PUBLIC PARTICIPATION IN ENVIRONMENTAL LAW
The continued Influence of EU Law

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Overview

- An analysis of the continued influence of EU Law on public participation in ‘environmental’ law in Ireland
- A selective and high-level analysis having regard to time constraints
- Involves a consideration of a number of disparate developments in domestic and EU law which are considered of particular significance in the context of public participation

Some Context

- As a general proposition in comparative terms Ireland can be considered to have a relatively ‘open’ system of public consultation
- Generally, no requirement to establish a particular interest/prejudice to participate at first instance in most environmental decision-making processes e.g. open third-party planning appeals process
- Complimented by relatively liberal approach towards *locus standai*

Further Context

- Key drivers of Public participation are external – Aarhus Convention (AC)
- AC as an international agreement and under Article. 29.6 of the Irish Constitution it is not automatically incorporated into Irish Domestic law and has no direct legal effect in **domestic law** until expressly incorporated into domestic law which has not occurred to date
- AC **does** have force in domestic law via AC obligations imposed in EU law which must be transposed into Irish law and such transposing provisions must be interpreted (subject to *contra legem* rule) in accordance with EU law and the AC -*Conway v. Ireland* [2017] 1 I.R. 53.
- AC is part of **EU legal order e**.g AIE Directive, Public Participation Directive

Problems ?

- A persistent policy strand which seeks to ‘streamline’ some environmental decision-making process by limiting public participation -
- Strategic Infrastructure Development
- 2016 -Strategic Housing Development
- Revisions to appeals process for Forestry Consents -Forestry (Miscellaneous Provisions) Act 2020
- Mooted proposals to ‘reform’ judicial review procedures in planning cases including introducing new restrictions on who can challenge planning decisions and requiring applicants to establish a particular interest in the decision they are challenging

Key Provision – Article 2(1) - EIA Directive

- ***The key obligation – described as the 'fundamental objective of the EIA Directive Case C-215/06 Commission v Ireland para 49***

(2)(1). *Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4.*

Key Provision – Article 6 - EIA Directive

- Enshrines right of public participation in decision making procedures
- Article 6(2)

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

Aarhus Convention – Key Provision Article 9(2)

(9) 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.

Key Definitions – Article (1)2 EIA Directive

- (c) "development consent" means the decision of the competent authority or authorities which entitles the developer to proceed with the project;
- (d) "public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;
- (e) "public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2).
- For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

Some Issues

- What is a **'development consent'** – NB because it's the trigger for activating the public participation rights protected under the EIA Directive
- Its an **EU law concept** – and as such its meaning falls to be determined exclusively within EU law (*R. (Diane Barker) v. London Borough of Bromley* (Case C-290/03 [2006] E.C.R. 1/03949).
- Must be viewed through the prism of EU law not domestic law or domestic law concepts (*Flood & Sons (Manufacturing) Ltd & Anor -v- An Bord Pleanala & Anors* [2020] IEHC 195 Ní Raifeartaigh J.)
- CJEU has adopted a purposive interpretation having to the objective of the EIA Directive

An Taisce V ABP (McQuaid Quarries) (Sharon Browne) *Sweetman V ABP & Others*

- Judgement dealt with aspects of the “substitute consent” procedure contained in the Planning & Development Act 2000, as amended, and its compatibility with the EIA Directive.
- Statutory procedure s.177 (c) enable an application for Sub Consent where applicant can establish ‘exceptional circumstances’
- Application procedure two stages (1) leave to apply (2) substantive application – no provision for public consultation at first stage when compliance with exceptional circumstances criterion established
- Was this compatible with EIA Directive ?

Key Issue

- Was the application for leave an application for development consent within meaning of EIA Directive
- Appellants -the public have a right to participate on the existence of exceptional circumstances and/or the circumvention of the Directive, when a decision is made on these matters. As this occurs once and for all at the leave stage, it follows that they must have a right to make submissions at that point
- Respondents – application for leave to apply for substitute consent not a 'development consent' which engaged the public participation provisions of the EIA Directive – only engaged when the substantive application is made

McKechnie J. @paragraph 127

*"**European law requires that the public be entitled to participate at the application for leave stage of the substitute consent process.** The granting of leave is, quite evidently, **a pre-requisite to successfully navigating the section 177C/177D gateway. It is not a mere technical or box-ticking exercise; rather it is a highly significant aspect of the overall process, in that the outcome of the leave application will determine whether the substantive application can or cannot be made.** Importantly, while some matters which arise for consideration at the leave stage overlap with those which fall to be considered on the later stage, there are other matters, notably the issues of exceptional circumstances and/or the circumvention of EU law, which are finally determined at the preliminary stage. The legislative scheme does not permit these matters to be revisited subsequently; accordingly, as the domestic law now stands, the public is therefore denied any opportunity to make submissions on such matters"*

McKechnie J. @paragraph 128

"it must be remembered that the ***underlying purpose of public participation in environmental matters is to facilitate good, fully informed decision making, it being acknowledged that the public as a whole is one of the greatest repositories of environmental information. The EIA Directive recognises that without the opportunity to participate, it will be more difficult for the competent authority to reach the kind of decision as is envisaged*** *. Good decision-making can take place where the decision-maker has the relevant information before it. As the appellants have demonstrated, the matters which fall to be considered at the leave stage are matters in respect of which the public may have highly relevant information. It seems to me that, as a result of the restrictions imposed, Part XA of the 2000* ***Act fails to provide for effective participation at a stage when all solutions remain open: quite clearly, the option of refusing to grant leave is off the table by the time the public have any opportunity to make submissions which may be of relevance to that decision"***

McKechnie J @paragraph 134

"I interpret the Directive and the case law as being essentially concerned with affording, inter alia, members of the public ***with an opportunity of participating in the process at a time and in a way when it has the capacity to influence matters, certainly those critical to the decision. Hence the phrase "when all options are open". That however, does not have to be at the earliest point of the process.*** *As mentioned at paras. 127 and 129 above, my conclusion on this issue might well have been different if the factors under consideration, namely exceptionality and circumvention, were not foreclosed at the end of stage 1. Whilst I express no concluded view on it, it is at least arguable that participation in respect of such matters at a later stage, if still under consideration, would be consistent with the requirements of the Directive."*

McKechnie J.@paragraph 135

- Approved words of Advocate General Kokott in *Krizan p.134*

> *'134. In that regard, it must be noted that the updating assessment should determine whether repeat public participation is necessary.* ***The interests in effective and timely administrative proceedings must be balanced against the rights of the public.*** *Public participation would make the procedure more cumbersome, especially since in the course of the permit procedure it would possibly be necessary to examine, on more than one occasion, whether the environmental impact assessment is sufficiently up to date following changes in the circumstances which have occurred in the meantime.'*

Significance

- Judgement makes clear that "*matters would be considerably different if there was a total overlap in the factors which may be considered at each stage, or if the decision firstly reached was subject to being revisited at the substantive stage*" but in the case of the particular statutory provision under challenge this was not the case
- Judgement ***may*** call into question other aspects of development consent procedures especially pre-application procedures in which there is no or limited rights of public participation e.g. aspects of the SID/SHD procedures
- A number of proceedings of this nature extant before the courts

Case C-826/18 *Stichting Varkens in Noord* *Opinion of AG Bobeck - July 2020*

- Challenge to an application for a permit for the construction of a pigpen for 855 sows which fell within the scope of the EIA & IPC Directives in Netherlands
- Permit challenged by an individual and three ENGO's none of whom participated in the decision-making process leading to the grant of the permit
- Dutch law allowed any member of the public to take part in the public participation procedure preceding the permit but only "interested parties" had standing to challenge the resulting permit, and on condition that they had taken part in the public participation procedure.
- Dutch Court referred two questions to the CJEU

First Question- *Concerned the individual's citzens right to challenge the permit, and the extent to which the Netherlands is obliged to provide access to justice to members of the general public in relation to permitting decisions subject to the public participation procedures in Article 6 of the AC.*

- AG - wording of Article 9(2) of the AC is very clear in that it affords access to justice to members of the "public concerned" by virtue of having a sufficient interest or maintaining impairment of a right (Article 2(5) AC)
- Whilst Article 6(7) AC, allows the public at large to submit comments, information, analyses or opinions that it considers relevant to the proposed activity it does not grant reciprocal participation rights to all members of the public
- AG found that the AC permitted the national law in question to reserve court access to "interested parties" only.

Second Question -

Does Article 9(2) of the AC permit Member States to make access to justice for the public concerned dependent on the applicant having submitted observations in the preceding public participation procedure ?

- AG – Answer is NO !
- Whilst Member States have discretion under AC to set standing criteria as to what constitutes "sufficient interest" and the "impairment of a right", such criteria cannot deprive the right of its content. To requiring a person to have participated in decision-making procedure is, tantamount to inserting a new requirement in Article 9(2) that is "neither present in the text, nor compatible with the spirit of Article 9(2)", and thus diminishes the right that it guarantees
- Its clear from previous relevant case law of CJEU (cases C-263/08 *Djurgarden* and C-137/14 *Commission v Germany*) that the decision-making procedure leading to a permit and its judicial review are to be considered two distinct procedures. Introducing a relationship of conditionality would conflate these procedures into one package.
- It would undermine the automatic standing rights enjoyed by NGOs belonging to the "public concerned". Noted the practical implication for NGOs would be to require them to participate in all permitting decisions in order to safeguard their right to subsequently challenge them in court.
- Requiring prior participation would lead to absurd implications for individuals who for a variety of legitimate reasons had not participated

Case C-826/18 - *Significance*

If CJEU follows the approach of AG it will significantly constrain attempts to limit public participation to those who have participated in the initial decision-making process

It will clarify beyond doubt that prior public participation must not be a condition for standing under Article 9(2) of the Convention

Conclusions

Law is fluid and evolving at both domestic and EU level

The direction of travel appears to be clear - towards a expansionary approach which eschews restrictions on public participation in environmental decision-making

There is a ‘tension’ between policy agenda of ‘streamlining’ the development consent process and public participation which is particularly acute at a domestic level

This ‘tension’ will continue to play out in the courts in the coming years

EU law will be the key influence !

Thank You !

Questions and comments are welcome !

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