Introduction

[1] This paper has a narrow focus: it concerns Article 10a of the Environmental Impact Assessment (EIA) directive on access to justice (or access to a review procedure). It investigates the impact of Article 10a on judicial review proceedings before the national courts. One aspect of Article 10a which has generated keen interest and a substantial amount of litigation is the express requirement that the review procedure must not be ‘prohibitively expensive’. This obligation is cast in deceptively simple terms. The practical reality is otherwise, however. The rapidly evolving jurisprudence on this aspect of Article 10a confirms that the scope of the ‘not prohibitively expensive’ obligation is obscure. It is difficult to pinpoint the implications of this obligation for well-established rules governing costs in judicial review proceedings involving the EIA directive.

[2] Article 10a and the costs issue provides a neat case study of the challenges involved in the effective enforcement of European Community (EC) environmental law. Obligations articulated in environmental directives are often drafted in general terms, leaving Member States considerable discretion or flexibility in determining how obligations can best be accommodated within the national legal order. Identifying the scope of obligations created in environmental directives frequently engenders genuine and often long-running disputes before the national courts and/or before the European Court of Justice (ECJ). Unfortunately, this has proven to be the case with the access to justice obligations set down in Article 10a. This paper presents the case law wherein the Irish courts have grappled with Article 10a in the context of liability for costs.

EIA Access to Justice Provisions

[3] Article 3 of Directive 2003/35/EC² (the public participation directive) introduced important amendments to the EIA directive, including a new Article 10a which deals with access to justice.³ Article 10a purports to implement the access to justice obligations set down in Article 9(2) and (4)-(5) of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental

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Matters. Article 3(8) of the Convention is also relevant in the specific context of legal costs associated with judicial proceedings. It provides:

Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

Note, in particular, the express acknowledgement of the national courts’ power ‘to award reasonable costs in judicial proceedings’.

[4] Ireland remains the only Member State of the European Union (EU) that has failed to ratify the Aarhus Convention to date. The Convention does have an impact on Irish planning and environmental law, however, as a result of Ireland’s membership of the EU. This is because the EU is a Party to the Convention and it has introduced a number of important legislative measures to bring EC environmental law into line with Aarhus requirements. These measures include Directive 2003/35/EC. Member States were required to implement this directive by 25 June 2005. Two High Court decisions have referred to the Aarhus Convention to date: Sweetman v An Bord Pleanála (No 1) [2007] IEHC 153 and Kavanagh v Ireland (No 2) [2007] IEHC 389.

[5] Article 10a – Core Elements

Article 10a contains six paragraphs. The text of each paragraph is presented below in bold font for ease of reference. The comments aim to highlight the core elements of Article 10a, but do not provide an exhaustive analysis. While this paper focuses exclusively on the costs issue, it is important to note that Article 10a holds implications for a number of other aspects of judicial review law and practice, including, locus standi/standing and the standard or intensity of review to be applied by the courts.

Art 10a[1]: Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned [as defined in Article 1(2) of the directive]:

(a) having a sufficient interest, or alternatively,

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

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

Comment: Article 10a[1] sets out the basic obligation on Member States to provide access to a review procedure wherein members of ‘the public concerned’ can challenge ‘the substantive or procedural legality’ of decisions involving the EIA directive. Note, in

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particular, the express reference in Article 10a[1] to ‘the relevant national legal system’ which confirms that national law continues to play a significant role in determining the characteristics of the review procedure. Article 10a[1] mentions two potential *locus standi* tests and Member States are free to choose between them – a ‘sufficient interest’ or ‘the impairment of a right’ (where national administrative law requires this as a precondition).

**Art 10a[2]**: Member States shall determine at what stage the decisions, acts or omissions may be challenged.

**Art 10a[3]**: What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any [NGO], meeting the requirements referred to in Article 1(2) [of the EIA directive], shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

**Comment**: Article 10a[3] is important in terms of *locus standi*. It requires Member States to determine national standing requirements ‘consistently with the objective of giving the public concerned wide access to justice’ (emphasis added). It also provides that environmental non-governmental organisations (ENGOs) that meet specific requirements set down in Article 1(2) of the EIA directive are deemed to have standing.

**Art 10a[4]**: The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

**Comment**: This provision simply means that if national law requires parties to pursue any available administrative remedies *before* they are entitled to proceed to judicial review, then this aspect of national law is not affected by Article 10a.

**Art 10a[5]**: Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

**Comment**: This provision sets minimum standards for the review procedure mentioned in Article 10a[1]. The review procedure must be ‘fair, equitable, timely and not prohibitively expensive’.

Note that there is one aspect of Article 9(5) of the Aarhus Convention which is not replicated in any shape or form in the text of Article 10a. The relevant Convention provision provides:
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 (emphasis added).

Art 10a[6]: In order to further the effectiveness of the provisions of this article [Art 10a], Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

[6] The express reference in Article 10a[5] to a review procedure that is ‘not prohibitively expensive’ is one of the most intriguing aspects of Article 10a. It raises a number of difficult questions:

What does ‘not prohibitively expensive’ mean?

How does one measure this concept in practice? – just how expensive is prohibitively expensive? The use of the phrase ‘prohibitively’ indicates that a high threshold of expense is intended here.

What impact does this obligation have on rules governing costs in judicial review proceedings involving EIA?

Irish rules governing liability for costs

[7] The general position is that costs follow the event, unless the court orders otherwise. Legal costs are high in this jurisdiction. Fear of liability for substantial (and potentially ruinous) legal costs is a substantial barrier to litigation in the environmental law area. While the courts have a discretion to refrain from awarding costs against an unsuccessful litigant, or to order the successful party to pay costs, it is impossible to predict how a court will exercise its discretion in a particular case. There are many examples of cases where the courts have not hesitated to award costs against unsuccessful litigants in the environmental area, including cases where important points of EC EIA law were at issue. As the law stands at present, the principles governing protective costs orders (PCOs) and costs in ‘public interest’ challenges are narrowly drawn: see, in particular, Friends of the Curragh Environment Ltd v An Bord Pleanála (No 1) [2006] IEHC 243 and Dunne v Minister for the Environment, Heritage and Local Government (No 4) [2007] IESC 60. In Dunne (No 4), a unanimous Supreme Court confirmed the fundamental importance of the general rule that costs follow the event, whilst

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5 Consider, eg, Lancefort v An Bord Pleanála [1999] IESC 82; O’Connell v EPA [2003] IESC 14; ‘Anti-incinerator campaigner faces €200,000 legal bill’, Irish Times 8 December 2004—report of costs ruling following Martin v An Bord Pleanála (No 2) [2004] IEHC 368; and Dunne v Minister for the Environment, Heritage and Local Government (No 4) [2007] IESC 60. Following the unsuccessful appeal in Martin v An Bord Pleanála (No 3) [2007] IESC 23, the Supreme Court applied Dunne (No 4) and awarded costs in favour of the developer and the State.
acknowledging that ‘special circumstances’ may justify a departure from the norm. It is clear from the judgment delivered by Murray CJ that the Supreme Court has set a high threshold to be met before a challenge will be regarded as exhibiting the required ‘special’ or ‘exceptional’ characteristics to warrant departure from the normal rule as to costs. The costs problem is compounded by the lack of an effective system of civil legal aid for public interest cases.

Apart from introducing special rules governing locus standi of qualified ENGOs in EIA cases, Ireland has not taken any further steps to transpose Article 10a. The Irish authorities maintain that the availability of judicial review meets the requirements of Article 10a and that further legislative measures are not necessary. The European Commission has brought Ireland before the ECJ for alleged failure to transpose fully Directive 2003/35/EC, including Article 10a. These infringement proceedings, (Case C-427/07 Commission v Ireland) provide the ECJ with its first opportunity to consider the new access to justice provisions. Advocate General Kokott delivered her Opinion in Case C-427/07 Commission v Ireland on 15 January 2009 and provided important insights on the ‘not prohibitively expensive’ obligation (see paras 18-22 below). At the time of writing, the ECJ has not yet delivered judgment in these proceedings.

Irish jurisprudence on Article 10a in the context of costs

The main activity involving Article 10a to date has been in the national courts. The ‘not prohibitively expensive’ obligation was considered by the High Court in the following cases:

**Friends of the Curragh Environment Ltd v An Bord Pleanála (No 1) [2006] IEHC 243**

The applicant company sought a protective costs order (PCO) on the basis of the ‘not prohibitively expensive’ obligation articulated in Article 10a and on the basis of common law principles. Kelly J ruled that Article 10a did not meet the requirements for direct effect because, according to the High Court, its terms were not clear, precise and unconditional. In particular, the meaning of the concept ‘not prohibitively expensive’ was not clear – it could be taken to refer to court fees or to legal costs.

**Sweetman v An Bord Pleanála (No 1) [2007] IEHC 153**

Clarke J ruled that proper regard should be had to the Aarhus Convention when interpreting Directive 2003/35/EC.

Guided by Article 3(8) of the Aarhus Convention (see para 3 above), the High Court concluded that the reference to ‘not prohibitively expensive’ in Article 10a is not intended to cover the exposure of a party to ‘reasonable’ costs in judicial proceedings. Following this line of analysis, a court may award ‘reasonable’ costs against an unsuccessful litigant without breaching Article 10a. The obvious difficulty lies in determining what amounts to ‘reasonable’ costs in a particular case.
[13] The High Court emphasised the court’s power to depart from the normal rule that costs follow the event in cases involving a genuine public interest challenge.

[14] Subsequently, in *Sweetman v An Bord Pleanála (No 2) [2007] IEHC 361* (ruling on costs), Clarke J concluded that the aspects of the challenge in *Sweetman (No 1)* concerning transposition of Article 10a and questions as to the correct interpretation of Article 10a, were ‘issues of wide public importance, in that they have the potential to affect very many court proceedings involving challenges in the environmental field.’ These issues flowed from ‘new and potentially far reaching European legislation which had only been the subject of limited judicial consideration to date.’ Clarke J decided to depart from the normal costs rule and he awarded Mr Sweetman half of his costs against the State – excluding the costs of written submissions. Note that *Sweetman (No 1)* and *Sweetman (No 2)* pre-dated the Supreme Court’s decision in *Dunne v Minister for the Environment, Heritage and Local Government (No 4) [2007] IESC 60*. Article 10a was not at issue in *Dunne (No 4)*, however, and so it remains to be seen what impact, if any, Article 10a will have on the principles set down by the Supreme Court in that particular case.

*Kavanagh v Ireland (No 2) [2007] IEHC 389*

[15] The High Court determined that the reference to ‘not prohibitively expensive’ in Article 10a did not extend to an unsuccessful litigant’s exposure to legal costs. Note, in particular, the High Court’s reference to a ‘crank’s charter’. In the words of Smyth J:

> In my judgment the Directive [Dir 2003/35/EC] provides no reason to depart from the normal rule, that costs follow the event for the following reasons:-
>
> ... 
>
> (b) There is no reason to consider the plaintiff is a public interest litigant.
>
> ... 
>
> (c) The Directive's requirement that the proceedings to which it applies should not be “prohibitively expensive” does not extend to an unsuccessful litigant's exposure to legal costs.

Altogether from the absence of proof that these proceedings were “prohibitively expensive” it seems to me that if the Directive's terms were to be applied literally in the abstract and devoid of context then every litigant no matter how vexatious should have carte blanche to engage without risk of basic responsibility - **in short a crank's charter.**

(emphasis added)

In this regard I attach considerable significance to the provisions of Article 3(8) of the Convention which provides as follows:-

> “Each party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed
In my opinion the Convention is concerned to ensure that the “cost of entry” upon litigation, i.e. court fees are not prohibitively expensive. Furthermore the mechanism for providing for taxation of costs is a form of assurance that costs will not be “prohibitively” expensive, if as contended by the plaintiff the Convention is concerned with the fees other than court fees - of litigation.

[16] Contrast the High Court’s approach to Article 10a and costs in Sweetman (No 1) (above) with Smyth J’s analysis in Kavanagh (No 2).

Kenny v Provost, Fellows and Scholars of the University of Dublin, Trinity College (No 1) [2008] IEHC 320

[17] On this occasion, Clarke J took the opportunity to clarify an aspect of his earlier Sweetman (No 1) ruling. At paras. 5.9-5.11 of the Kenny (No 1) judgment, Clarke J clarified that the ruling in Sweetman (No 1) was to the effect that Article 10a does not prevent the award of ‘reasonable’ costs. It is worth setting out in full the following passages from Clarke J’s Kenny (No 1) judgment (emphasis added):

5.10 In passing I should note that, regrettably, due to the wording of two passages in my judgment [in Sweetman (No 1)] it is possible to misconstrue the findings in that case. One of the key findings is to be found at para. 7.8 where I express the view that the proper construction of the Directive concerned does not prevent the award of reasonable costs in environmental litigation. So far as that aspect of the case is concerned the finding is to be found in that paragraph. However, elsewhere, on one reading, it might be suggested that I had found that the Directive said nothing about costs at all. See para. 7.6. That paragraph needs to be seen in the context of the fact that the applicant did not seek any preliminary order in relation to costs nor, at the stage which the case had reached, did the applicant seek any order limiting the amount of costs which he should have to pay. Such matters would, of course, only have arisen in the event that the applicant became liable to pay costs in the first place. In the events that happened, and for reasons which I set out in a judgment delivered on the 25th October, 2007 [2007] IEHC 361, the applicant was in fact awarded part of his costs and, therefore, the question of any limitation on the amount of costs which he might have to pay did not arise. The paragraph to which I have referred might better have referred (as para. 7.8 did) to “reasonable court costs” rather than “court costs” and should not be construed as implying that there may not be obligations placed on the court under Directive 2003/35/EC, in an appropriate case, to limit (whether prospectively or at the time when costs are being considered) the amount of costs which might be awarded. Such issue, in my view, remains for decision in an appropriate case. However, because costs are sufficiently discretionary to enable the court to deal with costs orders in any way that is mandated by the Directive, it did not seem to me that any question of a failure to transpose had been established. In substance, therefore, the decision in Sweetman, on this point, amounts to a finding that reasonable costs can be awarded in the manner normally adopted in Ireland, that is to say costs following
the event in most cases. (It is to costs following the event rather than the quantum of such costs that the comments made in para. 7.9 are directed although again that paragraph could be better worded).

5.11 None of the parties sought a reference to the ECJ and the decision remains final. It is, of course, possible that in some separate set of proceedings, whether deriving from this jurisdiction or another Member State, the ECJ may come to a different view as to the interpretation of the Directive concerned and its effect in this jurisdiction. The mere fact that the ECJ authoritatively interprets both the Directive and, to the extent that it may be relevant, its direct effect, in a subsequent case does not necessarily mean that previous cases in which the courts of Member States have taken a different view of the relevant measures can be re-opened. Could, for example, persons who did not raise the question of the applicability of Directive 2003/35/EC now seek to retrospectively interfere with such costs orders already made.

Advocate General Kokott’s Opinion in Case C-427/07 Commission v Ireland

[18] Note that Opinions of Advocates General are not binding on the ECJ and it remains to be seen how the Court will rule in this case. This action by the Commission against Ireland before the ECJ under Article 226 EC concerned, inter alia, Ireland’s alleged failure to transpose fully Directive 2003/35/EC and alleged failure to inform the Commission regarding such transposition.

[19] The dispute concerned inter alia the purported transposition of Article 10a by the Planning and Development Act 2000 (PDA), as amended by the Planning and Development (Strategic Infrastructure) Act 2006 Act; ss50 and 50A PDA as amended govern the actions which may be brought against certain planning decisions.

[20] The Commission alleged inter alia that Irish rules governing judicial review did not transpose Article 10a in a number of respects. The present analysis focuses exclusively on the aspects of the Advocate General’s Opinion dealing with costs in the context of planning judicial review – paras 87-99 of the Opinion.

[21] It is important to note at the outset that the infringement proceedings concerned alleged failure to transpose Article 10a at all - as opposed to the quality of transposition. The Advocate General therefore concluded that the Commission’s complaints concerning the quality of Irish transposition was inadmissible in the current proceedings. In the event that the ECJ might take a different view on the admissibility point, the Advocate General examined, in the alternative, whether the Commission had demonstrated that Article 10a had not been transposed adequately in Ireland.

[22] The following are the relevant passages from the Opinion\(^6\) (emphasis added; text of footnotes omitted):

87. The Commission’s fifth complaint in relation to Article 10a of the EIA Directive and Article 15a of Directive 96/61 concerns legal costs. Under the fifth paragraph of both articles, the procedures in question are not to be prohibitively expensive.

88. The dispute between the parties concerns neither court fees nor a successful applicant’s claim to reimbursement of his legal costs. (36) Rather, it concerns the extent to which the applicant must be protected against being ordered to pay the other side’s costs if he is unsuccessful.

89. Ireland puts forward the view that Directive 2003/35 contains no provision on costs incurred by the parties to proceedings. It relies in this regard on provisions of the Aarhus Convention which are not expressly implemented in the directive. First, Article 9(5) of the Convention provides that the parties to the Convention are to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. Also, the second sentence of Article 3(8) states that the powers of national courts to award reasonable costs in judicial proceedings are not to be affected.

90. This submission is, however, not convincing. The second sentence of Article 3(8) of the Convention must be read in conjunction with the first sentence, which provides that persons exercising their rights in conformity with the provisions of the Convention are not to be penalised, persecuted or harassed. The second sentence merely makes it clear that the award of costs in respect of judicial proceedings is not to be regarded as a penalty, persecution or harassment.

91. Article 9(5) of the Aarhus Convention must, regardless of any express mention in Directive 2003/35, be taken into account when interpreting Article 9(4) of the Convention and the directive’s corresponding implementing provisions. It shows that the parties to the Convention had the need for assistance mechanisms entirely in mind when they laid down that procedures are not to be prohibitively expensive.

92. Besides, the third paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (37) also requires legal aid to be granted in so far as such aid is necessary to ensure effective access to justice. Since the Treaty of Lisbon has not yet been ratified, the charter as such admittedly does not yet have any binding legal effect comparable to that of primary law. However, as a source of legal guidance it sheds light on the fundamental rights (38) which are to be observed when interpreting Community law. (39)

93. The ban on prohibitively expensive procedures therefore extends to all legal costs incurred by the parties involved.

94. There is, however, no absolute ban precluding costs from being awarded against applicants who are covered by Directive 2003/35. This is shown not only by the wording, which forbids only prohibitive costs, but also in particular by Article 3(8) of the Aarhus Convention, which presupposes that costs can be imposed.
95. The Commission founds its objection that there is insufficient protection against prohibitive costs in particular on the basis that the costs of successful parties can be very high in Ireland, stating that costs of hundreds of thousands of euro are possible.

96. In this regard, Ireland’s submissions that rules providing for legal aid – the Attorney General’s Scheme – exist and that, furthermore, potential applicants can make use of the Ombudsman procedure which is free of charge are hardly compelling. The Attorney General’s Scheme is, according to its wording, inapplicable to the procedures covered by the directive. It cannot therefore be acknowledged to be an implementing measure. The Ombudsman may offer an unbureaucratic alternative to court proceedings but, according to Ireland’s own submissions, he can only make recommendations and cannot make binding decisions.

97. As the Commission acknowledges and Ireland emphasises, Irish courts can though, in the exercise of their discretion, refrain from awarding costs against the unsuccessful party and even order the successful party to pay his costs. Therefore, a possibility of limiting the risk of prohibitive costs exists.

98. This possibility of limiting the risk of costs is, in my view, sufficient to prove that implementing measures exist. The Commission’s action is therefore unfounded in relation to this point too.
99. I wish to make the supplementary observation that the Commission’s wider objection that Irish law does not oblige Irish courts to comply with the requirements of the directive when exercising their discretion as to costs is correct. In accordance with settled case-law, a discretion which may be exercised in accordance with a directive is not sufficient to implement provisions of a directive since such a practice can be changed at any time. (40) However, this objection already concerns the quality of the implementing measure and is therefore inadmissible.

Recent Decision of the Court of Appeal (England and Wales)
[23] In Morgan and Baker v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107, the Court of Appeal (England and Wales) was called upon to examine inter alia the nature and scope of ‘the Aarhus obligation on the Court when exercising its discretion on costs (regardless of whether or not the Convention is raised by one of the parties)?.’ The Court of Appeal’s unanimous judgment includes the following paragraphs which are of particular interest (emphasis added):

Drawing the threads together

47. It may be helpful at this point to draw together some of the threads of the discussion, without attempting definitive conclusions:

i) The requirement of the [Aarhus] Convention that costs should not be "prohibitively expensive" should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.

ii) Certain EU Directives [including Dir 2003/35/EC] (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases [Case C-427/07], the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.

iii) With that possible exception, the rules of the CPR [Civil Procedure Rules] relating to the award of costs remain effective, including the ordinary "loser pays" rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion.

iv) This court has not encouraged the development of separate principles for "environmental" cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The Corner House [R (Corner House) v Secretary of State for Trade and Industry [2005] EWCA Civ 192] statement of those principles must now be regarded as settled as far as this court is concerned, but to be
applied "flexibly". Further development or refinement is a matter for legislation or the Rules Committee.

v) The Jackson review [In Nov 2008, Jackson LJ was appointed by the Master of the Rolls to conduct a ‘fundamental review’ of costs in civil litigation. A report is anticipated by Dec 2009] provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee. Even if we were otherwise attracted by Mr Wolfe's invitation (on behalf of CAJE) to provide guidelines on the operation of the Aarhus convention, this would not be the right time to do so.

vi) Apart from the issues of costs, the Convention requires remedies to be "adequate and effective" and "fair, equitable, timely". The variety and lack of coherence of jurisdictional routes currently available to potential litigants may arguably be seen as additional obstacles in the way of achieving these objectives.

**Impact of Article 10a – business as usual or a ‘crank’s charter’?**

[24] For the present, the implications of Article 10a on litigation costs in EIA cases remain unclear – notwithstanding the fact that Member States were required to implement Directive 2003/35/EC by 25 June 2005. Almost four years after this deadline, and notwithstanding a series of judgments from the High Court, the law remains shrouded in uncertainty. The complex interaction between various sources of legal authority: the Aarhus Convention, Article 10a and national rules governing costs in judicial review proceedings, creates an intricate mosaic of legal principles (as demonstrated by the recent Court of Appeal ruling in *Morgan and Baker*). It appears that the current state of uncertainty will persist in the absence of clear guidance from the ECJ on the scope of the ban on ‘prohibitively expensive’ review procedures and on its practical consequences.

[25] The ECJ judgment in Case C-427/07 *Commission v Ireland* may provide valuable guidance on the ‘not prohibitively expensive’ obligation, but it is impossible to predict how the Court will deal with the thorny admissibility issue concerning the quality of Irish transposition of Article 10a. In the meantime, it falls to the judiciary at national level to interpret and apply Article 10a. There is, of course, the possibility of an Irish court seeking a preliminary ruling from the ECJ under Article 234 EC on the correct interpretation of Article 10a.

**Postscript**

[26] On a separate issue, an important EIA ruling is due shortly from the ECJ. In Case C-75/08 *Mellor v Secretary of State for Communities and Local Government*, a reference for a preliminary ruling from the Court of Appeal (United Kingdom), the ECJ must determine whether reasons must be given for a decision not to carry out an EIA in respect of an Annex II project (i.e. a negative screening decision), and if so, the scope of
this duty. In an Opinion delivered on 22 January 2009, Advocate General Kokott answered this question in the affirmative.

23 April 2009