500,000 in costs; in 2019, €241,000; in 2020, €181,000; and in 2021, €51,000. The numbers are relatively low relative to what we pay in legal costs."*

The data was also divided into the average payment made to the Board's own legal advisers and the average payment made to Judicial Review applicants for each of those three stages in order to provide a complete picture of the total cost of defending the cases. In particular, the data on the type of applicant was interrogated to determine the level of costs that commercial applicants for Judicial Review might incur, as under the current regime they also benefit from costs protection rules. Finally, the individual case dataset was also used to ascertain average figures for the cost per day of hearing a Judicial Review in the High Court and in the Appeal Courts/CJEU. The limitation on this data is the size of the dataset and therefore the average costs are only indicative.

Insofar as possible, the cases in the individual case dataset were distributed evenly across the period 2012 to 2022 (c.5 cases per year) to ensure that the data was not skewed by particular points in time and to ascertain any trend in costs over that time period. Due to limited availability, the dataset does not include data for 2012 or 2013, but includes more than five cases per year for 2016, 2017 and 2020.

The Board also provided a dataset of overall legal spend per year for the period 2012 to 2022, which was broken down in terms of payment to the Board's own legal advisers and payments to Judicial Review applicants (the overall legal spend dataset). The purpose of analysing this data was to ascertain any trends in costs over that time and to have visibility of the cost of defending and the cost of losing/conceding cases.

In order to provide context for the overall legal spend dataset, the Board also provided data in respect of the number of Judicial Review cases issued against the Board over the same period. Although the costs for cases issued in a particular year are not necessarily determined in the same year, and there is a lag period, nonetheless the number of cases issued will have a direct effect on the costs over time: more cases will increase the overall legal spend.

Conscious that the Board's data could potentially contain unique features or trends, the OPR sought out additional data from other bodies that are subject to Judicial Review in the planning and environmental sphere, by way of control samples for the purposes of analysis in this section of the report. In this regard, the OPR contacted the Chief State Solicitor's Office (CSSO) but its data was not readily available for use in this report.

In addition, Fieldfisher accessed the High Court Legal Costs Adjudicator's (LCA) website and, despite many of the adjudication decisions not being published, identified two determinations in respect of planning and environmental Judicial Reviews: one concerning a decision of the Board, and another concerning a decision of the EPA. These detailed LCA determinations are broken down into four or five stages of litigation, allowing comparison with the different stages identified in the Board's cases as set out above, and provide useful control samples for the Board's dataset. It should be noted that the Board's dataset includes some cases where the costs were subject to decisions of the LCA, albeit they are not public decisions and therefore there is no public breakdown of the figures.

This search also resulted in four less detailed LCA determinations in respect of other Judicial Review cases, two of which concerned planning and environmental Judicial Reviews with local authorities named as respondents. In these cases, the respondents were seeking their costs against the applicants whose cases had been dismissed (one of them being a lay litigant), and it is not clear that PCOs were sought or made. As these cases are potential outliers, the data that they provide has been given limited weight.

Finally, there are a number of ongoing applications for planning-related Judicial Reviews in respect of matters the OPR is involved in (as well as other respondents). Given that such litigation is at a relatively early stage and is ongoing, it is premature to draw conclusions on costs.

3.2 The Board's Dataset

The Board's dataset is relatively small (46 cases)[51] and with such a number there is always a danger of outliers or random numbers skewing the results. Where this is the case, the narrative identifies what has been included or excluded.

One apparent divergence between the two datasets is that the Board's own legal costs are less than the applicants' claims for costs in the individual case dataset, whereas in the overall legal spend dataset the Board's legal costs versus the applicants' legal costs are more evenly balanced. This reflects the fact that the individual case dataset largely comprises cases that the Board has lost[52] and had to pay out costs to applicants, whereas the overall legal spend dataset includes cases that the Board has won and not paid out any costs to applicants.

This, and other conclusions, are discussed further below.

3.2.1 The Individual Case Dataset

This data gives an idea of the average cost (albeit within the limited dataset of 46 cases) to a respondent of each stage of litigation in a planning and environmental Judicial Review. The respondent is the Board, being representative of the bulk of litigation costs for all planning decisions in Ireland, however this is cross-checked against other data for the EPA (below). The average costs are considered in total, and separately the costs paid out to the Board's own legal advisers and paid out to successful applicants.

The average figures for each of the three Stages looked at - A (the Leave Stage), B (the High Court Hearing Stage), C (the Appeal or CJEU Reference Stage) - are set out in Tables 1 and 2 below.

There is a range of scenarios for the Leave Stage (some cases will be conceded at the Leave Stage prior to leave being granted, others will not be conceded until much later when leave has been granted and opposition papers have been prepared) that will affect the quantum of costs incurred. These were grouped together as the main costs (applicant's counsel and professional fees in preparing for the leave hearing) are largely incurred once proceedings issue.

Similarly, there is a range of scenarios for the High Court Hearing Stage. For example, some cases could be conceded during the hearing, whereas others could proceed though full hearing and result in a Court order quashing the Board's decision often including costs hearings and hearings on final orders. Some cases could be heard in 1 day or less and other cases could be heard in 3-4 days or more, depending on the complexity of the subject matter or the legal issues.

Despite these differences, this data was grouped together, as once a case is set down for hearing the main costs (brief fees for counsel and professional fees for preparing the case for trial) are largely incurred. However, more information was sought from the Board as to the number of days the hearing lasted for in each of the cases as that was considered a variable that could significantly increase or decrease the gross sum claimed. This is discussed more below when considering the quantum of *"simple" and "complex"* cases. For the purpose of average figures, all of the data was kept grouped in order to provide an overall picture of costs across the range of cases provided.

[51] Note, this was reduced to 44 cases as two cases were removed from the analysis as they were Leave Stage cases that had been contested, therefore incurring a hearing cost at Leave Stage and skewing the results.

[52] The individual Case Dataset does include two cases that the Board won, but in one of those the Board did pay out some costs to the applicant and did not recover any costs in either.

There is also a range of scenarios for the Appeal/CJEU Reference Stage. Most cases that are appealed will include a certificate hearing for grant of leave to appeal, some could then proceed to the Court of Appeal and potentially the Supreme Court, or some could proceed straight to the Supreme Court by way of Leapfrog Appeal. Questions of law could, however, be referred to the CJEU by the High Court or an Appellate Court and could result in a decision based on written submissions only for which the costs would be quite low or alternatively involve a physical hearing in Luxembourg for which the costs would be higher.

This data was grouped together on the basis that all the cases in the dataset each seemed to comprise only one or other of these eventualities, so it was decided the costs would balance out and an overall picture of costs across the range of cases would be provided. However, a scenario where there is an appeal and a reference is quite possible, and this would result in higher than average costs.

Finally, in order to more accurately reflect average costs, the dataset was divided into cases conceded, cases lost and cases won by the Board. Two cases that were conceded after contested leave applications were excluded from this data, as they included hearing costs for the Board's own legal advisers which distorted the average costs. Three cases that were conceded at High Court or Supreme Court level were included in the cases *"lost"* as they included High Court hearing costs for the Board's own legal advisers and for the Judicial Review applicants which distorted the average costs. In essence, therefore, all the *"conceded"* cases only reached Leave Stage (insofar as that stage is categorised for the purpose of this report), and all the *"lost"* cases reached High Court and/or Appeal/CJEU Reference Stages.

Notably, the costs in the individual case dataset have not been adjusted for inflation.

3.2.1.1 Average Costs at Leave Stage

Stage	No. of Cases	Average of Total Costs	Average of Total Paid to Board's Legal Advisers	Average Payment made to Judicial Review Applicant	Average of ABP Costs as % of Total Costs	Average of Judicial Review Applicant's Costs as % of Total Costs	Average % Difference Between the Applicant's Costs and the Board's Costs
Leave	15	€39,756	€11,817	€27,939	30%	70%	136%

Table 1: Average Cost of Cases Conceded (at Leave Stage)

The conclusions drawn from Table 1 are as follows:

The average cost to the Board of the Leave Stage is c.€40,000 per case, of which 70% (c.€28,000) is made up of payment to the Judicial Review applicant, the remaining 30% (c.€12,000) is made up of payment to the Board's legal advisers. The costs paid by the Board to the Judicial Review applicant for the Leave Stage is 136% more than that which it pays its own legal advisers, which may be explained by the fact that the main costs incurred are on the applicant's side in preparing for the leave hearing. It should be noted that in this data there were two instances where the Board's own legal advisers' costs were c.€40,000 at the Leave Stage and the applicant's costs were c.€83,000 in one of the cases and c.€2,000 in the other, which significantly changes the average cost. It is assumed that these were contested leave applications where there was considerable work on the respondent's side in defending the cases at the Leave Stage. These cases were removed from the individual case dataset.

3.2.1.2 Average Costs at High Court Hearing and Appeal/CJEU Stage

Stage	No. of Cases	Average of Total Costs	Average of Total Paid to Board's Legal Advisers	Average Payment made to Judicial Review Applicant	Average of ABP Costs as % of Total Costs	Average of Judicial Review Applicant's Costs as % of Total Costs	Average % Difference Between the Applicant's Costs and the Board's Costs
High Court Hearing	20	€279,229	€99,693	€179,537	36%	64%	80%
Appeal/ CJEU Reference	7	€462,638	€192,342	€270,295	42%	58%	41%

Table 2: Average Cost of Cases Lost (High Court Hearing and Appeal/CJEU Stage)

- The average cost of the High Court Hearing Stage to the Board is c.€280,000, of which approximately 64% (c. €180,000) of the total cost is made up of payment to the Judicial Review applicant and the remaining approximately 36%(c.€100,000) is made up of payment to the Board's own legal advisers. On average, the costs paid to the applicant for Judicial Review is 80% higher than the costs paid to the Board's own legal advisers for a case that goes to High Court Hearing Stage.
- The average cost of the Appeal/CJEU Reference Stage to the Board is c. €462,000, approximately 58% (c. €270,000) of which is made up of payment to the Judicial Review applicant and the remaining approximately 42% (c. €192,000) is made up of payment to the Board's own legal advisers. It should be noted that these figures include the cost of a High Court Hearing, as well as the Appeal/CJEU Reference cost. On average, the costs paid to the applicant for Judicial Review is 41% higher than the costs paid to the Board's own legal advisers for a case that goes to Appeal/CJEU Reference Stage. It should be noted that this data includes five cases where the total costs are >€500,000 (including one where the total costs were €854,000), which significantly increase the averages.

3.2.1.3 Costs in Cases the Board has Won

Stage	No. of Cases	Total Costs	Total Paid to Board's Legal Advisers	Payment made to Judicial Review Applicant	ABP Costs as % of Total Costs	Judicial Review Applicant's Costs as % of Total Costs	% Difference between the Board's Costs and the Applicant's Costs
High Court Hearing	1	€306,974	€265,974	€41,000	87%	13%	-85%
Appeal/ CJEU Reference	1	€213,546	€213,546	€0	100%	0%	-100%

Table 3: Cost of Cases Won (High Court Hearing and Appeal/CJEU Stage)

These two examples give an idea of the cost of a High Court Hearing or a case that goes to Appeal/CJEU Reference Stage where the Board is ultimately successful. In the first example, clearly the applicant succeeded in some part, as the Board paid €41,000 in costs, but otherwise the costs are made up of payments to the Board's own legal advisers in successfully defending the case. This simply illustrates that there is a cost to the Board in defending cases even when it is successful, and costs recovery from Judicial Review applicants in planning and environmental cases is limited (if at all).

3.2.1.4 Costs Incurred by Commercial Applicants in the Individual Case Dataset

The dataset from the Board also includes a description of the Judicial Review applicant in each case. It was considered useful for the purpose of this report to understand the costs involved in cases brought by commercial entities against the Board (whether as applicants for development or third parties), and to compare those costs with other third parties, domestic applicants for development and environmental NGOs (eNGOs). It is important to note that the Board provided this data in raw form with simply a description of the applicant for Judicial Review and does not differentiate between applicants for Judicial Review. From the Board's perspective the type of applicant is not relevant, aside from any *locus standii* issues that may occasionally arise.

The purpose of including this information in this report is to ascertain the level of costs sought by corporate entities and to compare that sought by other entities. The data here relates mainly to cases that the Board has lost or conceded, therefore it is not a complete picture, but it is assumed that corporate entities bringing planning and environmental Judicial Reviews avail of the current costs protection regime (i.e. there is *"no order"* if they lose a case brought against the Board).

The Board's data does not disaggregate commercial applicants seeking costs protection therefore there is no means of ascertaining from the dataset whether commercial applicants are in fact seeking cost protection. However, as noted above at section 3.1, the OPR is a party to certain Judicial Review proceedings being brought by commercial applicants and they have sought costs protection.

Therefore, understanding the level of costs incurred in cases brought by commercial entities is relevant in considering whether to make any distinction between the types of applicant in any future protective costs regime or legal aid scheme for planning and environmental cases. It is noted that in the UK the system of costs protection distinguishes between individual applicants and commercial applicants but currently no such distinction exists in domestic law in Ireland. The Convention/EU law is not clear as to whether the NPE principle should apply to entities with purely commercial rather than environmental interests, in circumstances where such commercial entities have sufficient financial resources to bear the costs of litigation themselves.

Applicant Type	No. of Cases	Average of Payment Made to Judicial Review Applicant	Average of Total Costs
Leave	**15**	**€27,939**	**€39,756**
Commercial applicant for development	2	€54,260	€69,089
Commercial third party	1	€30,750	€35,773
Domestic applicant for development	3	€23,791	€27,488
Third party	9	€23,160	€37,770
High Court Hearing	**21**	**€172,940**	**€280,551**
Commercial applicant for development	2	€169,399	€261,785
Environmental NGO	3	€212,208	€452,795
Domestic applicant for development	5	€77,010	€117,034
Third party	9	€233,056	€340,333
Third party (lay litigant)	1	€2,095	€68,285
Commercial third party	1	€171,669	€293,152
Appeal/CJEU Reference	**8**	**€236,508**	**€431,501**
Environmental NGO	3	€189,810	€366,372
Third party	5	€264,528	€470,578

Table 4: Types of Applicant Incurring Judicial Review Costs (Leave, High Court Hearing and Appeal/CJEU Stages)*

*Please note that Table 4 includes cases that the Board won, lost and conceded, therefore there is a slight difference between the average figures here and the average figures noted in Tables 1, 2 and 3 above.

The findings from Table 4 in respect of commercial applicants are as follows:

Two cases at Leave Stage brought by commercial applicants for development incurred average costs of c.€54,000 and one case at Leave Stage brought by a commercial third party incurred costs of c.€31,000, both higher than the average costs at Leave Stage across all applicant types of €28,000. This is not accounting for the Board's own costs which were incurred in defending the matter, but the average of the total costs is also included in Table 4, which gives an indication of what each case costs the Board overall.

Two cases at High Court Hearing Stage brought by commercial applicants for development incurred average costs of c.€169,000 and one case at High Court Hearing Stage brought by a commercial third party incurred costs of c.€172,000. These are in line with the average costs at High Court Hearing Stage across all applicant types of c.€173,000. Again, the average of the total costs gives an indication of what each case costs the Board overall.

There were no cases brought by commercial applicants for development/third parties at the Appeal/CJEU Reference Stage to consider in the dataset.

3.2.1.5 Cost Per Day of Hearing in the High Court and Appeal Courts/CJEU

The Board's data comprised a wide range of cases, some that were clearly legally and factually complex and took up to eight days of hearing in the High Court (and more in the Appeal Courts/CJEU), and others that were much simpler and only took one day in the High Court.[53] The average total cost per day was calculated by dividing the total cost by the number of days at hearing (both in the High Court and in the Appeal Courts/CJEU, if relevant). It is acknowledged that this is a rudimentary calculation which does not reflect the nuances of the different cases, for example the number of counsel involved, the complexity of the issues or the length of time a matter has taken to get to hearing. Evidently, a significant amount of costs are incurred prior to the actual hearing of a case. Counsels' and solicitors' fees are incurred over the course of the progression of a case, but ultimately when a costs claim is evaluated, the main constituents are counsels' brief fees for hearing, the solicitors' professional fee and any additional outlay (printing, stamp duty, etc.). Therefore, whilst looking at an average costs per day is not entirely reflective of the way fees are incurred, it does provide a useful barometer as to how complex a case is: cases that are factually/legally straightforward have a lower cost per day than cases that are factually or legally more complex. On the whole, this is reflected in the cases that were heard for a greater number of days.

[53] This is excluding cases that were conceded at the Leave Stage.

Stage	No. of Days at Hearing in High Court	Total Paid to the Board's Legal Advisers	Payment Made to Judicial Review Applicant	Total Costs	Average Total Costs Per Day at Hearing
Appeal/CJEU Reference	1	€213,546	€0	€213,546	€213,546
High Court Hearing	1	€35,746	€53,149	€88,895	€88,895
Appeal/CJEU Reference	2	€91,629	€125,000	€216,629	€108,314
High Court Hearing	2	€47,191	€72,401	€119,592	€59,796
High Court Hearing	2	€90,866	€145,000	€235,866	€117,933
High Court Hearing	2	€36,426	€100,000	€136,427	€68,213
High Court Hearing	2	€66,190.02	€2,094	€68,285	€34,142
Appeal/CJEU Reference	3	€142,539	€90,000	€232,539	€77,513
High Court Hearing	3	€110,477	€150,000	€260,477	€86,826
High Court Hearing	3	€74,296	€188,797	€263,094	€87,698
High Court Hearing	3	€121,483	€171,669	€293,152	€97,717
High Court Hearing	3	€128,694	€210,000	€338,695	€112,898
Appeal/CJEU Reference	4	€122,026	€247,067	€369,093	€92,273
Appeal/CJEU Reference	4	€190,833	€340,000	€530,833	€132,708
High Court Hearing	4	€97,913	€225,000	€322,913	€80,728
High Court Hearing	4	€180,037	€257,500	€437,537	€109,384
Appeal/CJEU Reference	4	€194,116	€322,363	€516,478	€129,120
High Court Hearing	4	€69,476	€136,000	€205,476	€51,369
High Court Hearing	4	€122,200	€195,000	€317,200	€79,300
High Court Hearing	4	€108,918	€250,000	€358,918	€89,730
High Court Hearing	4	€52,522	€240,000	€292,523	€73,131
Appeal/CJEU Reference	5	€266,754	€252,638	€519,392	€103,878
High Court Hearing	5	€6,051.80	€300,000	€306,052	€61,210
High Court Hearing	6	€178,294	€275,000	€453,294	€75,549
High Court Hearing	6	€265,974	€41,000	€306,974	€51,162
High Court Hearing	7	€168,143	€105,625	€273,768	€39,110
Appeal/CJEU Reference	7	€338,500	€515,000	€853,500	€121,929
High Court Hearing	8	€287,642	€490,000	€777,642	€97,205
Average Cost Per Day					**€90,760**

Table 5: Cost Per Day of Hearing in the High Court and Appeal Courts/CJEU

The conclusions drawn from Table 5 are as follows:

- The total cost per day ranged from c.€34,000 per day for a two-day High Court case, to c.€214,000 for a one day Appeal/CJEU Reference (although this was considered an outlier and it would appear that the costs were higher due to the protracted nature of proceedings and complex legal issues that were largely dealt with by submissions, rather than the physical hearings involved and perhaps involving multiple counsel).
- As a broad rule of thumb, costs for High Court Hearings were typically less than €100,000 per day, whereas costs for Appeal Court/CJEU Reference cases were typically more than €100,000 per day, although there were exceptions to this in the dataset as can be seen in Table 5.
- The average total cost per day, combining all the data for High Court Hearings and Appeal Court/CJEU References, was €90,760.

3.2.2 Overall Legal Spend Dataset 2012 – 2022

The Board provided data of overall spend on litigation costs for the period 2012 to 2022. As noted above, the overall legal spend dataset includes cases that the Board has won (i.e. not paid out any costs to applicants, but paid its own legal advisers) and cases that the Board has lost/conceded (i.e. paid out cost to applicants and to its own legal advisers). Therefore, it is a complete picture of the costs to respondents of defending planning and environmental Judicial Reviews, as opposed to just focusing on the costs paid out to applicants for Judicial Review who were successful.

The purpose of analysing this data was to consider trends in costs for planning and environmental Judicial Review over time. Trends in costs incurred by the Board in paying its own legal advisers, costs incurred by the Board in paying Judicial Review applicants that were successful, and the combined cost, were considered.

To put this data in context, the Board also provided the number of Judicial Reviews that were issued against it each year during the same period to show the amount of litigation that the Board was dealing with during this time, which as can be seen in Table 6 has been increasing. As stated above, the costs for cases issued in one particular year are not necessarily determined in the same year, there is a lag period before any costs are incurred and applicant's costs are only discharged following the conclusion of the relevant hearing and agreement/adjudication of costs. There is therefore not necessarily an absolute correlation in the Board's overall legal spend between the number of cases issued in any given year and the total costs in that year. However, clearly more cases issued will increase the overall legal spend over time, and this is reflected in the data as set out below.

The dataset sets out the average annual cost for the period 2012 to 2022 both separated into costs of the Board's own legal advisers and costs paid out to Judicial Review applicants, and combined into total costs.[54] This data is set out in Table 6 and graphically represented in Figure 1 below. It should be noted that the costs in the overall legal spend dataset have not been adjusted for inflation.

[54] Excluding any costs recovered from Judicial Review applicants that lost cases.

Year	No. of Cases Issued Against the Board per year	The Board's Own Costs	Judicial Review Applicant's Costs	Total Board & Applicant Costs (excluding recovery)	The Board's Costs as % of Total Costs	Judicial Review Applicant's Costs as % of Total Costs	Difference
2012	17	€936,268	€131,550	€1,067,818	88%	12%	0.75
2013	32	€611,213	€877,130	€1,488,343	41%	59%	-0.18
2014	42	€1,282,409	€1,105,656	€2,388,065	54%	46%	0.07
2015	30	€2,244,686	€212,546	€2,457,232	91%	9%	0.83
2016	48	€2,895,878	€1,006,667	€3,902,545	74%	26%	0.48
2017	47	€2,710,773	€869,974	€3,580,747	76%	24%	0.51
2018	41	€2,613,888	€1,208,067	€3,821,955	68%	32%	0.37
2019	55	€1,906,167	€1,783,218	€3,689,385	52%	48%	0.03
2020	83	€4,571,894	€3,877,892	€8,449,786	54%	46%	0.08
2021	95	€3,505,086	€4,209,469	€7,714,555	45%	55%	-0.09
2022	95	€5,181,450	€4,831,046	€10,012,496	52%	48%	0.03

Table 6: The Board's Overall Legal Spend 2012 – 2022

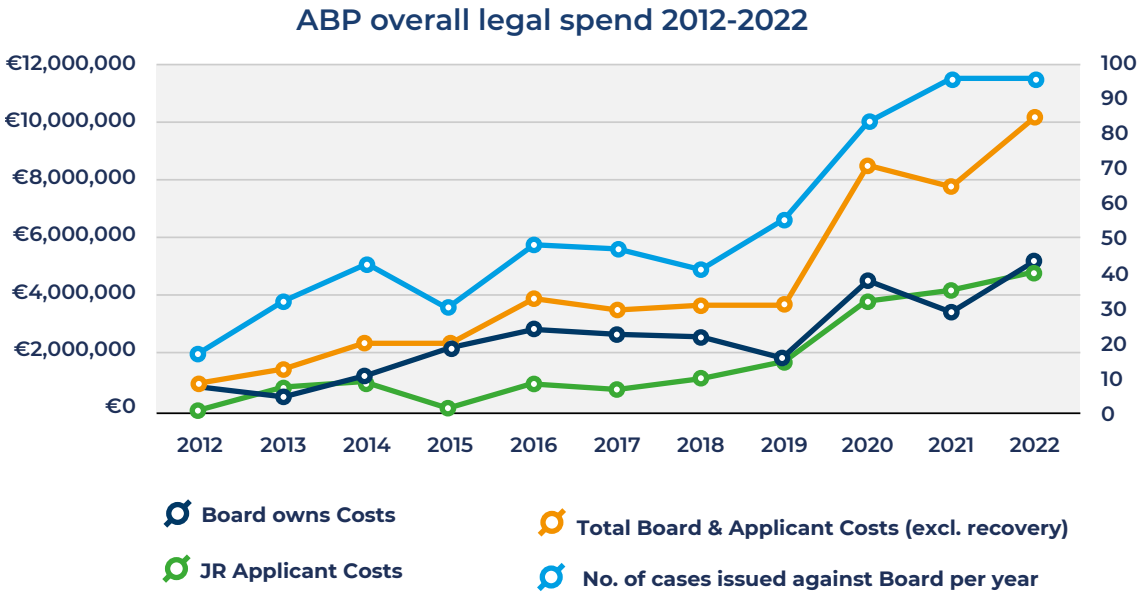

Figure 1: The Board's Overall Legal Spend 2012 – 2022

As noted above, the amounts paid by the Board for Judicial Review applicants' costs only arise where costs are awarded. In all but exceptional circumstances, this will be in cases where the applicant is successful. On the other hand, the Board has to employ legal advisers in all cases. The figures must be considered in that context. The research has not examined the potential cost of cases that the Board has successfully defended and avoided having to pay any applicant's costs. This is why in Figure 1 the breakdown of the total Board legal costs for the period 2012 – 2022 is generally higher for its own legal advisers than costs paid to applicants. This only includes the figures for the applicants' costs in those cases where costs have been awarded against the Board and clearly does not include applicants' costs in cases that applicants have lost (i.e. the Board did not have to pay costs to applicants, but still had to pay its own legal advisers to defend the cases).

The conclusions drawn from Table 6 and Figure 1 are as follows:

- The number of cases issued against the Board in 2022 (95 cases) was over five times what it was in in 2012 (17 cases). Although this has not been an ever-increasing trend, for example in 2015 and 2018 there were slight decreases in the number compared to the previous year, the trend is upward over the whole period.
- The Board's overall legal spend has increased year on year during the period 2012 to 2022 (except for a flat-line period during 2016 to 2019).
- The Board's overall legal spend increased from €1,067,818 in 2012 to €10,012,496 in 2022.
- In two years (2013 and 2021) during the period the costs paid out to applicants exceeded the costs paid to the Board's own legal advisers. For the remaining years the costs paid out to the Board's own legal advisers have typically been greater than the costs paid out to applicants. However, for the last four years (2019 to 2022) there was not as great a difference (c. +/- 15%) when compared with earlier years. Again, it is noted that the Board only pays costs to Judicial Review applicants in cases that it is unsuccessful in but pays its own legal advisers in all cases in which they are instructed.[55]

3.3 Legal Costs Adjudicators Published Judicial Review Determinations

The Office of the Legal Costs Adjudicators of the High Court (the LCA) has maintained a database of determinations since 2015. However, only adjudications that are considered of legal importance are made public. In order to provide relevant control samples to the Board's dataset, only Judicial Review cases have been considered, and as such there is a limited number of public adjudication determinations of these type of cases (six in total). In two of these cases, the LCA has provided a breakdown of fees for each *"section"* of work undertaken throughout the history of the case, as detailed in the Tables below, which is helpful to cross-reference with the breakdown of the Board's dataset. For the remaining cases, the legal cost adjudicator has not broken it down into such easily comparable sections therefore only the overall figures for the amount claimed and the amount adjudicated have been assessed.

3.3.1 Cases Where a Breakdown of Fees is Provided

The LCA has provided a breakdown of the fees awarded in two planning and environmental cases *(Friends of the Irish Environment v An Bord Pleanála* 2018/734 Judicial Review and *Peter Sweetman v Environmental Protection Agency* 2017/644 Judicial Review), but the *"sections"* are broken down slightly differently to the *"stages"* that are referred to in section 3.2.1 above on the Board's costs data. However, it is apparent that the main costs for the leave application are included in Section A, so that is equivalent to the "Leave Stage" for the Board's dataset. Section B includes all of the preparation for the High Court hearing, Section C includes the costs of the hearing itself, and Section E relates to the making of final orders, so combined they are the equivalent of the "High Court Hearing Stage" for the Board's dataset. Section D in the *Friends* case includes the costs of a CJEU reference, it is the equivalent of the "Appeal/CJEU Reference Stage" for the Board's dataset.

[55] In exceptional circumstances a Court may award costs to an unsuccessful applicant but there is a very high threshold for this.

***Friends of the Irish Environment v An Bord Pleanála* 2018/734 Judicial Review**				
Section (work undertaken)	**Professional Fee (Solicitor)**	**Junior Counsel**	**Senior Counsel**	**Subtotal**
	Adjudicated Sum	**Adjudicated Sum**	**Adjudicated Sum**	**Adjudicated Sum**
A (prior to commencement of proceedings)	€6,500	€7,500	n/a	**€14,000**
B (from issue of proceedings to hearing)	€45,000	€3,300	€4,300	**€52,600**
C (3 day High Court hearing)	€12,500	€28,750	€42,450	**€83,700**
D (CJEU reference)	€12,500	€6,000	€8,800	**€27,300**
E (post hearing)	€5,000	n/a	n/a	**€5,000**
Subtotal (B, C and E only)	**€62,500.00**	**€32,050.00**	**€46,750.00**	**€141,300**
Subtotal (A – E)	**€81,500**	**€45,550**	**€55,550**	**€182,600**
Total Sum Allowed at Adjudication (inclusive of all ancillary costs and stamp duty)				**€247,066**

***Peter Sweetman v Environmental Protection Agency* 2017/644 Judicial Review**				
Section (work undertaken)	**Professional Fee (Solicitor)**	**Junior Counsel**	**Senior Counsel**	**Subtotal**
	Adjudicated Sum	**Adjudicated Sum**	**Adjudicated Sum**	**Adjudicated Sum**
A (prior to commencement of proceedings)	€6,500	€5,250*	n/a	**€11,750**
B (from issue of proceedings to hearing)	€32,000	n/a	€3,500	**€35,500**
C (3 day High Court hearing)	€5,000	€18,200	€28,800	**€52,000**
D (post hearing)	€4,000	n/a	n/a	**€4,000**
Subtotal (B, C and D only)	**€41,000**	**€18,200**	**€32,300**	**€91,500**
Subtotal (A – D)	**€47,500**	**€23,450**	**€32,300**	**€103,250**
Total Sum Allowed at Adjudication (inclusive of all ancillary costs and stamp duty)				**€144,288**

** NB the LCA had included these costs in Section B, but they comprised costs of the Leave application and drafting, so these are included in Section A for consistency with the above.*

The LCA considered that the Section A costs were between €11,750 - €14,000 for these two cases, but this does not include outlay, ancillary costs and tax. It also only includes a Junior Counsel brief fee for the leave hearing and no Senior Counsel brief fee, which is unusual. A Senior Counsel brief fee is often included for such cases at the Leave Stage and could add up to €12,000 to the overall figure if it was allowed (typically an application is made to the judge hearing a leave application for a certificate for Senior Counsel if one is making the application). Therefore, the leave costs in these two cases are probably lower than normal.

The LCA considered that the Section B, Section C and Section E costs (i.e. the High Court Hearing Stage when combined) were between €91,500 - €141,300, but again this does not include outlay, ancillary costs and tax.

Finally, the LCA considered that the Section D costs in the *Friends* case (there was no Appeal/CJEU Reference in the *Sweetman* case) was €27,300. It should be noted that this CJEU Reference did not incur the cost of a physical hearing in Luxembourg, as it was considered by the Court on the basis of written papers only, so another Appeal/Reference that includes a physical hearing might incur higher costs.

The overall cost in the *Friends* case (leave costs, High Court Hearing costs, CJEU Reference costs and all additional costs including stamp duty on adjudication) was c.€247,000.

The overall cost in the *Sweetman* case (leave costs, High Court Hearing costs and all additional costs including stamp duty on adjudication) was c.€144,000.

The LCA's costs breakdown is on the whole consistent with the breakdown of stages in equivalent cases in the Board's dataset and therefore suggests that the conclusions drawn from the Board's data are reliable. In addition, the EPA (as opposed to the Board) was a respondent in the *Sweetman* case, and so it provides an additional assurance that the conclusions drawn from the Board's dataset are reliable.

3.3.2 Matters Where the Legal Cost Adjudicator has Not Provided a Sectional Breakdown and Only Global Figures are Provided

The remaining LCA determinations identified in respect of Judicial Reviews (summarised in Table 7) were useful, but not as closely comparable to the Board's dataset as the *Friends* and *Sweetman* determinations.

Case	Adjudicated Sum
White v The Bar Council of Ireland [2015/582 Judicial Review] (Four day hearing in the Judicial Review list, and it also included modularisation hearing, discovery motion, etc)	€289,684
Fingleton v The Central Bank of Ireland [2015/508 Judicial Review] (Four day hearing in the Judicial Review list)	€319,895
Rowan v Kerry County Council [2011/895 Judicial Review] (One day hearing in the Judicial Review list)	€65,976
Morris v An Bord Pleanála [2016/650 Judicial Review] (NB costs of the notice party, Fingal County Council as against the Applicant) (One day hearing in the Judicial Review list)	€24,209

Table 7: LCA Determinations in Respect of Judicial Review Cases

The *White v Bar Council* case (€290,000) and the *Fingleton v Central Bank* case (€320,000), were not planning and environmental cases. However, they were both Judicial Reviews that went to High Court Hearing Stage. As noted in Table 7 above, they comprised four day hearings and considerable complexity and interlocutory applications that clearly added to the overall cost. These might be considered at the upper end of the scale for High Court Judicial Review costs, and there are certainly some cases in the Board's dataset (that were more complex and ran for longer than normal in the High Court) with costs in this range.

The *Rowan* (€66,000) and *Morris* (€24,000) cases, which were planning cases, seem to have given rise to costs that were at the other end of the scale. As noted in Table 7 above, they comprised one day hearings and were probably less complex. Of note the *Morris* case was a challenge by a lay litigant. These might be considered at the lower end of the scale for High Court Judicial Review costs, and there are also some cases in the Board's dataset (that were less complex and ran for one day in the High Court) with costs in this range.

While these LCA determinations are less detailed, they provide a useful comparator to cases that are at the higher and lower end of the scale when compared to the Board's dataset.

3.4 Costs Data from the United Kingdom

3.4.1 England & Wales

The Senior Courts Costs Office (the SCCO) does not publish determinations in respect of costs. Therefore, there was no directly comparable information to compare with the determinations from the LCA in Ireland. However, there is a scale of fees for England and Wales set out in the SCCO guidelines and reference was also found to costs in a number of judgments of the High Court in planning and environmental cases that are instructive.

3.4.1.1 Scale of Fees England and Wales

In England and Wales, the scale of costs awarded to solicitors and other fee earners in respect of court proceedings can be found in the guideline rates as issued by the SCCO. The table below sets out the current[56] hourly rates for different grades of fee earner ranging from a qualified solicitor with 8+ years Post-qualification Experience (PQE) (Grade A) to trainees and paralegals (Grade D) for different bands in London and nationally. It is more difficult to put a figure on the overall professional fee that an applicant solicitor might charge, as it is not known what number of hours a case might take at the rate set out below. It is noteworthy that the LCA in the *Friends* and *Sweetman* cases discussed above said that he had not been provided with any time recording sheets in order to evaluate the amount of time that had been put in by the solicitors in question. The best the LCA could say was *"the matter occupied considerable time and the application of considerable labour placed demands, both on Solicitors and Counsel"*. However, London 1 and London 2 rates are very high, and rates between National 2/3 and London 3 are similar to what might be expected from a solicitor bringing a Judicial Review in the High Court in Ireland.

Grade of Fee Earner	A (qualified solicitor 8+ years PQE)	B (qualified solicitor/ employed barrister/legal exec 4+ years PQE of litigation experience)	C (other solicitors, legal execs and fee earners of equivalent experience)	D (trainees and paralegals of equivalent experience)
London 1[57]	£512	£348	£270	£186
London 2[58]	£373	£289	£244	£139
London 3[59]	£282	£232	£185	£129
National 1[60]	£261	£218	£178	£126
National 2/3[61]	£255	£218	£177	£126

Table 8: Hourly Rates for Grades of Fee Earner

[56] Came into force on the 1 October 2021 and subject to periodic review (where the rates change during the lifetime of a case, the new rates will be applicable).

[57] London Band 1 relates to very heavy commercial and corporate work by centrally based London firms and is not restricted to any particular postcode.

[58] London Band 2 relates to City and Central London and, in particular firms located in postcodes EC1 to EC4, W1, WC1, WC2 and SW1.

[59] London Band 3 relates to Outer London areas and would incorporate all other London Boroughs along with Dartford and Gravesend.

[60] National 1 encompasses the Counties of Berkshire, Buckinghamshire, Dorset, Essex, Hampshire (and isle of Wight), Kent, Middlesex, Oxfordshire, Suffolk, Sussex and Wiltshire together with Birkenhead, Birmingham (inner), Bristol, Cambridge City, Cardiff (inner), Leeds (inner), Liverpool, Manchester (central), Newcastle City, Norwich City, Nottingham City and Watford.

[61] All other areas not included in London 1-3 and National 1.

With regard to barristers, there is no general scale of litigation fees for a Junior Counsel or a King's Counsel. However the UK Supreme Court[62] has set out guideline figures for assessing payments to counsel for appeals based on specific aspects of the case, as follows:

Applications for Permission to Appeal	**Junior Counsel (JC)**	**King's Counsel (KC)**
Settling Application	£1,250	£1,750
Advice to Legal Aid Provider	£500	£800
Preparing Respondent's Objections	£800	£1,100
One Conference	£250	£500
Attending Oral Hearing by Appeal Panel	£1,600	£2,100
Appeals	**JC**	**KC**
Notice of Appeal (where UKSC has granted permission)	£150	£150
Notice of Appeal (where permission is not required)	£1,250	£1,750
Statement of Facts and Issues	£2,250	£4,500
Authorities	£900	£1,800
Conferences (each, up to a maximum of six)	£600	£1,200
Advice	£1,000	£2,000
Brief (based on a one day hearing)	£7,500	£15,000
Brief (based on a two day hearing)	£10,000	£20,000
Refresher (from day two of the hearing)	£1,625	£3,250

Table 9: UK Supreme Court Guideline Figures for Assessing Payments to Counsel for Appeals

Whilst there is no scale for the High Court Hearing Stage in England and Wales, it is probable that Counsel's fees would be similar in the High Court to an Appeal Court depending on the nature and complexity of the case. It provides something of a comparator to what is seen in Ireland. For example, in the *Friends* LCA determination Senior Counsel's brief fee for the High Court Hearing Stage was adjudicated at €30,000, plus a refresher of €4,000 per day, plus €450 for taking judgment (€42,450 total) and Junior Counsel's brief fee was adjudicated at €20,000, plus a refresher of €2,750 per day, plus €500 for taking judgment (€28,750 total), higher (after currency differences) but not dissimilar to the scale of fees for KC and JC in Table 9 above. In the *Sweetman* LCA determination Senior Counsel's brief fee for the High Court Hearing Stage was adjudicated at €21,000, plus a refresher of €3,500 per day, plus €800 for taking judgment and costs (€28,800 total) and Junior Counsel's brief fee was adjudicated at €13,500, plus a refresher of €2,350 per day (€18,200 total), slightly lower than the equivalent in Table 9 above.

It is also worth noting that Table 9 above highlights the increasingly complex nature of appeal procedures, whereby parties have to complete appeal responses and legal submissions, attend case management, agree issues and lists, prepare books, and attend hearings in the Appeal Courts and subsequently in the High Court if remitted back. This is clearly a feature of litigation in the Superior Courts in England and Wales, as it is in Ireland.

[62] The UK Supreme Court Practice Direction 13, https://www.supremecourt.uk/procedures/practice-direction-13.html#15

3.4.2 Costs Identified in UK Administrative Court Cases[63]

In order to source further information on the overall legal costs being claimed and awarded in the UK Courts, some recent decisions of the Administrative Division of the High Court of England and Wales from 2022 and 2023 (accessed through an online database) were reviewed.[64] Below is a sample of relevant (mainly planning and environmental Judicial Review) decisions which show the scale of costs involved in the UK system and the operation of the cost capping system (see case law examples in the Tables below). It should be noted that this is only a small sample of examples for demonstration and comparison purposes.

The examples demonstrate that the cost exposure limits are applied and altered readily by the Courts rather than a separate adjudication body such as the LCA in Ireland, perhaps made easier by the fact that there are thresholds or *"cost caps"* applied to planning and environmental cases. These limits are discussed more below, but in summary, they are £5,000 for an individual applicant, £10,000 for a commercial applicant and £35,000 for a respondent. Typically, costs limits are applied as fixed or revised downwards, however, a number of cases, where the £5,000 limit for an individual applicant has been revised upwards where the Court is of the opinion that the individual has the means to pay a sum greater than £5,000, were identified.

The examples also provide further insights on the costs involved at various stages of High Court planning and environmental claims, although it must be noted that the complexity of the case and the duration of the hearing involved are not readily discernible from these judgments. Nevertheless, these judgments provide a valuable comparative and an informative tool for review.

Hall, R (On the Application Of) v Royal Borough Of Greenwich [2023] EWHC 1588 (Admin)[65]	
Type of parties	Individual v Council
Description	An appeal of a refusal to grant leave for Judicial Review where the private individual claimant was unsuccessful. The facts concerned the planning committee's grant of planning permission for the demolition of an existing dwelling, including tree removal and geological issues, and the redevelopment of three four-bedroom dwellings. The cost exposure limit was originally raised from £5,000 to £25,000 and the claimant sought to reduce this on appeal to no more than £15,000 as it said that the higher value was prohibitively expensive. Fordham J found that the £25,000 limit *"struck an entirely appropriate and just balance"* due to the claimant's disclosed *"substantial resources"*.
Costs claimed	£36,000 (to Leave Stage)
Costs awarded	£25,000 – claimant's cost exposure limit raised significantly from £5,000 due to the individual means of the claimant.
Planning and environmental claim	Yes

[63] BAILII - 2022 England and Wales High Court (Administrative Court) Decisions

[64] BAILII - 2022 England and Wales High Court (Administrative Court) Decisions

[65] Hall, R (On the Application Of) v Royal Borough Of Greenwich [2023] EWHC 1588 (Admin) (27 June 2023) (bailii.org)

City Portfolio Ltd, R (On the Application Of) v Lancaster City Council (Re Costs) [2023] EWHC 1991 (Admin)[66]	
Type of parties	Company v Council
Description	Costs of withdrawn Judicial Review proceedings. Land was designated in January 2022 as a Conservation Area at speed on foot of an emergency report and the claimant sought to challenge this designation. Leave was granted on 4 April 2022. The decision to designate the area as a Conservation Area was rescinded on 6 December 2022 and the claim withdrawn on 13 December 2022.
Costs claimed	£83,294 (by the claimants to skeleton arguments stage)
Costs awarded	The defendant was ordered to pay the claimant's costs after 11 March 2022 when the defendant filed its Acknowledgement of Service but not before, to be assessed if they could not be agreed. The designation of a Conservation Area was rescinded and any degree of urgency on the Council's decision was gone after 11 March. The defendant had the opportunity to reflect on its actions at that stage and is therefore liable for the costs incurred by the claimant from that point in challenging its decision. The judge said that the question was whether a defendant who chooses to accommodate the Judicial Review claimant's grievance – causally linked to the fact of the claim but without accepting that the claimant is correct on the issues raised in the claim – should find itself liable to pay the claimant's costs and, if so, in full. In his judgment, the answer to that question was a fact-specific and case-specific answer, and he found in this case that the defendant could have avoided a costs order by conceding the case at an earlier stage.
Planning and environmental claim	Yes

R (City of Wolverhampton Council) v SSHD [2022] EWHC 1721 (Admin).[67]	
Type of parties	Seven Councils v Government Body
Description	A Judicial Review taken by seven local authorities of the policy of the defendant for procuring accommodation for asylum seekers, was commenced on 13 September 2021 and due to be heard on 12 and 13 May 2022. The policy was *'quashed'* by the Home Office on 13 April 2022 and the defendant maintained that the Judicial Review had become entirely academic and that it should not be liable for the claimant's costs. The Court ultimately agreed, finding that it could not readily identify – even as *"tolerably clear"* – which party would have prevailed on which of the various grounds that had been raised for resolution by the Court. The new policy was being actively considered before proceedings were issued and so it would be unjust to order either side to burden the full costs.
Costs claimed	£149,000
Costs awarded	Each party was ordered to bear its own costs.
Planning and environmental claim	No

[66] City Portfolio Ltd, R (On the Application Of) v Lancaster City Council (Re Costs) [2023] EWHC 1991 (Admin) (03 August 2023) (bailii.org)

[67] City of Wolverhampton Council & Ors, R (On the Application Of) v Secretary of State for the Home Department [2022] EWHC 1721 (Admin) (05 July 2022) (bailii.org)

Armstrong, R (On the Application Of) v Ashford Borough Council [2023] EWHC 317 (Admin)[68]	
Type of parties	Individual v Council
Description	An application to apply for leave for Judicial Review, challenging the change of use of the ground floor of an agricultural building to distillery use, was refused. The £5,000 cost exposure limit would apply to the claimant, however the issue was moot as the application was refused and the claimant hadn't submitted all the required documentation in any case. The claimant indicated in this case that he would not oppose a variation of the limit to £10,000 and neighbours had pledged £12,500 to the cause. Ultimately, because of the claimant's failure to comply with the cost capping procedure, the judge did not apply any variation.
Costs claimed	£5,938.98
Costs awarded	£4,148.48 as the total *"seems slightly excessive for the limited objective of filing an Affidavit of Service".*
Planning and environmental claim	Yes

Pearce, R (On the Application Of) v West Berkshire Council [2023] EWHC 209 (Admin)[69]	
Type of Parties	Individual v Council
Description	An administrative challenge to a grant of planning permission by the local planning authority for the erection of a single storey sports pavilion, car park and artificial turf pitch at Newbury Rugby Football Club, West Berkshire, where the claimant was unsuccessful. The planning authority applied to vary the £5,000 cost cap to £20,000, pointing to the claimant's statement of means as showing that he could afford that sum. The Court had regard to the six factors listed at CPR 45.44(3)(b), and found that the most relevant are that the claimant was a local resident who was concerned by the potential loss of the football stadium (but would have a later opportunity to voice those concerns if and when any application to develop it was made); the proposal was important in terms of the environment; the estimate of the costs of each sides was £20,000 for each side; there was no particular complexity; the claim was not frivolous; and there was a reasonable prospect of success.
Costs claimed	£20,000 estimated to be incurred by each side.
Costs awarded	£11,000 (taking account of £1,000 pledged by other local residents). The £5,000 cost limit was altered upwards based on individual means of the claimant, but the judge found that £40,000 would take most of the claimant's liquid assets.
Planning and environmental claim	Yes

[68] Armstrong, R (On the Application Of) v Ashford Borough Council [2023] EWHC 317 (Admin) (15 February 2023) (bailii.org)

[69] Pearce, R (On the Application Of) v West Berkshire Council [2023] EWHC 209 (Admin) (03 February 2023) (bailii.org)

Speciality Produce Ltd v SS Environment [2014] EWCA Civ 225 [2014] CP Rep 29[70]	
Type of Parties	Company v Government Body
Description	A Judicial Review of a decision to withdraw the claimant's recognition as a Producer Organisation (PO) under the Common Agricultural Policy Fruit and Vegetables Aid Scheme taken against the Secretary of State for Environment, Food and Rural Affairs. However, an internal statutory appeal against the decision was also undertaken and that was successful, rendering the Judicial Review moot and it was discontinued by consent, but parties couldn't agree on costs. The claimant said that it had obtained by consent the primary relief sought in the Judicial Review and should have its costs. The Secretary of State contended that the grounds upon which the claimant had been given leave to seek Judicial Review were quite distinct from the grounds of the statutory appeal on which they had succeeded and that there should be no order for costs.
Costs claimed	£215,000
Costs awarded	Each party was ordered to bear its own costs by the divisional Court and this was upheld on appeal. The Court of Appeal said that it *"would be wrong in principle for [the Claimant] to be awarded the costs of the application simply because the end result of the statutory appeal process was to remove the decision which was also the target of the claim for Judicial Review. That is not enough to enable it to be treated as the successful party in those proceedings."*
Planning and environmental claim	No

Tesco Stores Ltd, R (On the Application Of) v Allerdale Borough Council [2022] EWHC 2827 (Admin)[71]	
Type of parties	Company v Council
Type of case	A Judicial Review by Tesco of a local authority planning committee decision to grant planning permission to Lidl for a discount food store development on a site neighbouring Tesco. The Judicial Review concerned one ground of challenge as to whether the planning officer's report contained any material misdirection to Committee Members in respect of the interpretation and effect of parts of the Allerdale Local Plan. The Court found that the planning policy in question did not involve *"binary"* and *"breach"* components (Tesco's argument), but rather raised a whole series of evaluative questions for classic planning judgment. In addition, the Court found that there was nothing misleading in the planning report on this issue or on the second issue of the reuse of vacant and underused land. The claim failed on its merits.
Costs claimed	£25,008 by the successful defendant.
Costs awarded	All costs payable by the claimant, and it does not appear that a costs cap was sought or applied.
Planning and environmental claim	Yes.

[70] Speciality Produce Ltd, R (On the Application of) v The Secretary of State for Environment, Food And Rural Affairs [2014] EWCA Civ 225 (07 March 2014) (bailii.org)

[71] Tesco Stores Ltd, R (On the Application of) v Allerdale Borough Council [2022] EWHC 2827 (Admin) (08 November 2022) (bailii.org)

Beaumont, R (On the Application Of) v East Hertfordshire District Council & Anor [2022] EWHC 3303 (Admin)[72]	
Type of parties	Individual v Two Councils
Description	A renewed application for leave to apply for Judicial Review following a prior refusal to challenge five decisions of two local authorities that authorise the construction of new roads and two new river crossings over the River Stort in Hertfordshire. The claimant was the owner of land, together with his mother, that formed a large part of the land comprised in one of the river crossing applications. The grounds of challenge included that there was no EIA of the crossings individually, and that the defendants had justified deliberate disturbance of protected species on the basis of imperative reasons of overriding public importance, namely, delivery of benefits to the villages of additional residential development, without ensuring that those benefits will arise as the additional developments were not conditional upon the grant of the river crossings, so one could proceed without the other. The application was refused on the basis *inter alia* that the defendants were confident that the benefits to the villages would materialise and therefore they were justified in relying on same. The standard costs exposure limit of £5,000 was increased to £30,000 in view of the claimant's considerable wealth, as disclosed in his financial statement, and it was not considered that a cap of £30,000 exceeded his resources nor was it objectively unreasonable. The claimant was ordered by the divisional Court to pay £20,000 to the defendants and £5,000 to each of two interested parties.
Costs claimed	£38,543 (and reduced to £20,000 by the divisional Court)
Costs awarded	On appeal, the claimant was ordered to pay £15,000 to the defendants and £5,000 to each of the interested parties. The costs claimed by the defendants were considered *"excessively high"*, even at the £20,000 originally awarded. Notably, however, the Court agreed that the claimant had considerable wealth and Lang J found that the £30,000 cap did not exceed his resources and the decision was purely based on the excessive nature of the costs claimed.
Planning and environmental claim	Yes

[72] Beaumont, R (On the Application Of) v East Hertfordshire District Council & Anor [2022] EWHC 3303 (Admin) (08 November 2022) (bailii.org)

4.0 - Comparative Jurisdiction Analysis

In order to provide information on how a protective costs scheme might work, consideration was given to how the Aarhus principles on access to justice are implemented in other jurisdictions. In particular, the implementation in the United Kingdom, being the closest comparator to Ireland, as a system built on common law principles, of which there are only four (UK, Ireland, Cyprus and Malta) that are signatories to the Aarhus Convention. Malta was also examined for the purpose of a comparator, although it is quite a different system. Finally, analysis is included of a number of civil law jurisdictions, which is the prevailing manner in which justice is administered throughout the remaining countries that are signatories to the Convention.

4.1 United Kingdom

A summary of the statutory/civil procedure rules scheme in respect of costs for England and Wales, Scotland and Northern Ireland, is set out below.

4.1.1 England and Wales

The Environmental Costs Protection Regime (the ECPR) was introduced in England and Wales in 2013 by way of amendment to Part 45 of the Civil Procedural Rules 1998 (the CPRs). The ECPR capped the costs that a Court could order an unsuccessful claimant to pay to other parties.

'Aarhus Convention claim' is defined in CPR 45.41 as meaning a claim brought by one or more members of the public[73] by Judicial Review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions and which is within the scope of Article 9(1), 9(2) or 9(3) of the Aarhus Convention.[74]

Once a claim is established by the Court as an Aarhus Convention claim, the costs liability is capped for both the applicant and the respondent (subject to any variation made by the Court at the request of the applicant or respondent). Where it is successfully claimed that a matter is an Aarhus Convention claim, which gives rise to costs protection in respect of any of the grounds of a claim, the costs protection applies to the case in its entirety.[75]

The guiding principle in relation to cost protection for an Aarhus Convention claim is that environmental proceedings should not be *'prohibitively expensive'.*

[73] In ACCC/C/2014/100 & 101 the ACCC found that a public authority was not a member of the public and did not benefit from the costs protection regime as a claimant.

[74] This definition was amended by the Civil Procedure (Amendment No. 3) Rules 2019 specifically to broaden the definition to cover claims by way of statutory review. For example, the Town and Country Planning Act and of the Planning (Listed Buildings and Conservation Areas) Act 1990 in England and Wales allows claimants to bring statutory reviews of planning decisions. In essence, the legislation provides an alternative remedy to High Court Judicial Review Proceedings.

[75] *R (on the application of Catherine Lewis) v The Welsh Ministers v Velindre University NHS Trust* [2022] EWHC 450.

In an Aarhus Convention claim, the following costs limits apply[76] and the maximum adverse costs that can be ordered are as follows:

- Applicant (individual): £5,000;
- Applicant (in all other cases): £10,000; and
- Respondent: £35,000 (figures inclusive of VAT).[77]

Regardless of the number of applicants or respondents, the limits apply in relation to each such claimant or respondent individually and may not be exceeded, irrespective of the number of receiving parties.[78]

In order to avail of the costs liability caps in Aarhus Convention claims, the Applicant must:[79]

(a) state in the claim form that the claim is an Aarhus Convention claim; and

(b) file and serve with the claim form a schedule of the claimant's financial resources, providing details of the claimant's significant assets, liabilities, income, expenditure and where the claimant has been provided financial support, the aggregate amount which has been or is likely to be provided.

The respondent can challenge whether a claim is an Aarhus Convention claim at the outset. However, the respondent risks a costs order against it should it challenge the applicability of the Aarhus Convention and is unsuccessful (if the respondent is successful in challenging the applicability of the Aarhus Convention, the Court will usually make no order for costs).

Where claimed, the Courts will accept that costs protection applies to an Aarhus Convention claim unless it is denied by the respondent in its acknowledgement of service. Where the defendant denies that the claim is an Aarhus Convention claim, the Court must determine that issue at the earliest opportunity.

The CPR provides further flexibility for applicants and make provision for an applicant to *'opt-out'* of the Aarhus rules. In essence, the applicant may stipulate that the claim is an Aarhus Convention claim but expressly state that they do not wish for the cost protection rules to apply. This would result in the normal costs rules applying, i.e. loser pays.

The CPR provides that the Court may vary[80] or completely remove the above costs caps for any party to an Aarhus Convention claim, in light of their financial resources. However, this is on the proviso that this would not make the costs of the proceedings prohibitively expensive for the applicant (claimant).[81] For example, if a claimant had significant financial resources, a respondent could request that the Court vary or remove the costs cap in light of the claimant's financial resources.

[76] CPR Part 45.43.

[77] *R. (on the application of Friends of the Earth Ltd) v Secretary of State for Transport* [2021 EWCA] Civ 13.

[78] CPR Part 45.43(4). This provision reflects the position as per the case law: R *(Botley Parish Action Group) v Eastleigh* BC [2014] EWHC 4388 (Admin), where Collins J held that the defendant was entitled to claim up to the cost cap for each claimant.

[79] CPR Part 45.42.

[80] *Melanie Rainbird v London Borough of Tower Hamlets* (2017). The Applicant's application to have the PCO varied was denied based on the financial standing of the Applicant.

[81] Subject to the criteria listed in CPR 45.44(3)(b) and in *R (Edwards and another) v Environment Agency and others* [2010] UKSC 57 and *R (Edwards) v Environment Agency* [2013] UKSC 78.

A series of measures are allowed in England and Wales in order to achieve compliance with the cost provisions of the access to justice requirements in the Convention, the most important of which are:

(a) Protective costs orders under the Environmental Costs Protection Regime;

(b) Legal aid — i.e. public funding by the Legal Services Commission;

(c) Conditional Fee Agreements (CFAs) – i.e. an agreement where a lawyer and a client can agree to share the risk of the litigation by coming to a financial arrangement whereby part, or sometimes all, of the lawyer's fees will only be payable by the client in the event of success;[82]

(d) Judicial discretion.[83]

Where the EIA or the Industrial Emissions Directives are engaged, the Courts will consider the application of Aarhus Convention claim cost protection broadly. In essence, if it is a case of environmental significance, the threshold to attract Aarhus Convention claim costs protection is low.

As indicated above, costs protection for Convention claims applies not just to Judicial Review cases, but also cases brought under specific pieces of legislation[84] such as statutory appeals.

There exists, for example, a right to challenge a decision on whether to allow or dismiss an appeal (the appeal decision) of the Planning Inspectorate in the High Court. In essence, statutory reviews provide an alternative remedy to Judicial Review. There is no requirement to demonstrate that the statutory review pertains to public or administrative law.

Section 289 of the Town and Country Planning Act 1990 further permits appeals to the High Court relating to enforcement notices and notices under Sections 207 and 215 of this Act. In 2014 the Court of Appeal, in the case of *Venn,*[85] which concerned the grant of a PCO, confirmed that a statutory claim under Section 288 of the Town and Country Planning Act 1990 which sought the quashing of a planning decision, could be an environmental challenge falling within Article 9(3) of the Aarhus Convention (which requires access to a judicial procedure that is NPE).

4.1.2 Northern Ireland

The position in Northern Ireland largely mirrors that of England and Wales. However, one notable difference is that, where an application to vary a PCO is made, the sums payable can only be varied downwards.

The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013; and the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 contain the relevant statutory provisions.

[82] The benefit of a CFA is limited in Judicial Review cases as the award of financial damages is rare in such cases.

[83] ACCC/C/2008/33 recommendation concerning compliance by the UK adopted on 24 September 2010.

[84] Aarhus costs protection does not apply to private nuisance claims, however.

[85] *The Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539.

4.1.3 Scotland

The position in Scotland broadly mirrors that of England and Wales and Northern Ireland.

Notably, the Court may refuse to make a *'protective expenses order'* if it considers that the applicant has no real prospect of success (which is similar to the test of whether an applicant has an *'Arguable Case'*). The wording of the Rules of the Court of Session (the RCS) in Scotland appears to be narrower and more prescriptive than the rules of the CPR in England and Wales. However, it is understood that the Courts have interpreted limb C below broadly to grant costs protection orders, which has had the effect of levelling the playing field between each constituent part of the UK.

The RCS specifies that a protective expenses order must contain a provision limiting each party's costs liability as follows:

- Applicant: £5,000; and
- Respondent: £30,000.

The RCS 58A.1.- (1) applies to applications for protective expenses orders in-

(a) an appeal under Section 56 of the Freedom of Information (Scotland) Act 2002(a) as modified by Regulation 17 of the Environmental Information (Scotland) Regulations 2004(b);

(b) relevant proceedings which include a challenge to a decision, act or omission which is subject to, or said to be subject to, the provisions of Article 6 of the Aarhus Convention;

(c) relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment.

4.1.4 Overview of UK Scheme in Practice

One notable procedural difference between England, Wales and Northern Ireland (EWNI) and Ireland is that in EWNI there is a codified pre-action stage to Judicial Review proceedings. There is an obligation on the applicant to issue a pre-action letter which specifies whether it intends to make an application for a PCO. Upon receipt of the pre-action protocol letter, the respondent has 14 days (21 days in Northern Ireland) to respond. This provides the respondent with the opportunity to consider whether the claim, is in fact, an Aarhus Convention claim and respond accordingly.

The Judicial Review procedure and steps for asserting that a claim is an Aarhus Convention claim in England and Wales are set out below:

Step 1: Pre-Action Stage

The Pre-Action Protocol for Judicial Review sets out that a Letter Before Claim should be issued in advance of any application for leave to apply for Judicial Review.

> *''15 The letter should contain the date and details of the decision, act or omission being challenged, a clear summary of the facts and the legal basis for the claim. It should also contain the details of any information that the claimant is seeking and an explanation of why this is considered relevant.* ***If the claim is considered to be an Aarhus Convention claim (see CPR Part 45.41 to 45.44 and Practice Direction 45), the letter should state this clearly and explain the reasons, since specific rules as to costs apply to such claims****. If the claim is considered appropriate for allocation to the Planning Court and/or for classification as "significant" within that court, the letter should state this clearly and explain the reasons.''*
>
> [Emphasis Added]

A response to the Letter Before Claim should be issued within 14 days. The Pre-Action Protocol sets out that:

> *''If the letter before claim has stated that the claim is an* ***Aarhus Convention claim but the defendant does not accept this, the reply should state this clearly and explain the reasons.*** *If the letter before claim has stated that the claim is suitable for the Planning Court and/or categorisation as "significant" within that court but the defendant does not accept this, the reply should state this clearly and explain the reasons.''*

[Emphasis Added]

Step 2: Application for Leave to Apply for Judicial Review

After it has considered the response to its Letter Before Claim from the respondent, the applicant has three options:

(i) Assert that it is an Aarhus Convention claim and that it is entitled to costs protection;

(ii) Accept that the claim does not fall within the remit of the Aarhus Convention; or

(iii) Assert that the claim is in fact an Aarhus Convention claim but decide to *'Opt-Out'* of the costs protection rules.

Where the applicant asserts that its claim is an Aarhus Convention claim it must:

(a) state in the claim form that the claim is an Aarhus Convention claim; and

(b) file and serve with the claim form a schedule of the claimant's financial resources, which is verified by a statement of truth and provides details of —

(i) the claimant's significant assets, liabilities, income and expenditure; and

(ii) in relation to any financial support which any person has provided or is likely to provide to the claimant, set out the aggregate amount which has been provided and which is likely to be provided.

Step 3: Where the respondent denies that the claim is an Aarhus Convention claim

Rule 45.45 of the CPR sets out that:

> *''Where the defendant denies that the claim is an Aarhus Convention claim, the court must determine that issue at the earliest opportunity.''*

In practice, the *'earliest opportunity'* is likely to be the Leave Stage or at an early review hearing.

Step 4: Making of a PCO

Assuming that it is determined / or not contested that the claim is an Aarhus Convention claim, the Court will make the appropriate PCO.

An application to vary the amounts set out in rule 45.43 of CPR or remove altogether may be made at any time during the proceedings if there has been a significant change in circumstances (including evidence that the schedule of the claimant's financial resources contained false or misleading information) which means that the proceedings would now —

(a) be prohibitively expensive for the claimant if the variation were not made; or

(b) not be prohibitively expensive for the claimant if the variation were made.

4.1.5 UK Case Law on NPE/Lawfulness of Cost Caps

The UK Courts considered the provisions of the PCO regime in a number of cases which predate the introduction of the costs capping scheme under the CPR. A summary of three of the prominent cases that govern the application of the PCO principles in the UK, and which have shaped the development of the law in that jurisdiction, are set out below. Whilst the CPR will cover any Aarhus Convention claims falling under its remit, other claims such as the seeking of injunctive relief may have to rely on the more general protective costs order regime.

***R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600**

Corner House, an anti-corruption NGO, brought a challenge by way of Judicial Review against the government regarding the way in which British companies conducted business abroad. Whilst the substantive challenge was unsuccessful, the High Court refused to grant *Corner House* a PCO and this decision was appealed to the Court of Appeal. Whilst not an environmental claim, the judgment has been adopted and modified by the UK Courts in subsequent decisions relating to Aarhus Convention costs claims. The Court of Appeal considered whether to grant a PCO to allow a claimant of limited means access to the Courts in order to advance their case without the fear of a substantial costs order being made against them. The Court of Appeal set out, at paragraph 74 of the judgment, criteria that must be met before a PCO can be granted as follows:

> *''74. [...]. We would therefore restate the governing principles in these terms:*
>
> *1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:*
>
> *i) The issues raised are of general public importance;*
>
> *ii) The public interest requires that those issues should be resolved;*
>
> *iii) The applicant has no private interest in the outcome of the case;*
>
> *iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;*
>
> *v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.*
>
> *2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.*
>
> *3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.''*

The *Corner House* criteria are a helpful starting point when making an application for a PCO, however, the Courts have since accepted that it was necessary to modify the above criteria to take into account the Aarhus Convention when deciding whether to grant a PCO.

***R. (on the application of Garner) v Elmbridge BC* [2010] EWCA Civ 1006; [2011] 3 AER 418**

The respondent local authority granted planning permission for a redevelopment of Hampton Court Station adjacent to Hampton Court Palace. The claimant Mr Garner had failed to make submissions on the planning application although had been a long-standing objector to prior proposed developments which would have an impact on the Hampton Court Palace protected structure. In Mr Garner's Judicial Review, the High Court decided that he did not have standing

on the basis that he had not sought to influence the decision, albeit the Court acknowledged the importance of the issue that the claimant sought to bring before the Court. Further the High Court refused Mr. Garner's application for a PCO and ordered him to pay the respondent's costs of the PCO application in the sum of £3,000. The High Court was critical of the paucity of evidence provided by Mr Garner as to his financial resources.

The Court of Appeal considered the criteria set down in *Corner House* but in the context of a case to which Article 10a of the EIA Directive applied. The Court of Appeal accepted that Mr Garner was a member of the public concerned for the purposes of Article 10a and that he satisfied the UK law rules regarding standing. The Court noted that under community law, it is a matter of general public importance that those environmental decisions subject to the Directive are taken in a lawful manner. The Court therefore found that the case did raise issues of general public importance which the public interest required to be resolved.

This case modified the guidance set out in *Corner House* in light of the Convention. In particular, the Court considered the limbs of the test set out in *Corner House* that the matter must be of:

- *general public importance;* and
- *in the public interest to require resolution of those issues.*

The Court of Appeal held that both of these limbs are deemed to be satisfied simply by virtue of the case being environmental in nature and within the scope of the EIA and IPPC Directives.[86] Accordingly, an applicant does not now need to show that there is any general public importance in their case. Further, in such a case, the applicant does not need to show that proceedings would be *'prohibitively expensive'* for the applicant themselves. The proper approach to give effect to the underlying Directives is to consider whether the costs would be prohibitively expensive for the *ordinary member* of the public

The Court of Appeal granted a PCO for the appellants in the overall sum of £5,000 as being their total costs liability in the event their challenge was unsuccessful. The Court also imposed a cap of £35,000 by way of reciprocal limitation on the Respondents' liability.

This test for assessing what is *'prohibitively expensive'* and whether that should be objective or subjective was later clarified by the CJEU and the UK Supreme Court in the *Edwards* case (below).

Another aspect of the *Garner* case which is relevant to this report is the Court of Appeal's consideration of the application of a reciprocal costs limit on the amount that can be recovered from a respondent. The Court of Appeal considered that if the NPE test is not a wholly subjective one and does incorporate an element of objectivity, then the requirement in Article 10a is that the review procedure shall be NPE, not that it shall be NPE for only one of the parties engaged in the process.[87] The Court also held that the imposition of some kind of reciprocal limit upon a respondent's liability for costs is not necessarily inconsistent with Article 10a.

The Court of Appeal noted that *"there may well be long term problems if the courts were to consistently impose reciprocal caps that are "modest" upon successful appellants' ability to recover costs from respondents because such a course might well have the effect either that the claimant's lawyers would subsidise the process or that successful claimants would be exposed to prohibitively expensive costs claims from their own lawyers. It seems to me that these are systematic problems which we simply cannot resolve in this appeal, nor should we seek to do so given that the wider issues concerning compliance with Article 10a are to*

[86] (The Industrial Emissions Directive is the successor to the IPPC Directive).

[87] *Garner* paragraph 53.

be considered elsewhere."[88] Ultimately, the Court found that a reciprocal cap would not be inconsistent with Article 10a and that the difference in respective costs cap limits reflected the disparity of resources between the parties.

R. (on the application of Edwards and another) v Environment Agency and others (No 2) [2013] UKSC 78; and Edwards v Environment Agency (No 2) (CJEU C-530/11)

The substantive proceedings concerned a cement works in Rugby for which the Environment Agency issued a permit to continue operations with an alternative fuel source, switching from coal and petroleum coke to shredded tyres. Judicial Review proceedings were commenced by Mr Edwards, a local resident. The local campaign against the grant of the permit was led by a wealthy resident Mrs Pallikaropoulos and the High Court inferred that Mr Edwards had been *"put up as a claimant in order to secure public funding of the claim by the Legal Services Commission when those who are the moving force behind the claim believe the public funding for the claim would not otherwise have been available"* although did not consider this to be an abuse of process nor did it deprive Mr Edwards of standing.

Following the dismissal of the substantive proceedings, the decision was appealed to the Court of Appeal and Mr Edwards withdrew his instructions from his legal team and Mrs Pallikaropoulos was joined as an additional appellant. The appeal was dismissed and costs were awarded against her capped at £2,000. Mrs Pallikaropoulos then appealed to the House of Lords (now the Supreme Court) for an order varying or dispensing with the ordinary requirement to give security for costs in the sum of £25,000 and for a PCO under the *Corner House* principles. The appellant subsequently paid the security for costs sum and the House of Lords dismissed her appeal. The Environment Agency and the Secretary of State submitted costs bills of £55,810 and £32,290 respectively.

The House of Lords referred certain questions to the CJEU on whether the NPE requirement should be assessed on an *'objective'* basis by reference to the ability of an ordinary member of the public to meet the potential liability for costs, or whether it should be decided on a *'subjective'* basis by reference to the means of the particular claimant, or a combination of the two.

The House of Lords jurisdiction was subsequently transferred to the UK Supreme Court who considered the CJEU's decision on the reference questions.

The CJEU decision reaffirmed the principles established in *Commission v Ireland* noting that the Aarhus Convention does not affect the powers of national Courts to award *"reasonable costs"*, and that the costs in question are *"all the costs arising from participation in the judicial proceedings"*.

The CJEU held that the NPE assessment must take into account the interest of the person wishing to defend his rights and the public interest in the protection of the environment and that the assessment cannot, therefore, be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of costs particularly since members of the public and associations are required to play an active role in defending the environment. The costs of proceedings must therefore not appear to be objectively unreasonable and must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.

The UK Supreme Court extracted a number of the points from the CJEU decision in its judgment in respect of the NPE as follows:

[88] *Garner* paragraph 55.

(i) The test is not purely subjective. The cost of proceedings must not exceed the financial resources of the person concerned nor *'appear to be objectively unreasonable'*, at least in certain cases;

(ii) The Court did not give definitive guidance as to how to assess what is *'objectively unreasonable'*;

(iii) The Court could also take into account what might be called the *'merits'* of the case: that is, in the words of the Court, *"whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages"*.

(iv) *That the claimant has not in fact been deterred from carrying on the proceedings is not 'in itself' determinative;* and

(v) The same criteria are to be applied on appeal as at first instance.

The Supreme Court did not consider the last point as intended to imply that the same order must be made at each stage of proceedings, or that there should be a single global figure covering all potential stages, but rather that the same principles should be applied at each stage, taking account of costs previously incurred.

The respondents sought their costs from the appellant and agreed that these be capped at £25,000 which was the amount of the security provided. Taking the above CJEU's decision into account and given the limited information provided by the appellant as to her financial resources, the Supreme Court had no evidence to suggest that an order for payment of £25,000 would be subjectively unreasonable. The Court went on to conclude that in the special circumstances of the case, the figure of £25,000 was neither subjectively or objectively excessive.

It should be noted that this case pre-dated the introduction of the costs capping rules although given the financial resources of the appellant, it may have been a case where, even if the cost capping rules applied, the respondents would have sought to vary the cap upwards.

4.1.6 Summary of Relevant Aarhus Compliance Committee Decisions/ Commentary on the UK scheme

The ACCC set out a number of recommendations for the UK in UNECE Decision VII/8s concerning compliance by the UK with its obligations under the Convention. An extract on the issue considered and the measures required, is set out as follows.

Communication ACCC/C/2015/131

"(e)By not ensuring that courts take into account the stage of the proceedings when calculating the sum of costs to be awarded against an unsuccessful claimant in a procedure subject to article 9 of the Convention, the Party concerned fails to comply with the requirement in article 9 (4) for such procedures to be fair, equitable and not prohibitively expensive;

(f) Since the communicant was ordered to pay a costs order calculated on the basis of an hourly rate that was considerably higher than the actual contracted rate, the Party concerned failed to comply with the requirement that cost orders in procedures within the scope of article 9 (2) be fair and equitable in accordance with article 9 (4) of the Convention;

(g) By setting a significantly lower hourly rate (i.e. less than one-tenth of the sum of a legally represented party) at which successful "litigants in person" are entitled to recover their costs in procedures subject to article 9, the Party concerned fails to ensure that such procedures are fair and equitable as required by article 9 (4) of the Convention;"

Communication ACCC/C/2013/90

''6. Recommends that the Party concerned [the United Kingdom] take the necessary legislative, regulatory, administrative and practical measures to ensure that:

...

(b) When calculating the sum of costs to be awarded against an unsuccessful claimant in a procedure subject to article 9 of the Convention, the courts, inter alia, take into account the stage of the judicial procedure to which the costs relate;

(c) In judicial procedures within the scope of article 9 of the Convention, successful "litigants in person" are entitled to recover a fair and equitable hourly rate;

(d) In proceedings within the scope of article 9 of the Convention in which the applicant follows the party concerned's pre-action protocol, the public authority concerned is required to comply with that protocol.''

The Committee requested that the United Kingdom provide detailed progress reports to the Committee by 1 October 2023 and 1 October 2024 on the measures taken and the results achieved in the implementation of the plan of action in respect of the above recommendations.

4.1.7 Lack of Other Common Law Jurisdictions to Compare

Whilst the Aarhus Convention has been ratified by 47 parties, only four parties in total have a common law system, namely Ireland, the UK, Malta and Cyprus. Ireland and the UK have been considered in detail, and Malta is considered in limited detail, below. In order to put the assessment of common law jurisdictions in context, a number of civil law jurisdictions have also been considered below to ascertain what comparisons can be drawn and what differences exist.

4.2 Belgium

4.2.1 Summary of Statutory/Procedural Scheme (Judicial Code)

Belgium is a federal state made up of three regions, the Flemish, Walloon and Brussels-Capital Regions. The powers of the state are distributed by the federal state, on the one hand, and the regions on the other hand. If you wish to challenge a final administrative act or permit decision in the Walloon or Brussel-Capital Regions, an appeal must be made to the Council of State. If the matter arises in the Flemish Region there are two specialised environmental Courts to which applicable appeals must first be brought, the Council for Permit Disputes and the Enforcement College, and there is a final appeal to the Council of State. However, there are a range of other environmental actions, such as actions against private individuals which may be brought in the ordinary Courts and different Court fees and costs apply to those actions.

Court Fees and Costs Before the Council of State[89] (Conseil d'Etat)

In cases before the Council of State, there is a Court fee (rolrecht, droit de rôle) per applicant and per request of €200 (demand for suspension and demand for annulment).

[89] European e-Justice Portal - Access to justice in environmental matters (europa.eu)

The unsuccessful requesting or defending party has to pay a judicial allowance[90] (rechtsplegingsvergoeding, indemnité de procedure) to the successful party. This is a flat-rate allowance for the costs and fees of the lawyer of the successful party. A basic amount is set which can be increased or decreased depending on the circumstances of the case and within certain limits. This procedural indemnity is indexed according to inflation and can be altered when deemed appropriate.[91] The Council of State has to take the following into account when deciding on the compensation in a particular case:

(1) the financial capacity of the unsuccessful party;

(2) the complexity of the case;

(3) the manifestly unreasonable nature of the situation.

If the unsuccessful party benefits from legal aid, the legal compensation is set at the minimum amount, except in the case of a manifestly unreasonable situation. If several parties are awarded compensation at the expense of one or more unsuccessful parties, the amount is at most double the maximum compensation to which the beneficiary who is entitled to claim the highest compensation can claim. It is divided between the parties. No party can be held liable for payment of compensation for the intervention of the lawyer of another party in excess of the amount of the Court fee. The compensation cannot be granted or imposed on an intervening party. The amounts are adapted from time to time to developments in the cost of living (indexation). Most of the time, the basic amount of €700 is awarded, but it is difficult to say exactly why this figure is reached; perhaps it is an accepted practice.

With an hourly rate ranging from €125 to €200 or more (without VAT), barristers' cost for a case will easily reach €4,000 to €10,000, and €5,000 to €12,000 including injunctive relief. In the event that a further appeal is necessary (before the Council of State against a judgment of the Council of Permit Disputes), another €4,000 to €8,000 will be needed. Environmental NGOs might pay an average cost of €5,000 for a Council of State case and €2,000 for a case before the ordinary Courts. NGOs are understood to do a lot of preparatory work themselves so that they can limit barristers' costs. In some instances, barristers agree to a preferential tariff for an NGO (e.g. €75 hourly). The minimum cost for any case would be about €2,000. In complex cases, and in cases where there is a need to appeal, the cost can be much higher.

There are no specific provisions concerning legal aid for individuals or NGOs. Judicial assistance can be granted to legal persons.[92] There was only one reported decision that was identified in which legal aid was awarded to an environmental NGO.[93]

The Council for Permit Disputes may decide to waive Court fees if the applicant can prove that his or her income is insufficient. Only the costs relating to Council of State appeals have been considered as these are most applicable for the purposes of this report.

Claims Before the Ordinary Courts (e.g. Claims Against Private Persons)

Claims before the ordinary Courts are subject to the provisions of the Belgian Judicial Code (Articles 1017 to 1024). Articles 1017 to 1024 of the Judicial Code set out the legal framework of the party concerned with respect to costs before the ordinary Courts (i.e. those other than administrative Courts and the Constitutional Court).

[90] Belgium Law Portal: Belgian legal news (droitbelge.be)

[91] There are usually alterations at least annually.

[92] Art. 666 Judicial Code.

[93] Constitutional Court, n° 143/2016, 17 November 2016, M.S.

Article 1017 provides that: any final judgment handed down entails ordering the losing party to pay the costs. However, the judge may order that the costs be shared as he/she deems appropriate, including where each party succeeds on some and fails on other grounds.

Articles 1018 and 1019 of the Judicial Code set out the costs classed as *'legal costs'*.

Article 1022 of the Judicial Code addresses the case preparation allowance which is a flat contribution to the lawyers' costs and fees of the successful party with minimum and maximum amounts set. At the request of one of the parties, the judge may either reduce or increase the allowance by a specifically motivated decision, without, exceeding the maximum (€11,000) and minimum (€82.50)[94] amounts established by Royal Decree. In his/her assessment, the judge shall take the following into account:

- The unsuccessful party's financial capacity is a factor in reducing the amount of the allowance;
- The complexity of the case;
- The allowances awarded on a contractual basis to the successful party;
- The manifestly unreasonable nature of the situation.

If the unsuccessful party benefits from legal aid, the case preparation allowance is set at the minimum amount established by the Royal Decree, except in a manifestly unreasonable situation.

Costs Scale (Indemnité de Procedure) for Cases Before the Council of State

The litigation fee for disputes relating to claims measurable in money shall be determined as follows (with certain exceptions):

	Basic Amount	Minimum Amount	Maximum Amount
Up to € 250.00	€ 225.00	€ 112.50	€ 450.00
From € 250.01 to € 750.00	€ 300.00	€ 187.50	€ 750.00
From € 750.01 to € 2,500.00	€ 600.00	€ 300.00	€ 1,500.00
From € 2,500.01 to € 5,000.00	€ 975.00	€ 562.50	€ 2,250.00
From € 5,000.01 to € 10,000.00	€ 1,350.00	€ 750.00	€ 3,000.00
From € 10,000.01 to € 20,000.00	€ 1,650.00	€ 937.50	€ 3,750.00
From € 20,000.01 to € 40,000.00	€ 3,000.00	€ 1,500.00	€ 6,000.00
From € 40,000.01 to € 60,000.00	€ 3,750.00	€ 1,500.00	€ 7,500.00
From € 60,000.01 to € 100,000.00	€ 4,500.00	€ 1,500.00	€ 9,000.00
From € 100,000.01 to € 250,000.00	€ 7,500.00	€ 1,500.00	€ 15,000.00
From € 250,000.01 to € 500,000.00	€ 10,500.00	€ 1,500.00	€ 21,000.00
From € 500,000.01 to € 1,000,000.00	€ 15,000.00	€ 1,500.00	€ 30,000.00
Over € 1,000,000.01	€ 22,500.00	€ 1,500.00	€ 45,000.00

** Amounts adjusted to the indexation and valid from 01/03/2023*

As noted above, it is difficult to determine how the above fees relate to the €700 flat rate that seems to be quoted in a number of Conseil D'Etat cases.

[94] As noted above, these change annually therefore current figures will be available via Tarifs | Cours & Tribunaux (rechtbanken-tribunaux.be)

4.2.2 Simple, Non-technical Explanation of How It Works in Practice

The procedure for Judicial Review of administrative decisions by Belgium's Council of State is laid down in its basic act (lois coordonnées sur le Conseil d'Etat) and complementary regulations.

An action to annul an administrative act can be brought by any natural or other legal person which has been *"harmed"* or has an *"interest"* at stake. Meeting this requirement does not pose particular problems for individual claimants (natural or other legal persons) in environmental cases, and the standing requirements do not vary according to the type of environmental legislation concerned.

Due to the federal structure of Belgium, the implementation of the Convention involves federal law as well as the laws of the three regions (Flanders, Wallonia and Brussels Capital Region). Environmental and planning laws are part of the regions' competence, and so is the administrative structure for managing these laws. Hence, the regions decide on administrative appeals against various forms of environmental and construction permits. All three regions provide for administrative appeal procedures against *"environmental permits"* for any natural or other legal persons who can show an interest in the case.

As indicated above, Court appeals, after all potential administrative appeal procedures have been exhausted, must be brought directly to the Council of State in Walloon and the Brussel-Region. In the Flemish Region, an appeal must first (with certain exceptions) be brought to the Council of Permit Disputes or Enforcement College with a final appeal available from those bodies to the Council of State.

Costs might be an obstacle for access to environmental justice by ordinary people and NGOs in Belgium. These costs include Court fees, and the risk of having to pay a judicial allowance as intervention in the lawyers' fees and costs of the winning party if the case is lost. Although procedures in Belgium cannot be considered *"prohibitively expensive"*, lawyers' fees and the system of Court fees, judicial allowances and VAT might have a dissuasive effect. Therefore, the costs of environmental court procedures might constitute a hindrance to access to justice to certain individuals, there are fee waiver regulations and other similar support measures in operation.

4.2.3 Relevant Aarhus Compliance Committee Decisions[95]

ACCC/C/2014/111

This communication was by two eNGOs that alleged that Belgium has failed to ensure that access to judicial procedures to challenge an act or omission by a private person (i.e. Articles 1017 to 1024 of the Judicial Code) that contravened provisions of national law relating to the environment was NPE. The communicants' action had been held to be unfounded at first instance and on appeal, and the communicants were ordered to pay costs of €3,700. The average personal annual income in Belgium in 2012 was €16,651 — equivalent to €1,387.58 per month. The communicants had chosen not to risk increasing the burden of their bills for lawyers' fees, which they did not know how they would pay, and under Article 478 of the Judicial Code they would be obliged to consult a lawyer at the Supreme Court, whose fees would be at least €20,000.

Ultimately, the Belgian scheme was found not to be incompatible with the NPE provisions of the Aarhus Convention. Specifically, the national system in this case provided for a flat-rate contribution to be paid by the unsuccessful claimant (at the time of the dispute €1,320, for cases

[95] European e-Justice Portal - Access to justice in environmental matters (europa.eu)

not quantifiable in monetary terms) which the national judge could however adjust within a minimum and maximum range (at the time of the dispute between €82.50 and €11,000). The Committee found that, even though the flat-rate contribution would be prohibitively expensive for some applicants, given the discretion for the judge to vary this amount, the legal framework in itself did not contravene Article 9(4) of the Convention. However, the ACCC found that the amount of the case preparation allowance which these communicants in particular were ordered to pay (€3,700), together with other costs of the case, imposed a considerable financial burden on them - small NGOs with limited financial capacity and that it was clear that costs of this level could effectively prevent small environmental NGOs from challenging decisions, acts and omissions under Article 9 of the Convention.

The ACC found that the Court should have exercised its discretion under Article 1022 of the Judicial Code to reduce the basic case preparation allowance, taking the communicants' financial capacity into account.

The Committee indicated that *"the public interest nature of the environmental claims should be given sufficient consideration by the courts with respect to the apportionment of costs."*

4.3 Netherlands

4.3.1 Summary of Statutory/Procedural Scheme

In the Netherlands, Judicial Review of administrative law decisions concerned with the environment are adjudicated by the District Court[96] as a Court of first instance. An appeal from a District Court decision in environmental matters may be lodged with the *Afdeling bestuursrechtspraak van de Raad van State* (the Administrative Jurisdiction Division of the Council of State). This Court will also hear certain specified cases (e.g. zoning schemes) as a Court of first and only instance.

The Dutch General Administrative Law Act provides all procedural rules for Judicial Review and the administrative procedures that are to be followed before one can apply for Judicial Review.

Administrative Courts will review both the procedural legality and the substantive legality of administrative decisions as long as those are matters specified by the parties in the dispute. The Court is permitted to appoint an expert and the cost of such an expert is borne by the Court. If the parties seek to introduce expert evidence, it is at their own expense.

In administrative judicial procedures, legal counsel is not mandatory, whether for lodging an appeal or legal representation in Court proceedings.

For an administrative Court to hear an applicant's case, it is necessary to pay a fee, as stipulated in Article 8.41 of the General Administrative Law Act. The fee is €178 for a natural person and €354 for any other legal person lodging an appeal or injunction.[97] Fees before an administrative Court of Appeal are €131, €265 and €532 respectively.[98]

If the appeal is successful, these costs will usually have to be paid by the administrative authority (Article 8.75 and 8.114 of the General Administrative Law Act).

The default in most litigation in the Netherlands is that the loser pays the legal costs *('the loser pays principle')*. However, the *'loser pays principle'* does not apply in administrative Court cases. In most cases, the administrative authority will have to pay a calculated sum of legal costs (such as the costs related to lawyers representing the applicant) if the decision is quashed by the

[96] There are 11 regional District Courts in the Netherlands.

[97] European e-Justice Portal - Access to justice in environmental matters (europa.eu)

[98] Article 8:109 General Administrative Law Act.

Court. The amount that can be ordered is maximised, and is usually well below the actual costs incurred by the party, although it has not been possible to find actual figures for this report. A natural person may be ordered to pay costs only in case of a manifestly unreasonable use of the right of appeal although in practice the Courts very rarely exercise this power.[99]

If costs are awarded to a party who has been granted legal aid pursuant to the Legal Aid Act, these shall be paid to the registrar.

4.3.2 Simple Non-technical Explanation of How it Works in Practice

Under Dutch administrative law, only final decisions can be subject to legal review and appeal to the Courts. Administrative review and Judicial Review is not available against general binding rules or policy rules, only against the decisions based on them. The judge is allowed, though, in a dispute over the (formal or material) legality of a decision, to raise arguments calling into question the legality of the legal basis on which the decision is based. So it is possible to check whether a decision is compatible with EU law, environmental law included. It is also possible for the national judge to check whether national law complies with binding international law.[100]

There is also no evidence that costs for Court actions are prohibitively expensive.[101] The costs of one particular appeal were €990 and the Court fee was €251, which the Mayor and Aldermen of Gulpen-Wittem were ordered to reimburse to a third-party who provided legal aid to the appellant.[102] It would be good to get a few more examples of the costs ordered in similar cases but this has not been easy to ascertain.

Citizens and environmental NGOs can start legal procedures based on civil law. Two important developments need to be noted with respect to access to justice in practice:

- Firstly, actual access to justice may be diminished due to the fact that most installations and activities have been brought under a system of generic rules, instead of individual permits. This could reduce options for appeal against the granting of permits and permitting rules. However, under the generic rules claimants can still challenge that rules are not complied with and ask the authorities to intervene; and
- Secondly, Dutch NGOs increasingly seem to opt for civil instead of administrative procedures.

The *'loser pays principle'* mainly applies in civil cases. However, this is at the discretion of the judge. Each party has to pay for its own legal assistance, experts and other costs. In administrative procedures citizens are rarely asked to pay for the costs of the authorities linked to the appeal (Article 8.75 AWB).[103] If a case is won in the administrative Court, the public authority could reimburse costs for legal counsel if the Court orders. The amount that is awarded is usually well below the actual costs (Article 8:75 General Administrative Law Act).[104]

Legal assistance by a solicitor or barrister (advocaat) is mandatory only when cases are lodged before a civil Court including in the case of an appeal. The costs of legal assistance and expert advice in a civil lawsuit can be considerable.

The Court may ask the Administrative Courts Advisory Foundation (Stichting Advisering Bestuursrechtspraak (STAB)) to provide an extensive report on the technical elements of the

[99] European e-Justice Portal - Access to justice in environmental matters (europa.eu)

[100] eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0268

[101] Environmental Implementation Report 2017 – Netherlands - EUR-Lex - 52017SC0052 - EN - EUR-Lex (europa.eu)

[102] ECLI:NL:RVS:2017:2271, Council of State, 201604695/1/A1 (rechtspraak.nl)

[103] Environmental Implementation Review 2019 – the Netherlands -https://op.europa.eu/en/publication-detail/-/publication/aec10684-06ee-11ea-8c1f-01aa75ed71a1

[104] European e-Justice Portal - Access to justice in environmental matters (europa.eu)

case. This independent foundation, funded by the Dutch Government, hosts about 45 experts in all areas of environmental science and physical planning. Claimants can suggest the Court ask for such a report, but it is up to the Court to decide. If the administrative Court asks STAB for advice, the expert witness appointed will provide his or her opinion without charge.

4.4 Spain

4.4.1 Summary of Statutory/Procedural Scheme

Law 27/2006 of 18 July on the rights of access to information, public participation and access to justice in environmental matters (the Aarhus Law) is the main piece of legislation transposing the Aarhus Convention into domestic law in Spain.

The third chamber of the Spanish Supreme Court deals with administrative judicial procedure. This chamber can hear environmental cases at first instance against acts and norms from the Council of Ministers, the Government Delegated Commissions.

The principle that the unsuccessful party pays the costs of legal proceedings, provided by the Spanish judicial procedure law, applies as follows:

- At first or sole instance, the judicial body, when issuing its judgment or when resolving a procedural appeal, shall charge the cost to the party whose entire request is dismissed or rejected unless the case involved serious doubts on the facts and merits.
- In appeals, costs shall be charged to the appellant if the entire appeal is dismissed unless the judge considers that there were circumstances justifying the contrary.

When the petitions of the parties are partially accepted or rejected each party shall pay its own costs and share the common costs. Nevertheless, if the judicial body considers that one of the parties sustained the action or filed the case in bad faith or recklessness that party may bear the costs.

It is not straightforward to calculate the costs of the procedure as they depend on the value of the object of the case. Court fees are regulated by Law 10/2012. The Court can grant certain exemptions from the obligation to pay Court fees. For example, any natural or legal person to whom legal aid has been granted, and the public ministry, are exempted from Court fees or filing fees.[105]

Spanish legislation does not mention the requirement that costs should be NPE. However, as the Convention is part of the Spanish legal order, the NPE requirement has to be respected.[106]

4.4.2 Key Decisions in Relation to Spain's NPE Scheme

A Spanish environmental NGO (IIDMA) brought a case before the Spanish Administrative Court Chamber (Ref: 42/2017) challenging the Spanish Transitional National Plan for large combustion plants. The Court dismissed the case and ordered IIDMA to bear the Court costs, applying the *'loser pays principle'* provided by the Spanish judicial procedure Law. The Court separately approved a costs assessment on behalf of the defendant (the Spanish Administration) and three co-defendants intervening in the procedure, which amounted to €11,260.

IIDMA appealed to the Supreme Court Litigation Chamber (Ref: 3200/2019) the Court's decision approving the costs assessment, based on an infringement of its right to legal aid under Article 23.2 of Spanish Aarhus 27/2006, which should cover the costs imposed on the recipient NGO.

[105] Article 4.2. of Law 10/2012.

[106] European e-Justice Portal - Access to justice in environmental matters (europa.eu) Point 1.5.6.

Article 23.2 of the Aarhus Law recognises that NGOs fulfilling the standing requirements have a right to legal aid under the terms provided by Spanish Legal Aid Law 1/1996. The standing requirements require:

- At least two years of being registered before the action is brought;
- Having the protection of the environment as one of its statutory goals; and
- Being active in the territory in which the case is brought.

To be granted legal aid under Law 1/1996, an applicant NGO is required to provide evidence of insufficient means for litigation. In addition, Law 1/1996 places an obligation to pay the Court costs if the recipient's financial status improves within three years from the end of the judicial procedure.

Notwithstanding those requirements, the Spanish Supreme Court ruled that a not-for-profit environmental organisation with recognised legal aid under the Aarhus Law is not required to pay the Court costs, otherwise it would be contrary to the Spanish legal order. The Court noted that from the start of the procedure IIDMA was granted access to legal aid through a direct application of the Aarhus Law provisions. The Court held that eNGOs that meet Aarhus Law requirements are not required to prove insufficient means for litigation. Therefore, the condition for the payment of Court costs in Legal Aid Law 1/1996 did not apply to such cases.

The Court therefore changed its doctrinal approach by nullifying the costs order and exempting IIDMA from paying the €11,260 in costs that had been ordered.

ACCC Determination No. **ACCC/C/2009/36**[107] concerned compliance by Spain with the Convention and was adopted by the Compliance Committee on 18 June 2010.

The Committee considered that by setting high financial requirements for an entity to qualify as a public utility entity and thus enabling it to receive free legal aid, the current Spanish system is contradictory. Such a financial requirement challenges the inherent meaning of free legal aid, which aims to facilitate access to justice for the financially weaker. Thus, the party concerned failed to comply with Article 9, paragraph 5, of the Convention and failed to provide for fair and equitable remedies, as required by Article 9, paragraph 4, of the Convention.

In terms of legal representation, Article 23.2 of Law 29/1998 requires that parties to a Court case on appeal, which will be heard by two or more judges, must have two lawyers, one *"procurador"* and one *"abogado"*. Spanish citizens therefore have to pay the fees for two lawyers after the first instance, and also the fees for the two lawyers of the winning party in the event that they lose their case (*'loser pays principle'*). The ACCC found that the Spanish system of compulsory dual representation may potentially be NPE. However, the Committee did not have detailed information on how high the costs of the dual representation may be, while it recognised that such costs may vary in the different regions of the country. The Committee therefore stressed that maintaining a system that would lead to prohibitive expense would amount to non-compliance with Article 9, paragraph 4, of the Convention.

[107] ACCC/C/2009/36 Spain | UNECE

4.5 Malta[108]

An action for the Judicial Review of the legality of administrative action (including environmental decisions) may be filed before the First Hall of the Civil Court, which is the Court of first instance. Such an action is based on Article 469A of Chapter 12 of the Laws of Malta. The judgment of the First Hall of the Civil Court may be appealed by either party to the Court of Appeal.

Subsidiary Legislation 551.01, Environment and Planning (Fees) Regulations, stipulate the fees due to the Registry of the Environment and Planning Review Tribunal ('EPRT') in respect of appeals. These are usually €150 but appeals of development permission can be up to a maximum of €3,500 or €1,000 for eNGOs.[109]

When considering the professional fees payable to lawyers, architects and other technical experts required to conduct an appeal before the EPRT, one could easily run to some €2,500 to €3,000 in the more straightforward appeals. More complex appeals which would require analysis of environmental assessments and studies and expert opinion would be far more expensive – running to costs of €10,000 or more.[110] There is no specific mention of whether NGOs are eligible to receive legal aid or not.

The Court has the discretion to award or apportion costs in any way it deems fit. However, the general principle is that the losing party usually pays costs.

When an appeal is decided upon by the EPRT, and the appeal is upheld, the Tribunal may order that the fees paid for filing the appeal, or part of them, shall be refunded to the appellant.

4.6 Italy

In Italian litigation, the losing party bears the costs of the proceedings. However, it is a general practice in all civil cases that the T.A.R. (Regional Administrative Court) declares that each party should bear its own costs. Costs depend on the subject matter and amount/value in controversy (so called *contributo unificato* or Court fees) and on lawyers' fees which vary from €4,000 - €5,000 to €100,000 - €150,000.[111]

In Italy, there is no statutory clause requiring the Courts to avoid prohibitive costs. Nevertheless, Article 1 and Article 7 of the Code of Civil Procedure refer to the principle of due process, which is interpreted as requiring the avoidance of prohibitive costs. The Italian legal system applies *'the loser pays principle'* (Article 91 of the Code of Civil Procedure): if an applicant loses, the applicant will generally be required to bear the costs. Nevertheless, the judge can limit the losing party's liability for costs if he or she finds that the costs incurred by the winning party are excessive or unnecessary. The judge can also rule that each party has to bear their own costs: when one party won on one point(s) and the other party succeeded on another point(s), or for *"other exceptional reasons set forth in the judgment"* (Article 92 of the Code of Civil Procedure).[112]

[108] EU Access to Justice on Environmental Matters website, Malta, https://e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?MALTA&member=1

[109] European e-Justice Portal - Access to justice in environmental matters (europa.eu) Point 1.7.3.

[110] European e-Justice Portal - Access to justice in environmental matters (europa.eu) Point 1.7.3.

[111] The legal debate on access to justice for environmental NGOs (unece.org) Page 116.

[112] European e-Justice Portal - Access to justice in environmental matters (europa.eu) Point 1.1.9.

4.7 Sweden

As a general rule, challenging environmental decisions in Sweden is free. There are no Court fees, no obligation to pay the opponents' costs, no bonds to be paid for obtaining injunctive relief, or other costs to be paid, irrespective of whether the case is an administrative appeal or goes to Court. The ultimate responsibility to investigate the case according to the *"ex officio-principle"* lies with the administration and the environmental Courts – which both have technicians participating in the decision-making. There are no witness or experts' fees to be paid. This makes the environmental procedure cheap and easily accessible for the public.

4.8 France

In administrative Courts the rules on fees are in the administrative justice code Article L 761-1 and R. 761-1 to 761- 5. The Court fees or legal costs *(les dépens)* include expert fees, enquiry fees and all other legal work. With certain exceptions, legal costs are paid by the party that loses the case, unless particular circumstances of the case justify that they are paid by the other party or shared between them (Article R 761-1 administrative justice code).

For other fees, the judge decides who pays, but it is generally the losing party. The judge must take into consideration equitable principles and the economic situation of the plaintiff. One instance was identified where an NGO was ordered to pay €3,000 to a wind turbine entity.[113]

The judge may decide that parties will bear their own costs (Article L 761-1 administrative justice code). If the administration is the losing party, the State has to pay fees to the successful party. In two examples identified, the State paid €1,500 to an NGO[114] and €2,500 to a private person with legal aid.[115]

However, a barrister's fees will remain the responsibility of each party. They are generally considered to be expensive and this can be perceived as an obstacle for NGOs not entitled to legal aid. At the Court of first instance, the plaintiff may litigate in person (i.e. without a lawyer). For damages in a Court of first instance and in appeal and Judicial Review (cassation for legality action), a barrister will have to be engaged.

In most administrative cases, the judge does not decide on fees and each party pays its own fees. Even when a successful defending party seeks payment from an unsuccessful claimant NGO, the judge may refuse to order costs against the NGO.[116] There are many dismissals[117] of NGO actions without any obligation to pay any Court fees or other fees.[118]

[113] CE 6 June 2014 n° 360437.

[114] CE 26 February 2013 n°365640.

[115] CE 26 January 2011 n°310270.

[116] CE 12 April 2013 n°342409.

[117] CE16 April 2010 n° 318067; CE 28 March 2011 n° 330256; CE 20 March 2013 n° 354321; CE 23 March 2013 n° 329642; CE 25 September 2013 n° 352660; CE 16 July 2014 n°365515.

[118] Accessed via: The legal debate on access to justice for environmental NGOs (unece.org)

5.0 - Legal Aid and Assistance Mechanisms in Ireland and Other Jurisdictions

5.1 Judicial Discretion as to Costs in Public Interest Litigation in Ireland

In Ireland, there is a discretion at common law and under Section 169 of the Legal Services Regulation Act 2015 (as amended) for a Court to depart from the normal rule that costs follow the event, *"having regard to the particular nature and circumstances of the case"*. The factors to be weighed and balanced by the Court in exercising this discretion were considered in a recent judgment of the High Court in *EPUK Investments v Environmental Protection Agency & Ors* [2023] IEHC 138 paragraph 18, in particular in the case of *"public interest"* litigation, as follows:

> *"ix. In a case in which departure from the general rule is urged on the basis of the public importance of the case or that the plaintiff was acting in the public interest or that there was a public interest in the decision of the case, that* ***the plaintiff had or had not a private interest in the case or its outcome*** *is relevant to the exercise of the discretion. A private interest may dilute a losing party's claim to be a public interest litigant, but it is not, per se, a bar to the exercise of the discretion in favour of a losing party.*
>
> *x. As very many cases involve some element of public interest, and as that is especially so of public law litigation such as Judicial Review (the fundamental project of which is the "maintenance of the highest standards of public administration"), the nature, importance and degree of that interest is likely to be relevant to the determination of the question whether to depart from the general rule. The question is not merely whether a public interest was engaged but whether it was, in all the circumstances sufficient -* ***of such special and general importance*** *- to warrant departure from the general rule.*
>
> *xi. A further factor is whether* ***the legal issues*** *raised, rather than the subject matter itself, were of special and general public importance.*
>
> *xii. By way of a personal addition to this list, it seems to me to follow from the principles set out above that the weight to be given to a particular factor is relative, not absolute, and will* ***vary with context and circumstances****. For example, the same public interest which might tip the balance in favour of an unsuccessful Plaintiff with no private interest in the outcome of the case might not tip the balance in in favour of an unsuccessful Plaintiff with a great private interest in the outcome." [Emphasis added]*

The onus to demonstrate a departure from the normal costs rule rests on the person seeking to assert the public interest in the litigation.

This was considered recently in *Friends of the Irish Environment v Legal Aid Board & Ors,* [2023] IECA 190. The factual background to that case was that the applicant had been refused legal aid by the Legal Aid Board because it was a body corporate and the Civil Legal Aid Act 1995 only applied to natural persons. The High Court agreed with the Legal Aid Board, as did the Court of Appeal, in finding that the proper construction of the 1995 Act allowed the provision of legal aid and advice only to individuals and not to bodies corporate. The applicant, despite being entirely unsuccessful in the proceedings, asked the Court to exercise its discretion to award costs in its favour. The respondents did not seek an order for costs against the applicant, and the

Court of Appeal noted that it was *"exceptional"* for the applicant to be seeking its costs, and the circumstances in the appeal did not meet the relevant threshold to justify an award of costs in its favour. In particular, because:

(i) The issues raised did not approach the requisite novelty that would allow the Court to exercise its discretion (for example, such cases in the past have dealt with fundamental aspects of the separation of powers and issues of distinct novelty).

(ii) The issues raised did not entail the gravity that has characterised the issues considered in earlier case law (such as the separation of powers doctrine in *Horgan v An Taoiseach* [2003] IEHC 64 and *Curtin v. Clerk of Dáil Éireann* [2006] IESC 27, or the Constitutionality of the Judicial Separation and Family Law Reform Act 1989 in *TF v. Ireland*). The Court noted that in *An Taisce v An Bord Pleanála (Glanbia)* [2022] IESC 18 the Supreme Court refused to award the unsuccessful applicant its costs even though the case raised *"very important – even fundamental – issues of environmental law regarding the operation in particular of the EIA Directive"*.

(iii) The case could not be characterised as a *"test case"* just because it raised important issues, and it was not contended that there were other cases awaiting the outcome.

Therefore, in summary, there is a high bar to an unsuccessful litigant seeking to persuade a Court to exercise its discretion to award costs in favour of him/her/it, and it only really happens in exceptional circumstances. This does not provide any certainty to an applicant bringing an environmental Judicial Review in respect of its own legal costs.

5.2 Thresholds to Qualify for Civil Legal Aid Scheme in Ireland

It is possible to get legal aid in Ireland for a planning and environmental case, but there are stringent requirements for qualification. Firstly, legal aid is only available to natural persons and not to corporate bodies.[119] Secondly, in most circumstances,[120] the merits of an applicant's case will be assessed before they are granted legal aid. In considering the merits of the case, the Legal Aid Board will consider whether an average person would be willing to go to Court if paying for it with their own money and whether a reasonable solicitor/barrister would recommend going to Court knowing you were paying for it yourself and based on the facts of the case.[121] Thirdly, an applicant for civil legal aid in Ireland will be means tested and to qualify, the person must have an annual disposable income of less than €18,000 per annum and disposable assets of less than €100,000.

In 2022, the funding allocated by the Department of Justice to Civil Legal Aid services was €47.9 million.[122] In 2021, only 6.5% of applications for Civil Legal Aid services were for cases other than family law or international protection[123] and matters such as torts, conveyancing and property make up a significant proportion of those other matters.[124] Therefore, the funding available for and allocated to planning and environmental cases is likely to be very limited.

[119] See *Friends of the Irish Environment v Legal Aid Board & Ors*, [2023] IECA 19, where Murray J found that on its proper construction the Civil Legal Aid Act 1995 allowed the provision of legal aid to individuals and not to bodies corporate. In a later judgment ([2023] IECA 63) the Court of Appeal refused to make a reference to the CJEU as to whether there was an obligation under the Aarhus Convention or the EU Charter of Fundamental Rights to provide legal aid in cases concerning breaches of EU law, as that case had not been pleaded by the applicant.

[120] For example, the merits of the case are not assessed where the welfare of a child is at stake.

[121] Irish Legal Aid Board website, www.legalaidboard.ie/en/

[122] Legal Aid – Tuesday, 5 Jul 2022 – Parliamentary Questions (33rd Dáil) – Houses of the Oireachtas

[123] Annual Reports - LAB (legalaidboard.ie)

[124] See Chart 3 on p.28 of Legal Aid Board Annual Report 2021.

5.3 Legal Aid Schemes in Other Jurisdictions

The legal aid schemes provided in the UK, Belgium, Netherlands, Spain, Malta, Italy, Sweden and France are briefly outlined below.

5.3.1 United Kingdom

Legal aid is available for persons involved in environmental claims in certain limited circumstances for persons seeking to challenge by way of Judicial Review an enactment, decision, act or omission of a public body. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and secondary legislation made under it sets out the criteria for obtaining legal aid in Judicial Review. The applicant must be able to demonstrate that the proceedings benefit the individual, a member of the individual's family or the environment.

Applicants for legal aid must meet strict financial criteria in order to avail of legal aid. An individual may be eligible for legal aid for Judicial Review if they have:

- Less than £8,000 of capital
- A gross income of less than £2,657 per month
- A disposable income of less than £733 per month
- Certain state benefits.

The statutory framework permits the Director of Legal Aid Casework[125] to disapply the eligibility limits where an application for legal representation in a multi-party action is made which the Director considers has a significant wider public interest.

In ACCC Communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, the UK submitted that: *''The Legal Services Commission Funding Code Decision-making Guidance allows funding in litigation cases which have only a "borderline" chance of success but which have a "significant wider public interest". In practice, this has led to public funding of a significant number of environmental challenges.''*

However, the UK accepted in that instance that the legal aid system alone would not be sufficient to comply with Article 9, paragraph 4 of the Convention.

5.3.2 Belgium[126]

The Belgian system provides both primary and secondary legal aid. Primary legal aid involves practical information and initial legal opinions by lawyers or public welfare assistance centres whereas secondary legal aid consists of detailed advice or legal assistance/representation in proceedings and is exclusively provided by barristers.

Secondary legal aid is financed by the federal government and barristers are appointed to applicants from a list drawn up by the bar association. Depending on the financial situation of the applicant, legal aid may be granted partially or completely free of charge. The Belgian legal system also contains provisions to provide persons with insufficient resources with *"free of charge"* procedures which means they do not have to pay Court costs.

There are no specific legal aid provisions for NGOs or other legal entities although they may benefit from *"free of charge"* procedures in certain circumstances.

[125] A civil servant designated under LASPO by the Lord Chancellor.

[126] EU Access to Justice in Environmental Matters website, Belgium, Section 1.6.2, https://e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?BELGIUM&action=maximizeMS&clang=en&idSubpage=1&member=1

5.3.3 Netherlands[127]

The legal aid system applies to natural persons and is available to persons of limited means but may require payment of a personal contribution. Legal aid may include representation by a lawyer in litigation. Lawyers are paid a fixed fee according to the type of case. The fixed fee may be insufficient to cover the actual costs of procedures by those providing legal aid.

5.3.4 Spain[128]

Spanish law provides access to legal aid for natural persons, public interest associations and certain registered foundations who can demonstrate a lack of sufficient economic resources to initiate litigation. Article 23.2 of Law 27/2006 (the Aarhus Law) provides that not-for-profit organisations are entitled to legal aid if they meet the following criteria:

- Their statutes must include as the organisation's goal the protection of the environment or of any of its elements and must be active in achieving its goals;
- Must be legally constituted at least two years before the date on which the action is initiated;
- There must be a geographic connection (established in their statutes) with the area affected by the act or omission.

The Spanish Courts have recognised a right to legal aid for qualified NGOs regardless of their economic resources.

5.3.5 Malta[129]

Legal aid is available to natural persons for almost all civil claims in Malta, however, there is no record of it having been afforded to persons in respect of environmental litigation.

Companies are not entitled to legal aid and it is not clear whether NGOs are eligible (indeed it is understood that a recent request by an eNGO for legal aid was rejected). Legal aid is subject to an assessment of the merits of the case and the means of the applicant. Under the means criteria, a person must not hold property including savings with a net value above €6,988 for the preceding 12 months and the person's income for the prior 12 months should not exceed the national minimum wage for persons of 18 or over.

The absence of legal aid for environmental cases, plus the fact that the losing party is liable to pay the other side's costs, appears to be an obstacle to access to justice in Malta. However, unusually, there does not appear to be any ACCC decisions criticising Malta's implementation of the Convention.

[127] EU Access to Justice in Environmental Matters website, Netherlands, Section 1.7.3.3, https://e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?NETHERLANDS&action=maximizeMS&clang=en&idSubpage=1&member=1

[128] EU Access to Justice in Environmental Matters website, Spain, Section 1.7.3.3 – 1.7.3.7, https://e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?SPAIN&action=maximizeMS&clang=en&idSubpage=1&member=1

[129] EU Access to Justice in Environmental Matters website, Malta, https://e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?MALTA&action=maximizeMS&clang=en&idSubpage=1&member=1

5.3.6 Italy

Legal aid is available for environmental claims in Italy. Legal aid is granted to natural persons who have an annual income of less than € 11,493 (adjusted every two years for inflation). The person has to make an application to the relevant bar association, including providing documentary information in respect of their financial status, and the bar association makes a decision within ten days of the application. If the applicant is granted legal aid, he or she can choose a lawyer from a list held by the bar association and the Court fees and the lawyer's fees are paid for by the State. If the request is rejected, the person can apply again to the judge presiding over his or her case.[130]

Legal aid in Italy has also been extended to cover entities or associations that do not operate for profit or engage in economic activities and that have an annual income of less than €11,493. The same rules of application for natural persons apply to such entities or associations.

Eligibility for legal aid in Italy covers all instances and stages of proceedings and any derived or connected procedures (e.g. enforcement).[131]

In ACCC Communication ACCC/C/2015/130 concerning compliance by Italy with Article 9(5) of the Convention on the removal or reduction of barriers to access to justice, the ACCC was asked to consider whether considering income derived from non-commercial activities as part of the criteria for eligibility for legal aid was justified, and found as follows:

> *"112. The Committee considers that the exclusion of income from non-commercial activities when calculating an environmental NGO's eligibility for legal aid may be a useful assistance mechanism to remove or reduce financial barriers on access to justice. However, while article 9 (5) of the Convention requires Parties to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice,* ***it does not prescribe the exact form that those assistance mechanisms must take.*** *[...]." [Emphasis Added]*

Although the ACCC didn't go on to make any substantive finding on this aspect of the case, the comment here indicates a degree of latitude afforded to parties to the Convention in the threshold set for assistance mechanisms (such as legal aid) for removing or reducing financial barriers to access to justice.

5.3.7 Sweden

Legal aid is available for advice and Court fees in all types of civil cases in Sweden. However, as Court proceedings themselves are free of charge there is very little legal aid actually granted in reality. Legal aid is only available to natural persons, and not to companies or associations. Eligibility criteria include that the person's income must be less than €24,500, and all other financial circumstances are taken into consideration when calculating the income.[132]

Some Swedish authorities, such as the Swedish Environmental Protection Agency, Transport Administration and Consumer Agency, provide grants to NGOs for general use and distribute funds specifically for environmental legal action (in order to develop case law in the area).[133]

[130] EU Access to Justice in Environmental Matters website, Italy, European e-Justice Portal - Access to justice in environmental matters (europa.eu)

[131] EU Access to Justice Website, Legal Aid, Italy, https://e-justice.europa.eu/37129/EN/legal_aid?ITALY&member=1

[132] EU Access to Justice Website, Legal Aid, Sweden, https://e-justice.europa.eu/37129/EN/legal_aid?SWEDEN&member=1

[133] EU Access to Justice in Environmental Matters website, S, https://e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?SWEDEN&action=maximizeMS&clang=en&idSubpage=1&member=1

5.3.8 France

Legal aid is available for all types of proceedings in France, including civil and enforcement proceedings (which would cover planning and environmental claims). However, it is subject to complex financial, nationality, residence and admissibility criteria. For example, the financial criteria are €11,262 for full legal aid and €16,890 for partial legal aid for a single person. Nationality and residence criteria are that the person is a French national or EU or foreign nationals habitually resident in France (but only if their home country has a bilateral agreement on legal aid), apart from certain people, such as minors, to which this criterion does not apply. Claimants must have reasonable grounds for their case and their actions cannot be manifestly inadmissible or unfounded. There are exceptionality criteria if the person does not meet the standard criteria, but their action is worthy.[134]

It is available to all legal persons and may be available to associations but only if they meet the exceptional circumstances criteria mentioned above.

France has a pro bono public interest federation called *France Nature Environnement*. It has links with 3,500 environmental associations in France. It also has a network of 80 lawyers, some of whom are salaried and others who are academics, and they provide pro bono advice to people and cases in the public interest.[135]

[134] EU Access to Justice Website, Legal Aid, France, https://e-justice.europa.eu/37129/EN/legal_aid?FRANCE&member=1

[135] EU Access to Justice Website in Environmental Matters, France, https://e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?FRANCE&action=maximizeMS&clang=en&idSubpage=1&member=1

6.0 - Conclusions

1. The access to justice provisions of the Convention provide broad rights to the public to review decisions on access to information, and to review the substantive or procedural legality of any decision, act or omission by public authorities and private individuals relating to the environment. In addition, the procedures providing for same must be fair, equitable, timely and NPE. The test for NPE is not purely subjective; the cost of proceedings must not exceed the financial resources of the person concerned nor appear to be objectively unreasonable, at least in certain cases. This is the legal threshold that must be met by any protective costs scheme.

2. The practical effect of the Access to Justice pillar of the Convention as interpreted in Ireland is to ensure that there is a balance between the protection of the environment and sustainable development. There is a benefit to society from individuals and eNGOs participating in planning and environmental decision-making and holding public authorities, responsible for such decisions, to account. Therefore, the cost of challenging planning and environmental decisions should not be a dissuasive factor. Of course, there is also a need for a planning system that can make effective and timely decisions. This is the practical balance that should be achieved by any protective costs scheme.

3. Costs protection in planning and environmental cases has been a very contentious topic and generated a lot of litigation in recent years. The current approach in Ireland (based on the Supreme Court decision in *Heather Hill*) appears to satisfy the NPE principle (except for an issue with the *"environmental damage"* limb of the EMPA provisions). The current approach probably goes further than required in providing for *"no order"* as to costs in every planning and environmental case, as opposed to a contribution to costs from losing parties. However, there is provision for costs to be awarded against an applicant in certain limited circumstances, for example where the Court considers a claim to be frivolous or vexatious.

4. Any proposed protective costs scheme should ensure that it both satisfies the NPE requirement and makes the scope, parameters, thresholds and requirements as clear and simple as possible so as not to generate more contentious litigation.

5. The Board's individual case dataset (as verified against the published LCA decisions) provides a clear insight into the significant costs associated with defending planning and environmental Judicial Review cases in Ireland. A case conceded at Leave Stage might cost a respondent c.€40,000, whereas a case that is lost at hearing in the High Court might cost a respondent c.€280,000 or if it goes to the Appeal Court/CJEU Stage it might cost c.€462,000. Each of these Stages (including the Leave Stage) have preparation costs, brief fees and hearing fees, all of which get increasingly expensive the more the litigation progresses. This also illustrates that there is a clear cost-benefit to respondents in conceding cases at the earliest possible stage: where it is possible to identify legal frailties in the decision under challenge and concede at the Leave Stage, this might incur <10% of the cost of a case that goes all the way to Appeal/CJEU Reference Stage. There is still a cost to a respondent when it successfully defends cases as costs recovery is very limited (if at all, since the Supreme Court decision in *Heather Hill*). The individual case dataset shows that commercial entities incur similar levels of costs against the Board and a question for consideration is whether they should be able to avail of an entitlement to costs protection/legal aid.

6. The increase in the number of cases against the Board in the period 2012 to 2022 corresponds with an increase in the Board's overall legal spend in the same period.

7. There is debate about whether or not Ireland and the UK are *"high-cost"* jurisdictions for litigation. From the research carried out for this report the levels of costs encountered in Ireland and the UK are of an order of magnitude higher than in other civil law jurisdictions that were assessed. There was limited information available for civil law jurisdictions and what information was available related mainly to Court fees (rather than lawyers' costs). There are significant systemic differences between how justice is administered in civil and common law jurisdictions, for example, the number of judges in Ireland and the UK per 100,000 people is significantly below the EU average and there may be significant additional costs associated with the operation of the civil law legal systems, notwithstanding that legal fees appear to be lower. Therefore, assessing the NPE approach in any given jurisdiction does not necessarily give a full picture as to the actual cost of litigation, as it is only focused on the impact of adverse costs orders on applicants.

8. Costs data in civil law jurisdictions considered is not readily available particularly in relation to costs payable to successful applicants – perhaps a reflection of the apparently low levels of costs/adverse awards and low levels of litigation regarding costs in environmental litigation.

9. Ireland and the UK have implemented specific legislation to give effect to the NPE requirement, whereas this is less evident in other jurisdictions. The research was inconclusive as to why - perhaps because of a paucity of sources of information on civil law jurisdictions - but it may be at least partially due to scrutiny by the EU Commission and/or the ACCC.

10. The mechanism of cost capping in the UK appears to be a workable approach in a Common Law jurisdiction, such as Ireland, as it provides for a *"contribution"* within the means of individual applicants. The specific limits may become contentious depending on what the thresholds are and how they are varied by the Courts. However, cost capping does at least give a degree of certainty to parties who avail of the costs protection regime. It should be noted that in the UK it is administered by the Courts rather than a separate administrative body. The concept of a reciprocal costs cap (i.e. a limit on the amount that can be recovered from an unsuccessful respondent) was considered by the UK Court of Appeal in *Garner* who held that the imposition of some kind of reciprocal limit on a respondent's liability for costs is not necessarily inconsistent with Article 10a of the EIA Directive.

11. The nature of litigation in common law jurisdictions appears to be quite different from civil law jurisdictions. The former favour a party-led, adversarial approach both in identifying the facts and legal issues relevant to the dispute and to the conduct of the trial itself including the evidence to be offered and the use of expert evidence. The latter generally adopt a more inquisitorial judge-led approach. The implementation of NPE in the civil law jurisdictions considered in the report is varied and there are few examples of legislation expressly implementing the NPE provisions of the Convention. However, it seems the respective legal systems have achieved NPE through existing mechanisms and the use of judicial discretion.

12. Legal aid is available in Ireland and in the comparative jurisdictions to natural persons, subject to strict financial thresholds and, in many jurisdictions, an assessment of the merits of the case. In Ireland, the budget available for civil legal aid for planning and environmental cases is likely very limited. In Spain, France and Italy, legal aid is also available to certain other legal persons (e.g. NGOs).

Annex A - Article 9 of the Aarhus Convention

Access to Justice

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 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.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and Judicial Review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

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