

# Ireland for Environmental Law

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Environmental Litigation in the Irish Courts



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# English Speaking, Common Law and in the EU



Ireland for  
Environmental  
Law

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How can EU Acts be challenged?

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Article 263 TFEU

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Article 267 TFEU

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Mind the Gap

# Article 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

# Article 263

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.


**Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.**

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

# A "complete" system

- The national courts do not have jurisdiction to declare a measure of European legislation to be invalid: *Foto Frost v. Hauptzollamt Lubeck – Ost* (case C-314/85)
- Where [the] implementation [of an EU Act of general application] is a matter for the Member States, such persons may plead the invalidity of the European Union act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU
- *Judgment of 3.10.2013, Case C-583/11 P, Inuit Tapiriti, EU:C:2013:625, para 93*

A large fishing vessel is shown at sea, with a massive cod net full of fish being hauled up the deck. The net is a large, conical structure made of brown mesh, and it is filled with a large quantity of fish, likely cod. The vessel's deck is visible, and the net is being pulled up by a large crane or hoist. The background shows the open ocean and a clear sky.

Friends of the Irish Environment  
v  
Minister for Agriculture, Fisheries  
and the Marine (2020/396 JR)

Enforcing the Common Fisheries Policy MSY Objective

# Friends of the Irish Environment v Minister for Agriculture Food and the Marine

- Common Fisheries Policy – Regulation 1380/213 of the Parliament and the Council
- Maximum Sustainable Yield – MSY – the highest yield that can be taken without significantly affecting reproduction
- To be achieved by 2020 at the latest by all stocks

## *Article 2*

### Objectives

1. The CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies.

2. The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield.

In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks.



# Article 43 TFEU – Common Fisheries Policy

1. ...

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.

3. The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.

# More on fisheries regulation

- Council Regulation (EU) 2020/123 of 27th January, 2020, fixing for 2020 the fishing opportunities for certain fish stocks and groups of fish stocks
- Stock means a marine biological resource that occurs in a given management area
- Total allowable catch – TAC – the quantity of fish that may be caught from each stock each year
- Best available scientific advice - ICES

## Cod (*Gadus morhua*) in Division 6.a (West of Scotland)

### ICES advice on fishing opportunities

ICES advises that when the MSY approach is applied, there should be zero catches in each of the years 2020 and 2021.

### Stock development over time

The current spawning-stock biomass (SSB) is extremely low and has been below  $B_{lim}$  since 1997. Recruitment has also been very low since 2001, and below the time-series average. Fishing mortality (F) declined between 2005 and 2014 but has remained between  $F_{pa}$  and  $F_{lim}$  since 2014.



# 2020 TAC Regulation – Council Reg 123/2020

- Example – West of Scotland Cod

Species:	Cod <i>Gadus morhua</i>	Zone:	6a; Union and international waters of 5b east of 12°00' W (COD/5BE6A)
Belgium	2 <sup>(1)</sup>	Analytical TAC	
Germany	19 <sup>(1)</sup>	Article 8 of this Regulation applies	
France	203 <sup>(1)</sup>	Article 3 of Regulation (EC) No 847/96 shall not apply	
Ireland	284 <sup>(1)</sup>	Article 4 of Regulation (EC) No 847/96 shall not apply	
United Kingdom	771 <sup>(1)</sup>		
Union	1 279 <sup>(1)</sup>		
TAC	1 279 <sup>(1)</sup>		

<sup>(1)</sup> Exclusively for by-catches of cod in fisheries for other species. No directed fisheries for cod are permitted under this quota.

# Fisheries Management Notices - Monthly

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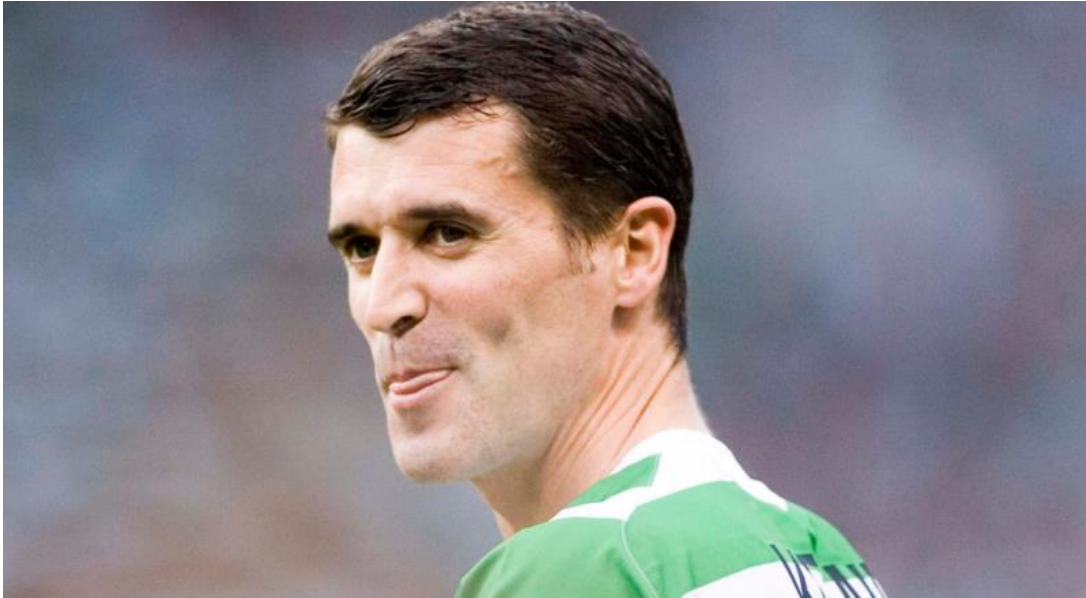
IRIS OIFIGIÚIL, MARCH 27th, 2020

HADDOCK ( <i>Melanogrammus Aeglefinus</i> )	Union and international waters of 5b and 6a (HAD/5B06A.)	12 tonnes	COD ( <i>Gadus morhua</i> )	6a; Union and international waters of 5b east of 12°00' W (COD/5BE6A)	2 tonnes
HADDOCK ( <i>Melanogrammus Aeglefinus</i> )	Union and international waters of 6b, 12 and 14 (HAD/6B1214)	30 tonnes	COD ( <i>Gadus Morhua</i> )	7b, 7c, 7e-k, 8, 9 and 10; Union waters of CECAF 34.1.1 (COD/7XLAD34)	2 tonnes
HADDOCK ( <i>Melanogrammus Aeglefinus</i> )	7b-k, 8, 9 and 10.; Union waters of CECAF 34.1.1 (HAD/7X7A34)	8 tonnes	PLAICE ( <i>Pleuronectes Platessa</i> )	7b, 7j and 7k (PLE/7HUK.)	0.10 tonnes
HAKE ( <i>Merluccius Merluccius</i> )	6 and 7; Union and international waters of 5b; international waters of 12 and 14 (HKE/571214)	24 tonnes	TUSK ( <i>Brosme brosme</i> )	Union and international waters of 5, 6 and 7 (USK/567E1)	4 tonnes
MEGRIMS ( <i>Lepidorhombus spp.</i> )	7 (LEZ/07.)	16 tonnes	WHITING ( <i>Merlangius Merlangus</i> )	7a (WHG/07A.)	6 tonnes
MEGRIMS ( <i>Lepidorhombus spp.</i> )	Union and international waters of 5b; 6; international waters of 12 and 14 (LEZ/56-14)	16 tonnes	WHITING ( <i>Merlangius Merlangus</i> )	6; Union and international waters of 5b; international waters of 12 and 14 (WHG/56-14)	4 tonnes
LING	Union and international	30 tonnes			

# Summary of Case

- Case supported by ClientEarth with funding and expertise 🙏
- Challenged the Fisheries Management Notices in previous three months by way of judicial review
- Primary relief – preliminary reference to the CJEU to determine the validity of the TAC Regulation in light of the CFP Regulation MSY objective
- Judgment of Barr J of 8 February 2022 ([2022] IEHC 64)
- Granted preliminary reference notwithstanding expiry of TAC regulation and Fisheries Management Notices – public interest exception and likelihood that issue will arise again
- The Court shared the applicant's doubts:
  - The key legal issue which the court must determine, is whether Art. 2(2) of the CFP constitutes an overarching binding legal imperative, that had to be observed when the Council was fixing the TACs for 2020 and succeeding years; or whether, as argued by the respondent, it was merely one of a number of aspirational objectives, which the Council had to take into account, along with a great deal of other matters, both scientific and within the broader economic sphere, when setting TACs for 2020 and beyond.
- Order for reference about to be transmitted to CJEU
- Case with EU – wide significance

# All credit to ...



- Friends of the Irish Environment
  - Tony Lowes
- ClientEarth Team
  - Jenni Grossman, Artur Meeus, Elizabeth Druel, Adam Weiss, Nick Goetschalckx
- Counsel
  - James Devlin SC, John Kenny BL



v





An aerial photograph of an industrial facility, likely a liquefied natural gas (LNG) terminal. The facility features several large, white, cylindrical storage tanks arranged in a grid-like pattern. In the foreground, two large LNG carrier ships are docked at a pier. The ships are dark-colored with 'LNG' written on their sides. The background shows a mix of green fields and wooded areas, suggesting a rural or semi-rural setting. The overall scene is captured from a high angle, providing a clear view of the industrial infrastructure and its surroundings.

Friends of the Irish Environment

v

Minister for  
Communications (2020/76 JR)

Challenging Regulatory Acts of the EU with no implementing measures

# Mind the Gap

- How does an eNGO challenge a regulatory act with no implementing measures (second category in Art 263(4)).
- “Direct Concern”
  - must directly affect the legal situation of the individual and, secondly, it must leave no discretion to its addressees, who are entrusted with the task of implementing it (Case T-262/10 Microban, para 27)
- No eNGO has ever qualified as directly concerned
- Therefore there are measures affecting the environment that apparently are immune from judicial review by eNGOs – raises issues of compatibility of the Aarhus Convention – ACCC case C32

# Trans European Energy Networks TEN-E

- Basic Regulation sets down criteria for approving projects on a list of “Projects of Common Interest”
- Implementing Regulation adopts this list every two years
- Requirement to include sustainability in the CBA
- Adoption of Shannon LNG terminal and connecting pipeline on the 4<sup>th</sup> Union list
- FIE alleged that this was not carried out lawfully and also that the Irish State had not given lawful approval under Article 172 TFEU as a matter of national law in light of the Climate Action and Low Carbon Development Act 2015
- Note ancillary point – when can a breach at national level during the adoption procedure cause the invalidity of the EU Act (Case T-219/17 *Berlusconi*)

# Summary of Judgments (Simons J)

- Judgment No 1 – [2020] IEHC 383
  - No implementing measure
  - No underlying dispute => No jurisdiction
  - No requirement for a procedure for such applications
- Judgment No 2 – [2021] IEHC 177
  - National law arguments fail for same reason – collateral challenge
  - The Government is not a “relevant body” for the CALCD
  - Therefore no need to consider approval by Government under Article 172
- Appeal heard before Court of Appeal – judgment pending



Eco Advocacy CLG  
v  
An Bord Pleanála (C-721/21)

Appointing Amici Curiae in a Preliminary Reference Procedure

# Summary

- Court decides to make preliminary reference on issues relating to EIA and AA Screening [221] IEHC 265
- 100. Accordingly, the order will be as follows:
  - (i). I will in principle make a reference to the CJEU in relation to the referable questions as set out above subject to a formal order for reference following further steps set out in this judgment;  
...
  - (iii). the parties have liberty to propose the addition of any relevant *amici curiae* in such submissions;
  - (iv). I will direct that if any one or more *amici curiae* is to be added, such entities would bear their own costs throughout, in the Irish courts and in Luxembourg, and would not have any liability for the costs of any other participant in the proceedings, and that such entities would get involved on a written-submissions-only basis unless otherwise ordered;
  - (v). the parties will have liberty to make any enquiries with any suitable entities whether domestic, European or international if and to the extent that they think fit, and for the avoidance of doubt have liberty to convey this judgment in unapproved form and any of the papers to any proposed *amicus curiae*;

- Proposal by Applicant to join An Taisce and ClientEarth
- Both were joined [2021] IEHC 610

“[T]he solicitor for An Taisce and ClientEarth indicated a willingness to be heard as *amici curiae*. On the applicant’s application, I joined those parties as *amici* on 27th July, 2021. As well as the parties proper, the *amici* were also given the opportunity to make submissions, which, without taking in any way whatsoever from the excellent submissions made by everyone else, I found to be particularly helpful in crystallising the issues and clarifying my own thinking. I think this case demonstrates that the applicant was very well advised to apply for the joinder the *amici* here, which was a genuinely helpful exercise, as far as I am concerned.”

# Hellfire Massey Residents Association v ABP

- Judgment (Humphreys J) [2021] IEHC 771
- Clarifies criteria for joining *amici*
- Requirements
  - Willingness
  - Bona fide interest in the issues
  - Cannot contest undisputed facts or submit evidence
  - Takes the case as it finds it



- Factors

- Public law nature of the case
- Status of *amicus* under international law or practice
- International or regional perspective
- Expertise
- Even if domestic – the degree to which it could bring additional perspective
- Impartial assistance
- Might otherwise be deprived of the opportunity of participating on the issue
- Managed to minimise costs
- The benefit of allowing the joinder
- Views of the parties
- Courts own desire to be assisted

- Eco Advocacy (Case C-721/21)
  - EIA and AA Screening
  - An Taisce and ClientEarth
- Hellfire Massey (Case C-166/22)
  - Strict Protection under Habitats Directive
  - An Taisce and Save Our Bride Otters
- Enniskerry Alliance/Protect East Meath (Pending)
  - ClientEarth
  - Interpretation of national costs rules in light of Article 9(3)/9(4) of the Aarhus Convention



Ireland for Environmental Law