

Enforcement of Environmental Law: The case for reform



*A report by
the Law Society's Law Reform Committee*



Law Society of Ireland

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INTRODUCTION

The Law Reform Committee of the Law Society was established in November 1997 in order to identify and focus upon particular areas of law in need of modernisation and reform. The central objectives of the Committee are threefold. Firstly, the Committee aspires to contribute towards the improvement of the quality, fairness and effectiveness of Irish legislation in a number of selected areas. Secondly, the Committee seeks to represent the views and experiences of the Law Society's members in relation to legislative initiatives and to enhance the Law Society's contribution to the development of Irish law. Thirdly and more generally, the Committee seeks to construct relationships between the Law Society and others involved in the review of law and policy, including senior policy-makers, statutory bodies such as the Law Reform Commission and the voluntary sector.

To date, the Law Reform Committee has published reports on a range of important legal issues including Domestic Violence (May 1999), Mental Health (July 1999), Adoption (April 2000), Nullity of Marriage (October 2001), Charity Law (July 2002), Discriminatory Planning Conditions (March 2005) and Rights Based Child Law (March 2006). The Committee continues to monitor developments in these and many areas.

The focus of the Committee's current report is the Enforcement of Environmental Law. The Report examines the respective roles of citizen, non-governmental organisations, commercial bodies and the State in environmental law enforcement. It examines the very important role of European Community Directives in this area and the extent to which EU requirements are being complied with in Ireland. The various strengths and weaknesses of the system of environmental enforcement in Ireland are also analysed.

This Report considers the various methods by which environmental law might be better enforced by the State and citizens in Ireland. It examines the possibility of the introduction of voluntary environmental agreements as a means of increasing compliance, through the engagement of the regulated community and the concept of negotiated enforcement provisions. It also discusses the introduction of pre-emptive cost orders as a means of improving access to justice for applicants. Comparisons are drawn with other common law jurisdictions and member states of the European Union to analyse how effectively certain enforcement mechanisms have operated in other domestic legal systems.

In several cases, the Report identifies systematic failures in the Irish environmental enforcement landscape. The current public enforcement mechanisms were considered by the Committee to often be "too blunt an instrument" to have any realistic practical effect. Both the formal and informal enforcement mechanisms available to citizens have issues with accessibility and cost.

The Report makes a number of specific recommendations in relation to the enforcement of environmental law. One general theme is the introduction of unambiguous and effective mechanisms for enforcement by the State and by citizens. New enforcement mechanisms through environmental community service orders, publicising of breaches, mandatory audit orders, the introduction of a penalty points system and the imposition of corporate responsibility for major environmental damage are recommended.

In order to enhance the rights of citizens to take civil and criminal enforcement actions, the Committee recommends the amendment of legislation to include the right to complain to regulatory authorities, the establishment of partnerships between members of the public / NGOs and regulatory bodies, the abolition of advance payment requirements in respect of information requests and the broadening of the scope of legal standing for citizens. The Committee also recommends that it should be possible for special interest groups to receive funding through the Legal Aid Board for public interest actions.

Voluntarily negotiated environmental agreements between the regulators and the regulated are proposed as appropriate in certain cases and the Committee recommends that suitable uses be identified and that a legislative framework be developed. Pre-emptive cost orders are also identified as an innovative solution to the challenge of costs in judicial review cases and the development of legislation in this area is discussed. Other procedures for reducing cost such as providing resources for an Ombudsman to examine procedures in this area and to mediate and encourage the achievement of compromises are also recommended by the Committee.

The Committee hope that those whose task it is to evaluate, modernize and develop environmental legislation in Ireland will benefit from the recommendations in this report.

The Committee would like to thank Stuart Margetson and Conor Linehan for their input, interest and support in the earlier stages of the study.

Members of the Law Reform Committee 2006-2007

Peter Fahy, Chair

Brian Gallagher, Vice Chair

Alma Clissmann, Secretary / Elaine Dewhurst, Secretary (2007/8 session)

Peter Allen

John Costello

Colin Daly

Rosemary Horgan

Marie Quirke

Geoffrey Shannon

Philip A Smith

Deborah Spence

Members of the Environmental Law Sub Committee

Deborah Spence

Finola McCarthy (co-opted) with Aoife Shields

Owen McIntyre (co-opted)

Alma Clissmann, Secretary / Elaine Dewhurst, Secretary (2007/8 session)

SUMMARY OF RECOMMENDATIONS

1. PUBLIC ENFORCEMENT

1.1. Community sanctions

We recommend the institution of environmental community service orders. [Chapter 1, Section 4.3]

1.2. Publicising breaches

We recommend that a review should be undertaken of the means whereby enforcement agencies publicise breaches in advance of any action being taken, and also post judgment. The publicity orders discussed in this chapter could be considered as an alternative means of publication as both a deterrent measure and a way of exerting public pressure on undertakings to improve their environmental performance. [Chapter 1, Section 4.3.2]

1.3. Mandatory audit orders

We recommend that mandatory audits of not only licensed but unlicensed facilities, and in particular SMEs, should be available to regulating bodies as a form of administrative order. We recommend that an environmental liability risk-based approach should be adopted in determining the number of inspections and audits that should be required in relation to any activity, whether licensed or unlicensed, and in particular SMEs, in the area of environmental compliance. [Chapter 1, Section 4.3.3]

1.4. Penalty points and withering of convictions

We recommend the use of incremental offences, so that offending organisations would accumulate penalty points in appropriate circumstances. A certain number of penalty points could then trigger a more serious consequence, such as the imposition of restrictions or the revocation of a licence. Along with incremental offending, the idea of incremental redemption could also be utilised. Where breaches of conditions are treated as offences which are recorded against the offender, whether on its licence or as a matter of criminal record generally, such records should be capable of withering over time where repeat offences do not occur. [Chapter 1, Section 4.3.5]

1.5. Corporate responsibility for major environmental damage

We recommend that an equivalent offence to corporate killing be considered, imposing corporate and individual responsibility for major environmental damage. We suggest that gross negligence would have to be systematic and only the acts and omissions of senior managers and corporate officers would determine if the offence was to be considered appropriate for prosecution. [Chapter 1, Section 4.3.6]

2. CITIZEN ENFORCEMENT

2.1. Legal Standing of citizen enforcer to take enforcement action

We recommend the promulgation of an umbrella environmental regulatory instrument granting broad legal standing to members of the public and NGOs to enforce environmental law, to include a number of safeguards against duplication of enforcement and vexatious enforcement action akin to those adopted in other jurisdictions. [Chapter 2, Section 4.3.2]

2.2. The right to complain to regulatory authorities

We recommend creating a statutory right to complain to regulatory authorities in respect of environmental matters, and that the receipt of such a complaint should set in motion an obligation on the part of the regulatory authorities to take enforcement action if appropriate. [Chapter 2, Sections 3.2.5, 4.3.2]

2.3. Partnership

We recommend the establishment of partnerships between members of the public/NGOs and regulatory bodies in the enforcement of environmental law. [Chapter 2, Section 3.5]

2.4. Access to Information

We recommend the abolition of advance payment requirements in respect of information requests, the increased use of the discretion of public authorities to reduce or waive fees where the public interest is concerned and the delimiting of the exemption grounds to access requests and the wider use of the harm and public interests test. [Chapter 2, Section 4.3.1]

2.5. Costs

We recommend that the remit of the Legal Aid Board should be expanded to encompass public interest actions taken by special interest groups, and that criteria and guidelines for the identification of appropriate cases be developed to ensure value for what funding can be made available. [Chapter 2, Section 4.3.4]

3. ENVIRONMENTAL AGREEMENTS

3.1. Identification of suitable uses of environmental agreements

We recommend the identification of those sectoral areas of Community environmental law where directives might be most easily transposed and implemented by means of voluntary environmental agreements. [Chapter 3]

3.2. Development of legislative framework for environmental agreements

We recommend the development of a formal and detailed legislative framework designed specifically to regulate and inform the use of environmental agreements (and other forms of self-regulation), that is

consistent with relevant Commission guidance and facilitates easy and effective compliance with the broader corpus of Community rules on the internal market, competition and State aid. [Chapter 3]

4. PRE-EMPTIVE COSTS ORDERS

4.1. A legislative framework for PCOs

We propose a statutory framework to allow for the possibility of legal aid as set out in chapter 2 and the making of pre-emptive costs orders in appropriate public interest cases. We recognise that, under court rules and their inherent jurisdiction under the Constitution, the courts retain discretion in relation to costs. Nevertheless we believe it would be helpful to set out the principles to be considered in legislation, as guidance for the courts in the exercise of that discretion.

We recommend

- The development of a statutory framework for the award of costs and pre-emptive costs orders in public interest litigation.
- The development of a definition of public interest litigation. The criteria identified by the Court of Appeal in the Corner House case provide a good starting point: a public interest case is one where: (i) the issues raised are one of general public importance, and (ii) the public interest requires that those issues should be resolved.
- The identification of different forms of PCO, ranging from orders directing that an applicant's liability for the respondent's costs be capped at a reasonable level, thereby discouraging excessive spending by well resourced public bodies, through orders directing that there be no order as to costs whatever the outcome of the substantive proceedings, to orders requiring that the respondent pay the applicant's reasonable costs as the proceedings progress.
- That it should not be a requirement for the making of a PCO that the applicant has no private or personal interest in the outcome of the case. However, the nature and extent of a private interest is a matter which the court may take into account, weighing the private interest against the public interest in the case. Where some element of private interest is involved, it would be open to the courts to vary the terms of any PCO in order to mitigate any inequity.
- That there should be no requirement that the applicant's legal representatives act *pro bono*, as such a requirement could unduly limit the pool of lawyers willing to act in such cases, and could make it unnecessarily difficult to find lawyers willing to take a case on a *pro bono* basis within the short timeframes which often must be met.
- That any capping of an applicant's costs should be reasonable and not disproportionate to the costs incurred by the respondent, and should avoid a significant inequality of arms. The unenumerated right to legal representation identified under article 40.3.1 of the Constitution would have to be considered in this context.
- That it should not be necessary for an applicant for a PCO to be completely financially unable to proceed with a case. In appropriate cases, the public interest in a case and the disparity of resources between the parties might justify a PCO being granted.
- That the application procedure for a PCO be streamlined and kept brief, so that unnecessary costs are not incurred. We recommend that consideration be given to interim PCOs to enable such applications to be made. [Chapter 4, Sections 5 and 7]

4.2. Other considerations in granting PCOs

In considering the desirability of equitable access to justice for concerned groups or individuals, the Irish courts might consider, among the additional factors alluded to by Laffoy J. in *Village Residents*, the virtual absence of civil legal aid in Ireland having regard to the objectives underlying the Aarhus

Convention. Also, in determining whether a PCO is warranted, the Irish courts might consider the likely benefit to the public broadly, in terms of the efficient production of timely precedent in order to ensure the application of rules of general public importance. In the absence of availability of civil legal aid in environmental matters, the judicious use of PCOs could represent an efficient allocation and use of public funds. [Chapter 4, Section 2]

4.3. Other approaches to reducing costs

The costs barrier to access to justice is real and can have grave consequences, particularly in environmental cases where the effects of decisions can impact on large numbers of people. We also recognise that the problem of costs is as real for respondents as it is for applicants. For recourse to litigation, we recommend the development of mechanisms to achieve agreement and to promote negotiation and compromise. A commitment to this on the part of public bodies and those charged with environmental matters could make a contribution to the problem of the costs barrier. The Ombudsman has no jurisdiction in planning matters where recourse may be had to An Bord Pleanála, but a properly resourced role for the Ombudsman to examine procedures, mediate and encourage the achievement of compromises could be a valuable one. [Chapter 4, Section 3.1]

4.4. Achieving non-prohibitive costs under the Aarhus Convention

We recommend that the implementation of the Public Participation Directive (2003/35/EEC) be considered as an opportunity to make provision for assisting greater access to justice through the provision of legal aid in environmental cases of public interest, a statutory framework for pre-emptive costs orders including provision for a so-called “Aarhus certificate”, and consideration of the establishment of an “Environmental Defenders Office”. [Chapter 4, Section 8.2]

EXECUTIVE SUMMARY

It is one thing to have a rigorous and comprehensive regulatory regime, but another to enforce it. Our membership of the European Communities has brought the requirements of European Community environmental law into the corpus of Irish environmental rules, with the greatest part of it coming to us in the form of directives. While directives indicate the results to be achieved, their implementation in domestic law is usually a matter for the Member State. In relation to enforcement procedures, Ireland has considerable discretion in the techniques to be used. With the technical complexity of much economic and industrial activity, the cost of enforcement and the cost of maintaining an effective regulatory regime can be high and may not always achieve a balance with the harm to be prevented or controlled. The challenge is to achieve a balance between the cost of environmental protection, the available resources to meet this cost and the unavoidable interference with economic activity. Inevitably there will be tensions and disagreements on where this balance lies.

1. PUBLIC ENFORCEMENT

The first chapter of this report examines enforcement by public authorities and the alternative techniques which could be used in addition to the main existing means of enforcement, which primarily consist of warnings, notices, regulatory fines and prosecutions. These are not the only or not necessarily the most effective remedies, and Ireland may be able to benefit from the experiences and innovations of other jurisdictions.

1.1 Theoretical underpinning

The existing regulatory regime involves two main enforcers, the Environmental Protection Agency (EPA) and the local authorities. They already have a good range of administrative, civil and criminal law techniques to enforce compliance with environmental law and the conditions of environmental licences, involving measures to promote compliance and deter breaches. The effectiveness of the different means of enforcement can vary considerably depending on the organisation against which the measures are taken, and the reasons for failures of compliance, whether the result of deliberate and calculating decisions, or inefficiency and lack of resources. Therefore discretion in the use of the range of enforcement measures is important.

It is also important that regulators actually regulate, as was demonstrated by the case of *Commission of the European Communities v. Ireland*, in which the European Court of Justice held that failure to comply with a directive at a Member State's systematic administrative level can amount to maladministration, as well as a simple failure to enact the directive's terms, and imposed a significant fine.

1.2 Potential mechanisms of enforcement

Other jurisdictions have experimented with some alternative approaches. Administrative measures such as infringement notices and on the spot fines avoid the cost and formality of court proceedings and can be effective for less serious infringements. Because they are low-cost, they are more likely to be used, and therefore more likely to be a deterrent. They have some disadvantages: it may be tempting to over-use them because they are so accessible, and if used for more serious breaches they may trivialise the gravity of the offence, and therefore should not be used for serious or repeat offenders. The other risk is that it may be cheaper to pay a small fine than contest it, even if it is not merited, because of the nuisance value. In the longer term, this can lead to injustice and undermine the authority of the enforcement regime. Administrative measures can be imposed by consent, as part of a negotiated remedial package, in the same spirit as a plea bargain, without automatically resulting in conviction of a criminal charge.

In appropriate circumstances, a penalty point system for incremental offences could trigger a more serious consequence, such as the imposition of restrictions or the revocation of a licence. Along with incremental offending, the idea of incremental redemption could also be utilised. Findings of a breach of the terms of a licence or an environmental offence remain on an organisation's record for the indefinite future. Where breaches of conditions are treated as offences which are recorded against the offender, whether on its licence or as a matter of criminal record generally, such records should be capable of withering over time where repeat offences do not occur.

The power to order an environmental audit can be constructive in cases of organisationally weak enterprises where a breach is suspected, as a pre-emptive rather than punitive measure. The risk of an audit with its attendant costs can act as an effective deterrent. Civil remedies imposed by a regulator, because of the lesser burden of proof compared to criminal proceedings, are more likely to be used, and can be sufficiently flexible to adjust the consequences to the demands of a situation including the seriousness of a breach and the resources and culpability of an organisation. In order to inspire confidence in administrative sanctions of this kind, it is necessary to have an appeal mechanism to review the regulator's discretion.

Fines, including on the spot fines, are already familiar in the health and safety legislation and could be extended beyond litter control to other aspects of enforcement. Powers to confiscate equipment, and to prohibit activities causing damage, can also be useful. Environmental community service orders, known elsewhere as environmental service orders or supplemental environmental projects, are another option. They must meet certain criteria and require supervision by the regulator, but have the advantage that they contribute to the environment in some way rather than merely penalise the offender. They can also be tailored to suit all kinds of organisation including SMEs. Environmental alternative measures are similar in effect to environmental community services orders, but are used after an organisation has been charged, but before a court hearing, as a kind of diversion procedure.

The savings in court time and more beneficial results for the community are weighed against the lack of due process and transparency, by both the regulatory authority and the organisation concerned.

Publicity orders are controversial and can be misapplied, but they can also be used to good effect in cases where an organisation is concerned to maintain good relations with the public. They can impact on the prestige of a company and personnel, when purely financial penalties would not be felt in the same way. In organisationally incompetent companies they can provide the motivation to improve poor management and working practices. To avoid a publicity order having disproportionate effect, the subject organisation should also have some input in how it is drafted and managed.

Environmental audit orders may be used in relation to a breach of environmental regulations, but may also be ordered in relation to activities which are not connected with an offence. The cost of paying for an audit can be a significant deterrent, but of course the threat of an audit must not be abused. If imposed by a court, the risk is that the order comes long after the original offence has been committed and is therefore less effective. Environmental audit orders are more likely to be of use to the regulatory authorities.

1.3 Other matters

The advantages of a specialised Environmental Court have been examined in the UK and floated by the Green Party in their pre-election manifesto here in Ireland. It would have the advantage of judges with particular expertise, but would be expensive to maintain, particularly in this relatively much smaller jurisdiction. An interesting variation on this idea is to have specialist lower court judges to whom environmental cases would be referred. This would allow them to build up expertise over time and also achieve greater consistency in judgments and penalties.

Finally and in addition to the above, the recent publication in the UK of Professor Richard Macrory's Report on regulatory sanctions is considered and supported by the Committee. The report *Regulatory Justice: Making Sanctions Effective* found that reliance on criminal prosecution failed to give regulators adequate means to effectively deal with many cases in a proportionate and risk based way.

It also found that the use of criminal prosecutions can be a disproportionate response in many instances to regulatory non compliance and that penalties handed down by the courts often failed to act as a sufficient deterrent or reflect the economic benefit gained.

2. CITIZEN ENFORCEMENT

The second chapter of this study examines the role for citizen enforcement of environmental law. In both law and practice, private persons and NGOs tend to have a secondary role in the regulation of environmental matters. The law has traditionally recognised and protected individual rights; the

environment, being a diffuse interest, does not fit easily within that framework. Nevertheless, there is considerable legislative recognition that individuals or groups can have an interest in protecting the environment, despite the more prominent role of regulatory authorities. Accommodations have been made to deal with problems of legal standing and cost.

2.1 Rationale for citizen enforcement

The general impact of citizen involvement in environmental matters is not quantified, but there is no doubt that in individual cases it can make a significant difference in uncovering, monitoring and pressing for resolution of environmental issues. Members of the public can also create a political climate in which protection of the environment is given greater weight. The advantage of citizen involvement in environmental regulation is that it encourages greater transparency and accountability, helps avoid agency capture by the regulated, and contributes to a more democratic regulatory system. The disadvantage is that citizen involvement may be taken over by a self-appointed elite, to the detriment of cooperation between the regulator and regulated, and over-representation of some interests including those with money to lobby. However, current political consensus is that the benefits of individual involvement outweigh the occasional disadvantages, and contribute to a healthier, more open, accountable and democratic society in which citizens can participate directly and the environment gain greater protection.

2.2 Mechanisms of citizen enforcement

The scope for citizen enforcement in public law extends to court orders for cessation, mitigation or remediation, with legal standing to make such applications well recognised. We argue that legal standing should continue to be available in relation to emerging issues also, for example in relation to genetically modified organisms. Some legislation also makes provision for private prosecutions of breaches of statute, but this does not exist across the board, and should be extended by provision of a blanket power to institute private prosecutions in environmental matters. While there is a general power to prosecute at common law unless restricted by statute, it would be better to have a specific power enabling such prosecutions to be instituted. Alternative courses of action, such as reporting breaches to the regulatory authorities and alerting the media, can also be effective, but do not involve direct action. Neither does a report to the Attorney General's Office, in the hope that it will act in the public interest. Finally, once a decision has been made by a public body, it may be appealed or judicially reviewed. It is not always easy to get the legal standing to use these remedies, they can be costly and in the case of judicial review do not involve an examination of the merits of a case, only the procedure followed. If a matter is being litigated anyway, a citizen or NGO may apply to be accepted as *amicus curiae*, but again this is not easy to achieve, and can be costly. The role of *amicus* needs to be more developed as to access and procedures.

The ability to make a complaint to a regulatory body is valuable, and should be enhanced by a requirement for a minimum level of investigation and feedback, so that it is known what steps have been taken. This is already the position in relation to planning law, where objectors are kept informed.

The only disadvantage of this requirement is that it involves committing some of the regulatory body's resources to a reactive role, rather than a strategic one. However, all regulatory bodies must have a reactive ability, and this at least will formalise one aspect of it, encourage public ownership of the regulator and the process, and enable people to feel they can participate and work in partnership with the regulator.

Private law, as mentioned above, was not originally designed to give a remedy for breaches of the wider public interest in a protected environment. But private law remedies in tort can be useful in the right circumstances, for example where the complainant has an interest in land and seeks compensation. Private law remedies are not so well suited to prevention of environmental damage, and focus more on the aggrieved person rather than the environment directly. Regulatory bodies may have immunity from private law suits for failure or negligence in the performance of their duties. This could merit re-examination in the interests of accountability.

Members of the public can perform an important informant role in inspection and monitoring. We believe there is scope in the future for greater cooperation between official regulatory bodies and voluntary bodies, which could be provided for in legislation or formulated as partnerships, coalitions or local level social contracts. The Ombudsman can receive complaints and although her findings are not binding, they have authority. However, her powers do not extend to certain appellate tribunals such as An Bord Pleanála, the EPA and local authorities exercising reserved functions.

Further, members of the public can be surprised at their own power in relation to the media, demonstrations, boycotts, assisting with negotiations for example on compliance agreements, lobbying for law reform and seeking more access to information.

Under EU law, three doctrines apply to make citizen involvement in enforcement possible: the doctrines of direct effect, public effect and State liability. In addition, the Commission will accept complaints and has a formal procedure for processing them which may eventually result in a reasoned opinion and infringement proceedings against a Member State. The complainant does not need to have any direct interest and no costs are involved. On the downside, the complainant loses control of the complaint once it is made, and the procedure can lack transparency and may be subject to political influence.

2.3 Impediments to citizen enforcement

Despite the opportunities for citizen enforcement, they are not much availed of. In looking for impediments to citizen enforcement, certain matters stand out: the ineffectiveness of the tools in practice because of the lack of clear environmental standards, and certain procedural, technical and cultural obstacles.

A key foundation for a citizen's role is the availability of information, without which it is difficult to identify violations and monitor compliance. This is recognised in the recent revisions of the Directive on Access to Environmental Information and the even stronger Access to Information pillar of the Aarhus Convention. There is a lack of clarity in the information which must be disclosed under the various provisions, including the Freedom of Information Act, which causes difficulties and is a deterrent, as is the cost involved. We recommend that the existing discretion to waive or reduce fees in cases of national importance should be extended to enable individuals and NGOs to play an effective enforcement role. In a democracy, there is an important role for whistle-blowers and activists.

The lack of legal standing can be another impediment. At the discretion of a court, legal standing is usually granted when individual rights are affected. This is not always the case in relation to the diffuse collective interest of the environment. An umbrella right to sue or prosecute would be useful, as exists in other jurisdictions, and would supplement the existing non-comprehensive intervention rights. Further, a citizen complaint should always result in specified action by regulatory authorities, at least to seek a response from the alleged offender, investigate and inform the complainant of the result.

In relation to court proceedings, the burden of proof can be very heavy for citizens who do not have the technical and legal resources of regulatory bodies. This is particularly so in criminal cases, where the burden of proof is higher.

The single largest impediment is cost – the cost of gathering evidence and paying for court proceedings. The indemnity rule, whereby the loser in an action must pay the costs of the winner, compounds matters. There is a recognised exception in some cases of undisputed public interest, but the public interest exception is rarely applied by the courts, and there is little consistency when it happens, in the absence of standard criteria for costs exemptions. The remit of the Legal Aid Board should be expanded to encompass public interest actions taken by special interest groups, and criteria and guidelines for the identification of appropriate cases could be developed to ensure value for what funding can be made available. This could be viewed as supplementary to the enforcement activities of local authorities.

Culturally, much has still to change to make the protection of the environment a wholly popular cause. As more information becomes available, it can be expected that awareness of the issues will increase.

2.4 Impact of recent regulatory developments

Certain recent regulatory developments have the potential to affect the role of citizen enforcement. The European Communities Environmental Liability Directive excludes civil suits against the regulators or regulated organisations, but it provides an additional point of entry for individuals or groups – they may request action by the authorities, and seek judicial review of regulators' decisions on liability.

The case law of the European Court of Human Rights has recognised that certain environmental protection should be afforded. Article 8 imposes a duty to protect the environment and provide information on environmental matters. Section 3 of the European Convention on Human Rights Act 2003 imposes a duty on public authorities to perform their duties in compliance with the Convention, and gives a cause of action for damages in the event of failure.

Finally, the Aarhus Convention has an important role to play. The title of the Convention emphasises public participation, access to information and access to justice, and is premised on the benefit of public involvement in environmental enforcement. The provisions for access to information and access to justice are the most relevant from the perspective of the citizen enforcer.

3. ENVIRONMENTAL AGREEMENTS

Environmental agreements have been developed in a number of jurisdictions as a means of implementing environmental directives with considerable success. For a number of reasons - size, central administration, and relative burden of implementing, monitoring and enforcing EC directives - Ireland would appear to have much to gain by their use. A number of legislative provisions would appear to permit this, and the 1996 REPAK agreement on packaging waste is an example of such an agreement in existence.

3.1 Background to environmental agreements

Environmental agreements have been successfully used in a number of countries including the Netherlands and Germany, and the Flanders region of Belgium established a legislative framework for them in 1994. The EC's Fifth Action Programme on the Environment of 1992 sought to move away from the traditional "command and control" approach and included "voluntary agreements" as a type of market based instruments that could be used to achieve co-regulation. A 1995 Commission progress report on the Fifth Action Programme saw the need for the development of common frameworks for environmental agreements, which was followed in 1996 by the Commission's Communication on Environmental Agreements. It set out a framework for their conclusion and application, to encourage their use. Excluded from the framework are directives that are intended to create rights and obligations for individuals, unless specifically contemplated within the directives themselves.

These "voluntary" agreements are usually set against a background of the threat of more formal, binding regulation, but nonetheless offer more negotiation, agreement and flexibility for industry. They are also more easily put in place and amended than legislation, but can give rise to problems of enforcement. Certain objectives are particularly suitable for such agreements, such as waste reduction programmes, which necessarily involve decisions by the actors themselves. A small number of actors in a sector also make the conclusion and observance of such agreements more practicable.

There is no broadly recognised definition of environmental agreements in EC law. A Council Recommendation of 1996 includes conditions against which draft agreements can be tested, including that they should take the form of enforceable contracts, specify quantified objectives and be accessible to the public.

The use of environmental agreements was endorsed in the European Commission's 2001 White Paper on European Governance, noting however that co-regulation is only suited to cases where fundamental rights or major political choices are not called into question and that the organisations participating must be representative, accountable and capable of following open procedures in formulating and applying agreed rules.

3.2 Advantages and risks

The Commission perceives three core benefits of self-regulation by environmental agreement:

- the encouragement of a pro-active approach from industry;
- cost-effectiveness for industry, which knows its own circumstances best; and
- faster achievement of objectives, in contrast to formal implementation of directives which takes four years plus from proposal of the directive.

None of these advantages, however, is undisputed: it can be argued that industry already engages fully with the regulatory process; that innovation by industry is driven by the market, and that the absence of agreement in advance can result in the need for costly assessment of the methods chosen; and the preparation of environmental agreements can be slow, and delay the taking of other measures if they fail. Other advantages can also be identified: environmental agreements are arguably less subject to political influence once agreed and more stable than legislation; they can work to achieve uniform environmental standards in different regional jurisdictions, as managed by the Dutch authorities; they are likely to result in higher compliance rates, be more democratic, and may result in a positive image for those participating.

The Commission also identified certain risks including the following, and made suggestions on minimising them:

- The need to define clear objectives from the outset, to aid transparency and to allow all stakeholders to participate equitably and effectively – general targets can be set in legislation, with provision for public participation;
- The inclusion of clear enforcement mechanisms and sanctions – to include the potential for public pressure with opportunities for scrutiny, and if not success the possibility of other measures; and
- Avoiding the problem of “free riders” where not all operators sign up to the agreement – use of a mix of instruments including incentives, and bestowing statutory authority on the agreements.

3.3 Guidelines for use of environmental agreements

The 1996 Commission Communication sets out guidelines for the use of environmental agreements, and also contains a checklist. Principles identified include

- Consultation and inclusiveness, including consultation with wider interests than those directly affected;
- The use of legally enforceable contracts, subject to their compliance with legislative provisions;
- Quantified objectives rather than “best effort” clauses;
- Staged approach with interim goals, primarily to facilitate the early detection of problems;
- Central monitoring of results for efficiency and comparison;
- Transparency and public access to information, including the publication of all environmental agreements;
- Independent verification of results if necessitated by the use of unharmonised standards in different countries or the need for confidentiality;
- Additional guarantees and measures to ensure effective implementation including for example fines and penalties, amendments to permits when renewed, and a commitment to regulatory measures if needed;
- A number of technical, drafting principles, including clarity as to the parties and definitions.

3.4 Compatibility with the EC Treaty

Case law of the ECJ holds that Community legislation which creates rights and duties for individuals must be implemented by means of formal legislative instruments. Implementation must also of course comply with Community law and not conflict with Treaty rules in three main areas:

- Rules on the creation of the internal market;
- EC competition rules; and
- Rules on permissible State aid.

The cross-cutting “principle of integration” as set out in article 6 of the EC Treaty must also be born in mind, as it impacts on the three principles above in their application to environmental protection measures. Further, environmental agreements must be compatible with international trade rules, in particular the Technical Barriers to Trade Agreement under GATT/WTO rules.

The internal market rules do not allow agreements to hinder the free movement of goods, except where justified by certain policy exceptions which include the protection of health and life of humans, animals and plants, and protection of the environment where such measures are proportionate to the objectives to be achieved. Competition law aims to restrict collaboration between undertakings in competition with each other, and member states can be in breach of it where public authorities enter into agreements which could adversely affect or distort competition, even for good environmental reasons, unless they come within the exceptions in article 81(3) of the EC Treaty and are on balance justifiable on environmental grounds. In this way environmental concerns are to be integrated into the implementation of all areas of Community policy, giving effect to the integration principle.

Four conditions must be met under article 81(3):

- the measure must improve the production or distribution of goods or promote technical or economic progress;
- consumers must get a fair share of the resulting benefit;
- the restriction must be indispensable to the environmental aim; and
- there must be no possibility of eliminating competition.

Article 82 prohibits the abuse of power by an enterprise in a dominant position, and although no exemptions are provided, a system of exemptions has developed in practice whereby the Commission balances any abusive practice against any benefit achieved. Conflicts between competition law and environmental protection objectives arise in two main ways. First, a dominant undertaking might set out to improve its environmental performance by using its market power to force its suppliers to meet certain environmental criteria or standards. More commonly, a waste or packaging collection and recycling scheme in a dominant market position might refuse to allow undertakings access to its facilities for the purpose of placing their products on the market.

Environmental agreements which grant subsidies or tax exemptions as an incentive to organisations to enter into them may amount to state aid in breach of article 87, which contains a general prohibition of this. Regulatory subsidies which exempt certain categories of undertakings from the scope of environmental rules are not treated as state aid. Article 87(2) and (3) list exemptions which are compatible with the Treaty *per se* and classes of state aid which may be exempted, including environmental agreements. In fact, since the introduction of the 1994 *Guidelines on State Aid for Environmental Protection*, it has been Commission policy to facilitate Member State initiatives which encourage higher standards of environmental protection through the provision of governmental incentives (direct financial contributions, tax exemptions or a redistribution of revenues from levies), including investment aid, subject to demanding conditions including:

- that the investment allows significantly higher levels of environmental protection to be attained than those required by mandatory standards, and
- the level of aid actually granted is proportional to the improvement of the environment achieved.

The 2001 *Guidelines on State Aid for Environmental Protection* explicitly aim to facilitate certain initiatives including, for example, contaminated land remediation, and they have been used to approve projects in the Netherlands and Tuscany.

3.5 International trade and WTO rules

There also exists potential for tensions between environmental agreements establishing product standards and international trade rules, in particular the Technical Barriers to Trade (TBT) Agreement. However, this agreement allows for exemption of measures which are necessary and proportionate to achieve a legitimate goal, including protection of the environment.

3.6 Conclusion

Environmental agreements have a significant role to play in the implementation and achievement of environmental regulation, with lesser resources and with greater flexibility and sometimes in the absence of legal certainty. While a formal and detailed legal framework designed to regulate the use of environmental agreements would be desirable, its absence does not necessarily preclude their use. Voluntary agreements could generally be used to implement a wide range of less strictly normative provision of environmental directives. We recommend the identification of suitable uses of

environmental agreements, and the development of a legislative framework to regulate and inform their use.

4. PRE-EMPTIVE COSTS ORDERS

4.1 Policy on judicial review in planning and environmental cases

The central policy objective behind the legislative restrictions on access to judicial review in planning and environmental matters, and underlying their judicial interpretation and application, is the prevention of unnecessary delays and vexatious and frivolous challenges, and the encouragement of early public participation in planning and environmental decision-making procedures. At the same time, provision is made to ensure that the public interest in effective environmental protection and planning control is represented and considered.

However, it is the issue of legal costs, and the “costs follow the event” rule for the allocation of such costs in particular, which has the potential to create the greatest practical barrier to applicants in the taking of environmental judicial review proceedings. As well as having an effect in individual cases, the barrier decreases efficiency because it restricts the supply of precedents. Chapter 4 proposes that the courts may be assisted by a legislative framework for the allocation of costs as between the parties to judicial review proceedings in public interest cases.

4.2 Costs in public interest cases

The relative financial and manpower strength of public bodies can make them resistant to negotiations and compromise and this is sometimes recognised and penalised by the courts. Further, the courts do on occasion depart from the usual “costs follow the event” principle in public interest cases, and there have been some recent instances of this. Pre-emptive costs orders (PCOs), in deciding the issue of costs before they are incurred, give greater certainty to the parties and therefore go further to reducing the costs barrier even than costs awarded which do not follow the event.

PCOs have developed recently in England and Wales, where the costs barrier has been a concern despite the more generous legal aid provision. The enlargement of the class of those with legal standing, dating from the early 1980s, was clearly going to be meaningless unless the issue of costs could be overcome, and in the early 1990s decisions were made which refused to penalise losing parties with the winners’ costs for public interest reasons. In 1999 in the *Child Poverty Action Group* case, the applicants sought a protective costs order and Dyson J. agreed that the court had discretion to make such an order in public interest cases. However, he held that the court’s discretion should only be exercised in the most exceptional circumstances, and he set down four tests to be satisfied:

1. The court must be satisfied that the issues raised are truly ones of general public importance;

2. The court must be satisfied, following short argument, that it has a sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make the order;
3. The court must have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue; and
4. The court will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.

Dyson J's tests have been applied since in other cases, and PCOs have been made capping the applicant's exposure and granting the applicant full immunity from all potential liability.

The issue of PCOs, and the judicial requirements for the grant of such orders, was revisited in 2005 by a "powerfully constituted" Court of Appeal in *R (Corner House Research) v. Secretary of State for Trade and Industry*, where the applicable principles were restated. The Court of Appeal relaxed Dyson J's requirement that the court have "a sufficient appreciation of the merits", instead requiring that there is "a real (as opposed to fanciful) prospect of success" or that the applicant's case is "properly arguable". It restated the principles as follows:

1. A PCO 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 is 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 doing so.
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.¹

The merits threshold was lowered to avoid heavy and time-consuming ancillary litigation. The issues must still be of general public importance, and there is an added requirement that the public interest requires that those issues should be resolved. This implies that the Court of Appeal was concerned to encourage the emergence of clear precedents in relation to questions of law of public importance.

The requirement that the applicant have no private interest has been somewhat problematic, and after being initially enforced it was later relaxed. The Liberty group, established to study the issue of PCOs and other matters under the chairmanship of Sir Maurice Kay (Kay LJ), published its findings in June

¹ Judgment, para. 74.

2006 in *Litigating in the Public Interest* and on this issue concluded that while a private interest might be *relevant*, its absence should not be a *requirement*. They also noted that under the Human Rights Act 1998 only persons directly affected by a violation of the European Convention on Human Rights are eligible to bring proceedings, and it also discerned a lack of clarity as to what constitutes a private interest, distinguishing between a financial interest, and a moral or intangible one.

Principle 1(iv) appears to require an equitable balance between the applicant and the respondent to be struck in considering a PCO and the degree of protection, and the resources available to the applicant will be the starting point. The *BUAV* case illustrates that an applicant with sufficient resources may qualify for a PCO if to run the case would be an irresponsible risk to its other responsibilities.

The favourable light which *pro bono* representation for the applicant can throw on a PCO application in accordance with principle 2 has also been criticised, as undermining the principle of “equality of arms”, and on practical grounds given the very short timeframe open to applicants for judicial review in which to recruit *pro bono* lawyers to act, and the importance of maintaining the viability of the few legal practices which operate in the field of publicly funded environmental litigation and which usually cannot afford to do much *pro bono* work. The Liberty group recommended that little emphasis should be placed on this factor.

The issue of capping an applicant’s legal costs has been debated in the context of the last principle, affirming the discretion of the court in relating to granting or withholding PCOs. The arguments for not capping an applicant’s costs are persuasive, as this could limit the argument of important public interest issues, and the court has sufficient discretion to make no order as to an applicant’s costs if this is what the circumstances require. The Liberty group was unable to agree on this issue. However, the issue is more important in the UK than in this jurisdiction, because of the rules there on success fees in conditional fee arrangements. In Ireland, the unenumerated right to legal representation identified under Article 40.3.1 of the Constitution would have to be considered in this context.

The inability to proceed with a PCO is another of the *Corner House* criteria. As the Liberty group pointed out, “It was hard to see why a factor suggesting that a PCO should be granted had become one whose absence excluded the possibility of a PCO”. The approach taken in the *BUAV* case, where the applicant could have proceeded with the applications without a PCO, but where one was made because of the public interest in the case and the disparity of resources between the parties, is more satisfactory.

The Court of Appeal in the *Corner House* case was concerned that an application for a PCO should not result in ancillary litigation and should be quickly decided with minimal costs. It requires a PCO application to be dealt with at the leave stage of judicial review, preferably on the papers, with up to one hour’s oral hearing if refused, with costs limited to £1,000 (papers only) to £2,500 (oral hearing), or if multiple parties maximum costs of £2,000 and £5,000. The total maximum exposure should thus be limited to £7,000, with this liability for costs to deter unmeritorious applications. Even these sums

have been criticised as being a deterrent, and the Liberty group was of the view that in PCO applications there should be no order as to costs unless a party acted unreasonably.

An “Aarhus certificate”, to be granted by a court when it considers that an action falls within the remit of the Aarhus Convention (namely that it is related to the environment, that the case is in the public interest and that the applicant has an arguable case), would have a similar effect to a PCO but could be designed to be more readily granted once certain criteria were met.

4.3 Other common law jurisdictions

PCOs have been examined in Canada and Australia by Law Reform Commissions and the courts, which have refused to award costs against the losing party in a number of public interest cases.

4.4 Ireland

The first application in Ireland for a PCO was considered in the *Village Residents Association (no. 2)* case by Laffoy J, who held that the court had discretion to make such an order within the Rules of the Superior Courts, but that case did not meet the criteria. She approved the principles developed by Dyson J. in the *Child Poverty Action Group* case, then the leading case in the UK, and anticipated that a more flexible approach might be warranted, for example in relation to planning matters involving public interest issues.

PCOs were next considered by Kelly J. in *Friends of the Curragh Environment Ltd. v. An Bord Pleanála*. He accepted the *Corner House* principles as appropriate, but held that the issues raised were not of public importance. The applicants had also argued that article 10(a) of Directive 85/337/EEC as inserted by article 3 of Directive 2003/35/EEC (the Public Participation Directive), which was then a year overdue for incorporation in Irish law, should be given direct effect specifically in relation to a requirement that there should be a review procedure which would not be prohibitively expensive. However, Kelly J. held that the provisions of the directive concerned were not sufficiently clear, precise and unconditional to be given direct effect. Further, the directive could not have horizontal effect and a PCO could not be ordered against the Turf Club, which was a notice party. He dismissed the application and awarded costs against the applicant to the respondent and the notice party. The costs incurred were considerable, involving numerous court appearances and two full days in the High Court. The principles set out in the *Corner House* decision to avoid ancillary litigation and minimise the costs of a PCO application were not applied.

4.5 Giving effect to the Public Participation Directive

The direct effect of the Public Participation Directive (2003/35/EEC) and the question of prohibitive costs came again to be considered in *Sweetman v. An Bord Pleanála and others* in April 2007, by Clarke J. His judgment dealt with a number of points which are also relevant to PCOs.

He held that if it should prove necessary on the facts of any case to give a more generous interpretation of the requirement of “substantial interest” in section 50 of the Planning Act 2000 so as to meet the “wide access to justice” criteria in article 10a, then that could be done without difficulty.

He considered that judicial review was an adequate remedy under the directive, even though it does not allow a review on the merits.

Lastly, he considered the question of costs, and whether exposure to the risk of liability for the other party’s costs would amount to a prohibitive cost under the directive, even though he agreed with Kelly J’s finding in *Friends of the Curragh Environment* that the directive could not have direct effect in relation to this issue. Referring to the provisions of the Aarhus Convention, article 3.8 that “this provision shall not affect the powers of the national courts to award reasonable costs in judicial proceedings,” he held that the “absence of excessive cost” requirement in the directive was not intended to cover the exposure of a party to reasonable costs in judicial proceedings. As courts have discretion in relation to costs and may award costs to the losing party in public interest cases, he held that the level of exposure to costs was not unreasonable under article 3.8.

This interpretation, firmly placing environmental law challenges within the framework of judicial review as to the degree of review and the costs, will be a disappointment to many who had other expectations based on a different interpretation of article 10a of the Public Participation Directive.

4.6 Other views on costs as a barrier to justice

The Law Reform Commission of England and Wales in 1994 proposed discretionary legal standing to be granted for public interest cases. The Irish Law Reform Commission examined the issue of PCOs in its consultation paper and *Report on Judicial Review Procedure* (2003 and 2004). It concluded that the making of a PCO was a high risk strategy, and recommended that a court should exercise its discretion in relation to PCOs only in exceptional circumstances, but also that “where any doubt exists, the court should instead simply indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings”. It noted that the court could give an indication of the likely outcome in relation to costs, and that this would have the advantage of flexibility, giving comfort to the applicant party that, excluding any adverse circumstances coming to light in the course of the proceedings, it would be awarded its costs.

4.7 Recommendations

Chapter 4 concludes by recommending a legislative framework to allow for the possibility of legal aid as set out in chapter 2 and the making of PCOs in appropriate public interest cases, the legislative framework to reflect the analysis and critique of PCOs earlier in the chapter. It also suggests that the Courts, in deciding whether or not to accede to an application for a PCO, might consider the lack of legal aid and the usefulness of precedent decisions, if applicable.

As another way to lower the costs barrier, we propose the development of mechanisms to achieve agreement and promote negotiation and compromise, with openness to this on the part of public bodies. A properly resourced role for the Ombudsman to examine procedures, mediate and encourage the achievement of compromises could be a valuable one.

Lastly, we recommend that the implementation of the Public Participation Directive be considered as an opportunity to make provision for assisting greater access to justice through the provision of legal aid in environmental cases of public interest, a statutory framework for PCOs including provision for a so-called “Aarhus certificate”, and consideration of the establishment of an “Environmental Defenders Office”.

Chapter 1

PUBLIC ENFORCEMENT

“The trick of successful regulation is to establish a synergy between punishment and persuasion.”²

1. INTRODUCTION

This chapter examines public enforcement in Ireland, focusing on the mechanisms that are currently used and the experience of other jurisdictions. The chapter begins by examining different theories underpinning public enforcement, and continues with an examination of the measures, both administrative and penal, currently being used in Ireland, with commentary on the weaknesses of, and difficulties with, certain remedies. It discusses public enforcement in other comparable common law jurisdictions, and where their experience might be relevant here. The European Court of Justice decision in *Commission v. Ireland* (Case C-494/01 26 April 2005) is considered, and the chapter looks at whether the systematic administrative failures identified by the ECJ in that decision still exist, or are now adequately addressed by environmental administrative measures and enforcement agencies in Ireland. Finally, from a consideration of all of the above, we make recommendations to improve environmental enforcement in Ireland.

2. THEORIES UNDERPINNING THE ENFORCEMENT OF ENVIRONMENTAL LAW

In this section we consider theories and models of environmental enforcement to assess which model best provides for the protection of the environment without disproportionately interfering with the economic activity of the nation.

2.1 Deterrence versus compliance model of enforcement

Analysis of regulatory enforcement styles within different jurisdictions by economists, political scientists and socio legal scholars has identified different models of enforcement. The two principal styles are deterrence and compliance. Deterrence focuses on punishment, the goal being to successfully prosecute and penalise wrongdoers, after an offence has been committed. A compliance strategy, in contrast, focuses on persuading persons to adhere to the law through advice, persuasion, agreement and informal enforcement tools.³ The most effective model may be to combine elements of

² Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) at 25.

³ See Abbot “The Regulatory Enforcement of Pollution Control Laws: The Australian Experience” (2005) *J.E.L.* (17) (2) at 161, K. Hawkins, *Environment and Enforcement Regulation and the Social Definition of Pollution* (Oxford University Press, 1984) and Hutter, *Compliance: Regulation and Environment* (Oxford University Press, 1997).

the two. This is the so-called “hybrid” model. Under this model, a compliance strategy is favoured until an undertaking wrongly exploits the relationship of cooperation between the enforcement agency and itself. When that happens, sanctions are employed.⁴

Key to this approach is the idea of the enforcement triangle,⁵ elaborated by Ayers and Braithwaite. It provides a model whereby measures which are less costly, both to the regulator and the wrongdoer, are taken in greater number and with greater frequency by enforcement agencies. More severe penalties are only applied when the measures on the lower tier of the triangle are not successful. The use of measures at the base of the triangle, combined with the threat of the measures at the top of the triangle, should ensure compliance in the majority of cases. Key to the effectiveness of this approach is a willingness on the part of the enforcement agencies to use the more severe measures, if measures at the base of the triangle do not work. If the enforcement agency is not prepared to use more severe sanctions, undertakings will not fear any severe adverse effects for non-compliance, and overall compliance with environmental legislation will decrease. One type of model has persuasion at the base, followed by a warning letter, followed by a civil penalty, followed by a criminal penalty, followed by suspension of a licence and ending with revocation of licence.

This model is closely connected to the theory of optimal compliance. Perfect compliance with environmental legislation is neither possible nor indeed perhaps desirable. Sometimes the costs of complying with environmental legislation outstrip the benefit to society on a socio-economic level of allowing an activity not to be overly hindered. A balance should be struck between the reduction of environmental harm and the efficient and economic operation of industry. In addition, as resources available for enforcement are not infinite, the costs of achieving compliance outstrip the benefit of compliance. On this understanding, optimal compliance is the point at which the social benefits accruing from compliance with environmental law are equivalent to the social costs incurred in securing that level of compliance.⁶

Related to the issue of costs is a famous model elaborated by Gary Becker to illustrate how the level of compliance of undertakings relates to the enforcement activity of public agencies.⁷ This can be illustrated as:

$$U < pD$$

U is the profit to the wrongdoer arising from the non-complying act. p is the probability of apprehension by a public agency, and D is the costs to the offender resulting from such apprehension.

⁴ See Ayers and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) and Abbot “The Regulatory Enforcement of Pollution Control Laws: The Australian Experience (2005) J.E.L. (17) (2)

⁵ See Ayers and Braithwaite, *op.cit* Ogus and Abbot “Sanctions for Pollution: Do we have the Right Regime” (2002) J.E.L. (14) (3)

⁶ Stigler, “The Optimum Enforcement of Laws” 78 *Journal of Political Economy* 78 (1970) 526.

⁷ Becker, “Crime and Punishment: An Economic Approach” 76 *Journal of Political Economy* (1968) 161.

Therefore, U must be less than pD .⁸ It should be clarified that the p and D do not necessarily reflect the real probability of apprehension or cost to the wrongdoer, but rather the wrongdoer's perception of such risk of apprehension and the cost.

Therefore, an effective enforcement strategy should aim to increase the probability of apprehension, the cost to the wrongdoer and the wrongdoer's perception of both the risk of apprehension and the costs. Does Ireland's enforcement strategy presently do this?

2.1.1 Different types of non-compliant wrongdoers

Not every offender offends for the same reason. One system of classification of wrongdoers divides offenders into three categories: the amoral calculator, the political citizen and the organisationally incompetent entity.⁹ It is in respect of the amoral calculator that the Becker model outlined above becomes most important. For this type of wrongdoer, non-compliance results from a calculated appraisal of the benefit of non-compliance compared to the risk and costs of apprehension. It has been suggested that for these offenders, enforcement agencies should take a severe approach, adopting a deterrent strategy based on strict enforcement and the imposition of severe legal sanctions.¹⁰

In contrast, the "political citizen" wrongdoer does not obey the law because he does not see the basis for it, or does not agree that it is fair. His compliance is contingent on his perceiving the rationality of the environmental law. In the case of these wrongdoers, environmental regulators most effectively take a persuasive and educational approach.

Some wrongdoers do not intentionally breach environmental rules, but rather their non-compliance is due to organisation failure. It may also be due to lack of clarity in the law which may be remedied by the enforcement authority issuing guidance,¹¹ or by test cases in the courts. In the case of these undertakings, the regulator should again take an educational and advisory role with certain administrative sanctions, that will be discussed later. Audits and reporting obligations should also have an effect on the organisationally incompetent entity.

The only type of offender not mentioned in this model is the unfortunate accident causer, neither incompetent nor uncaring. Experience suggests there are quite a number of these offenders, and our view is that the educational and advisory role is best adopted as the most appropriate approach to such wrongdoers.

⁸ See Ogus and Abbot *Op.cit.* for an example. p is a fraction of 1.00 which represents certainty. So, a potential wrongdoer should obey the law if, for example, the profit from the illegal act (U) is €100, the chance of apprehension (p) is one of 5 (0.20), and the costs arising from being caught (D) are €800: $100 < 0.20 \times 800$.

⁹ Kagan and Scholz, "The Criminology of the Corporation and Regulatory Enforcement Strategies" in Hawkins and Thomas, *Enforcing Regulation* (Kluwer – Mighoff, 1984).

¹⁰ See Abbot "P V Regulatory Enforcement of Pollution Control Laws: The Australian Experience" *op.cit.* at 164.

¹¹ A good example of this is the website of the Data Protection Commissioner, which gives considerable guidance on obligations under the Data Protection legislation www.dataprivacy.ie. The European Commission's DV ENV recognises the value of guidance and test cases, see Cashman, "Commission Compliance Promotion and Enforcement", *JEEPL* 5 2006 385 at 391.

Another difference in undertakings, which may require different approaches to environmental regulation, is that between large corporations and small and medium size enterprises (SMEs). SMEs generally have a higher level of environmental impact per unit and lower compliance rates with health, safety and environmental regulation.¹² Gunningham has identified a number of characteristics specific to SMEs which hinder their effective regulation. These include a lack of resources to comply on behalf of SMEs. Many SMEs are also unaware of their environmental impact and obligations. They have less environmental awareness and have less to fear from environmental pressure groups than larger corporations. Another issue is the sheer number of SMEs. This leads to infrequent inspections, and a low risk of detection of non-compliances. Many of the solutions to these particular difficulties are best found outside the realm of traditional enforcement measures. Examples might be environmental agreements or greater participation by private citizens, both of which are considered elsewhere in this study. However, regulatory authorities must be aware of the specific challenges of SMEs when drawing up enforcement policies. As has been stated by Gunningham in the same report:

“Effective regulatory design involves tailoring a particular combination of policy instruments to particular circumstances. Most commonly, this involves developing sector-specific policy prescriptions and recognising that even within each sector, there are likely to be a variety of different players with different degrees of competence and different motivations.”

The experience of regulating large enterprises is completely different. Most large enterprises, though far from all, are highly aware of their environmental obligations and have systems in place to manage these. They have long-term business plans, systems of control designed to manage business and legal risk, and, perhaps sometimes most importantly, they have deep pockets. In addition, many large companies run shy of the media, and the threat of publicity can be an effective tool. They are also more likely to be subject to inspections and audits, which increases the likelihood of detection. Such strategies as education and compliance assistance strategies are less important to large enterprises than they are to SMEs. Equally, pressure from third party market forces may not be as effective as it is on SMEs. On the other hand, “name and shame” may have a greater effect on a large corporation than in the case of most SMEs.

2.2 Developing an optimum enforcement strategy

In light of the above strategies, a number of key matters must clearly be borne in mind when drawing up a public enforcement policy. Regard must be had to the cost of enforcement measures, and in many instances, the best option is the most cost effective, such as the serving of administrative notices rather than prosecution. Secondly, the potential detection of non-compliance must be increased, so that non-compliant undertakings will fear being caught. The probability that a non-compliant undertaking be penalised must also be increased. And, most importantly, undertakings must have the perception that they will be caught, that if they do not comply they will pay, and therefore the benefits of non-compliance are simply not worth the risk. Any strategy must also take into account the different sorts

¹² Gunningham “Beyond Compliance: Next Generation Environmental Regulations”. Paper presented at the *Current Issues In Regulating Enforcement and Compliance* conference convened by the Australian Institute of Criminology in conjunction with the Regulatory Institutions Network, RFSS, Australian National University and the Division of Business and Enterprise, University of South Australia, held in Melbourne, 2/3 September 2002.

of offenders, and apply the most judicious measure in the circumstances that present themselves to the regulator.

Analysis of a lack of compliance may reveal an underlying problem in legislation or practice which is at fault, and strategically it may be more useful to tackle the underlying problem than the infringements which relate to it. In the experience of the European Commission, there is a place for both broad-based infringement procedures tackling wide or systemic failures, as well as for important individual cases which may have high intrinsic or strategic importance, as where key points of principle arise or major threats to very endangered species or habitats are involved.¹³

3. CURRENT ENFORCEMENT MEASURES IN IRELAND

On the 26th of April 2005, the European Court of Justice issued a judgment in Case C-494/01 (*Commission of the European Communities v. Ireland*) condemning Ireland for general and persistent failure to respect EU waste law. This judgment illustrated that weaknesses in administrative structures for implementing and enforcing Community environmental laws can amount to a systematic failure by a Member State to comply with its environmental obligations. The importance of this case is that it illustrates that administrative failures in *administering* environmental law, rather than simple failure to put legislative structures in place, can amount to failure to comply with the obligations of a directive. The legislative provisions are in place for Ireland to comply with its obligations under the Waste Framework Directive. This decision focused attention on Irish administrative bodies' purported failure to fully make use of the powers available to them under environmental legislation.¹⁴

On the 3rd of May 2005, the Minister for the Environment, Heritage and Local Government issued a direction under section 60 of the Waste Management Act, 1996. This was the first time the Minister had exercised his powers under this section, which authorises him to issue general policy directions in writing to local authorities and to the Environmental Protection Agency (EPA). The local authorities and the EPA are legally obliged to have regard to such directions. The intention behind the direction was to encourage an intensification of action against illegal waste activity (which include unauthorised disposal of waste, such as the abandonment, dumping or uncontrolled disposal of waste) and enhance the response of local authorities and the EPA in ensuring the protection of the environment and human health and the prosecution of offenders. In determining the nature of such prosecutions the Minister directed that regard should be had to the elimination of the economic benefit deriving from the illegal activity.

¹³ Cashman, "Commission Compliance Promotion and Enforcement in the Field of the Environment", JEEPL 5 2006 385 at 389.

¹⁴ The Commission itself recognises that successful implementation of environmental law encompasses both promotion of compliance and enforcement. "Enforcement is not a 'good' in itself but a means to obtain results. Other means may be more effective and, for that reason, preferable. There is a recognition that the two broad categories of compliance: promotion and enforcement need to be closely associated. Indeed, these categories are perhaps best seen as a continuum, since it is difficult to draw a clear dividing line." per Cashman, "Commission Compliance Promotion and Enforcement in the Field of the Environment", JEEPL 5 2006 385 at 386.

A key feature is the Minister's exhortation to local authorities and the Agency to pursue maximum potential penalties against offenders. Prosecutions are to be instituted in all cases using powers under the Waste Management Acts 1996 to 2005 and other relevant legislation in order to deter breaches of waste law.

On 12 July 2005 the ECJ imposed the largest financial penalties yet on France for inadequacies in its inspection and enforcement system. The Court held that national measures introduced to prevent breaches of the fisheries regulations must be effective, proportionate and a deterrent. The implications of this judgment have resonance in the field of environmental law in general. It is clear that the ECJ is exerting more pressure on Member States to ensure that their administrative structures provide for the adequate enforcement of environmental law.

Regulatory agencies in Ireland (principally the EPA and local authorities) have available to them a reasonable range of administrative measures, and may also bring civil or criminal proceedings in the courts. They now have more powers than at the time the complaints were brought that led to the Commission initiating a case against Ireland. Irish developments since that time include the designation of a dedicated enforcement section within the EPA, the Office of Environmental Enforcement (the OEE) and enhanced enforcement provisions under the umbrella of the Protection of the Environment Act 2003.

The measures available are considered below. A table of offences, enforcement and penalty provisions is set out in the Appendix.

3.1 Administrative measures

3.1.1 Warning letters

Warning letters are at the weakest and lowest end of the enforcement triangle. They are relatively cheap in terms of administrative cost for the enforcement agency to issue, and may on occasions have the desired effect without further action being taken. A warning is a written notification that, in the regulator's opinion, an offence has been committed. A warning letter will be recorded by the EPA and/or the Local Authority and may be referred to in subsequent proceedings.¹⁵ Warning letters should be clear, simple and unambiguous, informing the wrongdoer of the offence and what is expected to remedy the situation. Failure to comply with the warning will be followed by appropriate action.

3.1.2 Statutory Notices

Statutory notices are also cheap in terms of administration costs. They are stronger than a warning letter, are legally binding, and non-compliance with such a notice constitutes a criminal offence. The

¹⁵ Office of Environmental Enforcement, Enforcement Policy at 6

statutory basis for notices is found in several provisions under environmental legislation covering areas such as waste,¹⁶ water,¹⁷ air,¹⁸ and noise.¹⁹

3.1.3 Licence Suspension or Revocation

This constitutes the harshest form of administrative enforcement. In effect, it is actually a more severe penalty in most instances than a criminal fine. This is because it has the effect of depriving the undertaking of the lawful right to engage in an activity, and it has been suggested that it could be treated as incapacitating the wrongdoer in the same way that imprisonment incapacitates an individual in relation to mainstream crime.²⁰ The power of the EPA to revoke or suspend an IPC licence was introduced by section 41 of the Protection of the Environment Act, 2003.²¹ A waste licence may be revoked by the EPA by virtue of section 48 of the Waste Management Act 1996 as inserted by section 41 of the Protection of the Environment Act 2003.

A waste or IPPC licence can be revoked or suspended if the licensee no longer satisfies the requirements for qualifying as a “fit and proper” person. A person shall no longer be regarded as being a fit and proper person if that person has been convicted of an offence under certain specified environmental legislation,²² but the 2003 Act reasonably provides the EPA with a discretion on whether or not a past offence is to be counted against a person, and it is expected that this discretion will be used reasonably and fairly. In our view this is appropriate. Nor will a person be a fit and proper person if any person or persons employed by the undertaking to direct or control the carrying on of the activity does not have the requisite technical knowledge or qualifications to carry on the activity, or if the undertaking is not in a position to meet any financial commitments or liabilities that may be incurred in the reasonable view of the Agency, arising from compliance with and termination of the operating licence. This remedy is not a remedy that the EPA has used much, if at all. Certain commentators are sceptical of the appropriateness of the loss of a licence as a sanction if it is the only deterrent option, or if it is not consequent on the criminal justice process.²³

3.1.4 Audits and Inspections

The EPA regularly carries out audits and inspections of licensed activities. Local authorities also have extensive powers of inspection. These powers are clearly important in the detection of non-compliance. The problem is one of resources. Regulatory authorities do not have the resources to audit and inspect every facility. Undertakings must credibly believe that they may be subject to an audit and inspection before they believe that there is a possibility of detection. A welcome step in prioritising regulatory resources, and thus obtaining optimum compliance, is a proposal for risk-based

¹⁶ S.55 of the Waste Management Act 1996

¹⁷ S.12 of the Local Government (Water Provision) Act, 1977

¹⁸ S.16 of the Air Pollution Act, 1987

¹⁹ S.107 of the Environmental Protection Agency Act, 1992

²⁰ Ogus and Abbot “Sanctions for Pollution: Do we have the Right Regime” *op.cit.at 204*

²¹ S.48a of the Environmental Protection Agency Act, 1992

²² Part 2 s.15 of the Protection of the Environment Act 2003; Waste Management Acts 1996 to 2005, Local Government (Water Pollution) Acts 1977 and 1999, the Air Pollution Act 1987 or the Environmental Protection Agency Acts 1992 and 2003.

²³ Ayers and Braithwaite *op.cit.*

enforcement of licences.²⁴ This approach provides for the classification of a facility as low, medium or high risk after an initial screening and risk assessment. The classification is made on the basis of three criteria:

- complexity – the extent and magnitude of potential hazards present;
- environmental sensitivity of the area around the facility;
- pollution record, or the compliance record of the facility.

The amount of the financial contribution to be provided by the company is dependant on its classification. So is the extent of a facility's obligation to carry out an Environment Liability Risk Assessment (ELRA) and to provide for Closure Restoration Management Planning (CRMP).

3.1.5 On-the-spot fines

An on-the-spot fine is a sanction that is currently available only in limited contexts such as under health and safety legislation, or for litter offences.²⁵ If a litter warden or a member of the Garda Síochána has reasonable grounds for believing that a person is committing or has committed an offence under the Litter Pollution Act 1997, the warden or guard may give to the person a notice stating that the person is alleged to have committed an offence and imposing an on-the-spot fine of €125. The recipient has 21 days in which to make payment, during which no prosecution will be initiated. It may be useful to extend on-the-spot fines to other environmental offences. This will be considered in the next section.

3.1.6 Other informal enforcement methods

Regulatory bodies in Ireland have other enforcement measures open to them. Informal publicity can constitute a form of enforcement, particularly in reputation-sensitive industries. The media is a powerful force that regulatory bodies are increasingly not shy of using. Thus the publication of wrongdoers on the EPA website is a strategy that is to be given a guarded welcome. This is because of the loss of control over the publication once in the public realm and the disproportionately ill effect of bad publicity in many cases which is unfair to the wrongdoer. Were the regulatory Authority not to have statutory immunity, this penalty might be more carefully employed.

Another informal enforcement measure is market power, whereby measures (whether educational, persuasive or more forceful) are brought to bear on undertakings along the supply chain. These undertakings can then impose pressure on others in the chain, through their contractual dealings. The threat of bad publicity is an enormously powerful tool in influencing market power.

3.2 Civil functions

3.2.1 Injunctions

Regulatory bodies have the power under numerous statutory provisions to apply to the District Court, Circuit Court or the High Court for orders requiring undertakings to do or to refrain from doing certain

²⁴ Guidance Documents and Assessment Tools on Environmental Liabilities Risk Assessment and Residuals Management Plans incorporating Financial Provision Assessment (EPA Contract OEE-04-03) Consultation Drafts 12th May 2005

²⁵ S.28 of the Litter Pollution Act 1997

matters. In the event of non-compliance with an IPPC licence any person may make an application to the Circuit Court or High Court, and that court may require the person in charge of the activity to do, refrain from, or cease doing any specified act, and make such other provision, including provision in relation to the payment of costs as the court considers appropriate.²⁶ Similar powers exist in the field of waste licences,²⁷ water,²⁸ and air.²⁹ These powers enable the enforcement agencies to require licence or permit holders to carry out remediation works to remedy the effects of their non-compliance, for example. They also enable court orders to be made preventing non-compliance from occurring or continuing, and therefore are very important in preventing actual pollution. In this respect, they might be seen as more effective in many instances than criminal sanctions. The European Commission in taking its case against Ireland (Case C-494/01) was concerned not to have to bring further similar cases against Ireland, and sought a form of order from the ECJ that recognised that the evidence pointed to structural non-compliance as distinct from a set of isolated aberrations.³⁰

Following the ECJ judgement in *Commission v. Ireland*, the section 60 policy direction issued by the Minister for the Environment, Heritage and Local Government stated:

“Local authorities should, where practicable, pursue civil remedies against illegal operators under the provisions of sections 55 to 58 of the Waste Management Act, 1996 to for example, seek to recover the costs of measures taken to prevent or limit environmental pollution caused by the waste.”

Tom Flynn B.L. has stated that

“this encouragement by the direction to avail of the remedies in sections 57 and 58 of the Waste Management Act 1996 will be welcomed by many who feel these very potent provisions have been under-utilised to date”.³¹

The range of measures that a court can impose is wide. In many cases, the use of these powers to provide for remediation, confiscate vehicles or carry out specified remedial action would provide a more efficient remedy than would a fine, and it is to be hoped that the potential of these powers will be fully realised in future.

3.2.2 Recovery of costs incurred in remediation by way of simple contract debt

The regulatory bodies may apply to court to recover costs incurred in remediation. Thus it is open for enforcement bodies to carry out necessary works without waiting for a non-compliant undertaking to do so.³² It is clear that this power enables regulatory authorities to take action that is necessary to

²⁶ S.99(h) of the Environmental Protection Agency Act 1992 as inserted by s. 15 of the Protection of the Environment Act 2003

²⁷ Ss.57 and 58 of the Waste Management Act 1996 as amended by the Protection of the Environment Act 2004

²⁸ S.10 and 11 of the Local Government (Water Pollution) Act 1977

²⁹ Ss.28 and 28A of the Air Pollution Act 1987

³⁰ Cashman, “Commission Compliance Promotion and Enforcement in the Field of the Environment”, JEEPL 5 2006 385 at 390.

³¹ Flynn, “An overview of Recent and Impending Developments in Environmental Law”, Planning and Environmental Conference 2005 (Thomson Round Hall)

³² E.g. S.56 of the Waste Management Act 1996 as amended by s.47 of the Protection of the Environment Act 2003 which provides that a local authority or the EPA may take steps to prevent or limit environmental pollution caused by waste and recover the costs of such steps as a simple contract debt in a court of competent jurisdiction from such person as may satisfy the court as a person whose act or omission necessitated such measures. Similar powers are specified in other environmental legislation, such

prevent pollution and recover the cost from the wrongdoer. The limitation of such remediation being undertaken by regulatory authorities and later sought from undertakings is that an SME or a business that has been liquidated will simply not have the money to reimburse the regulatory authorities. Therefore, there is a risk in enforcement agencies undertaking remediation work in the expectation that the costs will later be reimbursed. An example may be the *Silvermines* case, where though the Agency has recovered several million euro from the parent company, the Government through the local authority must proceed to complete the remediation work on pollution caused by the mining company. The remediation costs will ultimately largely be borne by the taxpayer. This is an example of how a compliance approach, emphasising compliance, rather than a deterrent approach, emphasising punishment, would be of more use.

3.3 Criminal sanctions

3.3.1 Fines

Various levels of fines are provided for under environmental legislation.

- *Waste* - Fines under waste legislation are up to €3,000 on summary conviction and up to a maximum of €15 million on indictment.³³
- *Water* - Fines for an infringement of water legislation are up to €1,270 on summary conviction and up to €31,743 on indictment.³⁴
- *Air* - Fines for an infringement of air legislation under the Air Pollution Act, 1987 are up to €1,270 on summary conviction and €12,700 on indictment.
- *Litter* - Fines for a litter infringement may not exceed €3,000 on summary conviction and €13,000 on conviction on indictment.³⁵
- *IPPC Licences* - Breaches of the Environmental Protection Agency Acts 1992 and 2003 attract fines of up to €3,000 on summary conviction and fines of up to €15 million on conviction on indictment. Offences under these Acts, as well as breaches of IPPC licences, include noise pollution offences.

3.3.2 Prison terms

Prison terms for environmental offences range from six months on summary conviction for a water or air offence up to 10 years for a breach of the Waste Management Acts 1996 to 2005³⁶ and the Environmental Protection Agency Acts 1992 and 2003. In practice in Ireland (as opposed to the UK) prison terms are rarely imposed.

3.3.3 Low criminal penalty usually imposed

Although maximum fines under environmental legislation reach €15 million,³⁷ in practice fines of this amount are never imposed. Likewise, prison terms have been extremely rare. This is despite provisions providing for the personal liability of certain officers of a company, including directors or

as s.13 of the Local Government (Water Pollution) Act 1977 as inserted by s. 10 of the Local Government (Water Pollution) Act 1990 and s. 27 of the Air Pollution Act 1987.

³³ S.10 of the Waste Management Act 1996 as amended by s.22 of the Protection of the Environment Act 2003

³⁴ S.24 of the Local Government (Water Pollution) Act, 1990

³⁵ S.24 of the Litter Pollution Act, 1997 as amended by s.58 of the Protection of the Environment Act 2003.

³⁶ S.10 of the Waste Management Act 1996

³⁷ Under the Waste Management Acts 1996 and 2005 and the Environmental Protection Agency Act 1992 and 2003

managers.³⁸ This phenomenon is one that is not only being noticed in the Irish jurisdiction.³⁹ It may be due to several factors including a reluctance on the part of courts to impose severe penalties in incidences where moral culpability may not seem high, for example in incidences of strict liability. Another consideration is the very high cost to the enforcement agency of taking a prosecution, given the existing principles of criminal procedure including the burden of proof and restrictive rules of evidence.⁴⁰

In the Minister for the Environment's section 60 policy direction dated 3rd May 2005, it was stated:

“While recognising that criminal sanctions are a matter for the courts, the regulatory authorities shall pursue illegal holders of waste looking to the maximum potential sanctions available in law. In that regard, prosecutions should be taken in all cases using the powers available under the Waste Management Act, as amended, or other relevant legislation to maximise the deterrent factor. An Garda Síochána should be asked to become involved in regard to more serious offences and the prosecution of offences should be at the highest available judicial level.”

It remains to be seen whether this newly energised focus will increase the penalties imposed on offenders and increase compliance in Ireland.

4. POTENTIAL MECHANISMS OF ENFORCEMENT

There are various mechanisms of enforcement that are used in other legal systems, both common law and civil, which might usefully be considered for use in Ireland. In this regard we also note and welcome the recent EPA call for an Administrative Sanctions Study, of March 2007. The EPA has gone to tender seeking applicants interested in an assessment of whether the introduction of administrative sanctions for environmental pollution offences in the Republic of Ireland would be in the interests of the main stakeholders (i.e. relevant government departments, the business community, the general public) and the environment.

4.1 Administrative measures

4.1.1 Infringement notices

These are also known as on-the-spot fines, and their use is widespread in environmental enforcement in other jurisdictions, for example Australia.⁴¹ Penalty notices are most appropriate for offences that can be easily remedied. Where the fine is paid, no criminal conviction is recorded. If the fine is not paid, the matter goes before a court. As previously mentioned, on-the-spot fines penalty infringement

³⁸ For example s. 9 of the Waste Management Act 1996 provides that where an offence has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect of the part of a person being a director, manager, secretary or other similar officer, that person as well as the body corporate shall be guilty of an offence.

³⁹ See Ogus and Abbot *op.cit.* on the experience in Australia and Woods and MaCoy *Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach* (Centre for Law and the Environment, UCC) for the British situation.

⁴⁰ Ogus and Abbot at 293

⁴¹ See e.g. s.62 BEPA 1970 and ss.232-9 PEO Act 1997. Offences dealt with by way of a penalty notice generally impose strict liability.

notices have been introduced in our most recent health and safety legislation.⁴² In Australia the use of such penalty infringement notices is common.

There are several arguments in favour of the greater use of penalty infringement notices. Firstly, they are low in cost to the regulator. This, in turn, leads to a greater probability that they will be imposed, and therefore a greater likelihood of apprehension for wrongdoer. This can act as an important deterrence factor. They can complement other administrative measures such as warning letters and notices by providing a more severe penalty, yet not one which is overly harsh.⁴³ Due to their modest administrative and legal costs, these penalty notices have been identified as being of particular use in SME offender cases.

There are, however, certain drawbacks to administrative penalty notices. If they are overused, they can serve to trivialise serious wrongdoing and thus they should not be used for repeat or grave offences. There are also procedural concerns. Many innocent companies may be tempted to simply pay a fine rather than incur the costs associated with defending themselves in court. This leads to an injustice being done. Nevertheless, administrative penalty notices are being increasingly considered, for example, in the UK.⁴⁴

4.1.2 Mandatory environmental audits

In Australian state environmental law, regulators have the power to compel a company to carry out a mandatory environmental audit of its activities in certain circumstances. This power is exercised where a regulatory body suspects that an organisation has breached the relevant Act, regulations, licence conditions or administrative orders.⁴⁵

Currently environmental audits in Ireland are required as standard in many licences and permits where they form an important detective function. A power to compel audits even where it is not a condition of a permit might be useful as a method of ensuring compliance. In particular, such administrative power would be useful in tackling organisationally incompetent entities. Such audits would show up the defects in an undertaking's policies, systems of work or facilities and so would prevent a recurrence of the incident. This is a more effective method of protecting the environment in many instances than a more punitive measure.

4.2 Civil measures

Civil penalties are a practical method of enforcement increasingly coming under consideration, in the most part because of certain inherent difficulties with using criminal prosecution for environmental

⁴² Safety, Health and Welfare at Work Act 2005.

⁴³ See Australian Law Reform Commission *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 25th April 2002 and Woods and Macrory "Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach".

⁴⁴ Para. 43 of the Environmental Audit Committee Environmental Audit Sixth Report at para. 43

⁴⁵ See e.g. s.175 PEO Act 1997 and s.30 of Environmental Management and Pollution Control Act 1994 (Tasmania)

offences. It is felt by some that criminal prosecution is too rigid an approach to be used for all but the most serious of offences, because it focuses on achieving punishment rather than prevention and requires stringent procedural safeguards which often can undermine efficiency. In addition, strict liability offences lead many to consider that a criminal conviction is not appropriate in circumstances where no real moral culpability is involved. One of the main alternatives to prosecution is the use of civil penalties whereby the regulator imposes a financial penalty on an offender instead of initiating a formal prosecution. This system is used widely in several European countries, in the United States and in Australia. Criminal prosecution could be preserved for intentional non-compliance with the law.⁴⁶

A lesser burden of proof, that of the “balance of probabilities” rather than “beyond reasonable doubt” applies in civil matters. In Germany, a pragmatic policy has been implemented to decriminalise the increasing range of regulatory offences which were “clogging up” the criminal system. Adequate procedural safeguards are maintained, and it is felt that the imposition of civil rather than criminal penalties provides an effective way of penalising offenders. The USA is very reliant on the use of civil penalties. It applies such penalties even in the case of the most serious infringements. For example, in October 2003, Chevron Texaco paid a \$3.5 million civil penalty for air emissions. No penalty in Ireland has ever been imposed that is anywhere near that amount. In its Sixth Environmental Report, the UK environmental audit committee felt that civil penalties would not be effective without similarly large penalties being applied.⁴⁷ We do not necessarily agree with that assessment. Given that applying civil procedures would reduce the administrative burden, such civil penalties could be imposed more readily than criminal penalties. This in turn would increase the probability that action would be taken against an offender and a penalty imposed. Taking the model of the enforcement triangle, this would increase the chance of apprehension (p) and so reduce the perceived benefit to a wrongdoer of non-compliance.

Woods and Macrory propose a model for an environmental civil penalty system, which could be considered for adoption in Ireland.⁴⁸ Penalties could be applied for a core range of less serious offences, for example the unintentional breach of a licence. The penalties should be set to reflect the seriousness of each offence, the clean up costs (or harm to the environment) as well as the financial means of the party involved. Civil procedures including the civil standard of proof would be followed. In addition, a suitable appeal mechanism would be required to review the exercise of the regulators’ discretion.

The UK environmental audit report recommended that guidance be taken from powers available under health and safety regulations. It recommended environmental bodies being granted a power to summarily confiscate the vehicle, plant and machinery or other instrument which had repeatedly been used in environmental offences. It also recommended a power to place a prohibition notice on bodies

⁴⁶ See Woods and Macrory (“Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach”)

⁴⁷ See Environmental Report *op.cit.* at para 42

⁴⁸ See Woods and Macrory *op.cit.* at 4

forbidding them to carry out the activity which was resulting in the non-compliance. In Ireland, powers to issue administrative notices already enjoyed by the Agency could be used more to confiscate or prohibit activities which are resulting in environmental pollution.

4.3 Criminal sanctions

In Ireland criminal sanctions are limited to fines and custodial sentences. In practice, fines are the most common criminal sanctions. However, in other jurisdictions, numerous other types of orders can be made by the courts. The sanctions listed below would not need to be applied exclusively in a criminal sphere, but could also apply if the civil system outlined above was to be developed, in addition to civil financial penalties.

4.3.1 Environmental Service Orders / Supplemental Environmental Projects (SEP)

Australia has developed an administrative sanction or regulatory mechanism called Environmental Service Orders. In the USA they are called Supplemental Environmental Projects, and in common parlance this penalty might be known as doing community service. These orders require a wrongdoer to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit. Suitable projects could be found within a locality, and a wrongdoer should have the means, capability and willingness to undertake the work. In the USA, the US EPA follows a four-step process in evaluating a proposed SEP.

The project must meet the basic definition of an SEP, in other words, it must improve, protect or reduce risks to public health, or the environment at large. SEPs cannot include actions that the defendant is likely to be required to perform legally as injunctive relief as a result of court proceedings.

All legal guidelines must be satisfied. The project cannot be inconsistent with any underlying statutes and must either advance an objective of the environmental legislation; reduce the likelihood of similar non-compliances; reduce the adverse impact of the non-compliance; or reduce the overall risk potentially resulting from the non-compliance.

A project cannot use funds to satisfy obligations of a federal agency nor can money be spent on projects that might circumvent limitations on federal funding.

A commitment to perform an SEP may mitigate any other penalty assessed. The US EPA utilises a formula whereby the final settlement represents an amount that is equivalent to the settlement amount minus the SEP cost multiplied by a mitigation percentage.

US SEPs may comprise community medical treatment, therapy or studies, improvements in recycling, treatment and disposal techniques, conservation or remediation of resources, provision of seminars,

publications, training or technical support to other companies, or non-cash assistance with state or local emergency response or planning agencies.⁴⁹

Environmental Service Orders and supplemental environmental projects clearly offer a benefit to the environment. They have a deterrent effect, but can also benefit the community. In addition, such orders are particularly useful in targeting SMEs. The orders avoid the problem associated with monetary fines where the value of the fine is limited by the wealth of the offender. The order would also be useful in dealing with non-corporate offenders who may not be able to pay a high fine. A disadvantage is the administrative costs associated with monitoring the process of the project, which would be borne by the regulator.⁵⁰ Overall, however, experience indicates that the benefits outweigh the disadvantages.

4.3.2 Publicity Orders

Courts in certain Australian regions⁵¹ may make publicity orders. Where publicity orders are imposed, the offending individual or company must publicise the offence, the environmental or other consequences and the penalties and other orders imposed as a result of the committing of the offence.⁵² The publicity notice may take whichever form and be published in such place as is requested by the EPA. In one example, a golf club was found guilty of polluting a local creek with pesticide and was ordered to publish a notice in the golf club's newsletter.⁵³ Publicity orders are normally sought against corporate offenders, where the deterrent effect of fines is frequently limited. In deciding whether or not an order will be made, the defendant's culpability, prior record and harm caused will be considered. Other relevant factors include cooperation during an investigation and the entering of a guilty plea.

The European Commission has instituted scoreboards for the nature directives and the Water Framework Directive to provide a regularly updated comparative picture of how Member States are doing in meeting key obligations.⁵⁴

Publicity orders have been the subject of much debate. Questions have been raised whether the adverse publicity is effective as a corporate sanction⁵⁵ such as by Fisse and Braithwaite. It is argued that the public will pay little or no attention to negative publicity and, in any event, corporations may dilute effectiveness through counter publicity. Coffee does however support ideas of publicity sanctions identifying culpable individuals within a corporation. Some commentators, however, outline the

⁴⁹ See IMECE Secretariat Staff, *Penalties and Other Remedies for Environmental Violations: An Overview*, Seventh International Conference on Environmental Compliance and Enforcement 9th-15th April 2005

⁵⁰ See Abbot "Pollution Control Law in Australia" J.E.L. (2005 (17)(2)) at 177

⁵¹ Victoria and NSW

⁵² See e.g. s. 67 AC(2) EPA 1970 and s.250 (1) PEO Act 1997

⁵³ *EPA v. Warringah Golf Club Limited* (2) [2003] NSW LEC 222

⁵⁴ Cashman, "Commission Compliance Promotion and Enforcement in the Field of the Environment", JEEPL 5 2006 385 at 387.

⁵⁵ Coffee, "No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment" 79 *Michigan Law Review* (1980)

advantages of publicity orders.⁵⁶ Companies taking place in the Fisse and Braithwaite study were sensitive about prestige, over and above profits. Financial impacts of significance occurred in only a small minority of case studies. However “non-financial impacts – loss of corporate individual prestige, decline in morale, distraction from getting on with the job and humiliation in the witness box – were acutely felt”.⁵⁷

More so than fines, publicity orders may force a company to improve its inadequate working practices and ineffective management systems, and therefore are good at targeting organisationally incompetent undertakings. Public pressure could be used to force organisations to carry out reform of their internal policies. This appears to have had an effect in more recent years with the development of socially responsible funds and the triple bottom line.⁵⁸

However, not all are impressed by publicity orders, as is exemplified in May 2000 when the Shadow Minister for the Environment in the Victorian Parliament commented: -

“[but the other provisions] enforce publicity and self mortification – almost a modern version of the stocks, with the medieval idea that a convicted person, a wrongdoer, ought to be laid out in stocks in a public place and held up to ridicule; that is an ancient notion”.⁵⁹

Nevertheless, publicity orders would seem to be a useful tool in the armoury of any regulatory body. They at least should have some element of joint control or consent by the parties involved, instead of being subjected to the whim of the media. The majority of offences would not warrant a formal order. It should be noted that in Australia Environmental Service Orders are inevitably accompanied by a publicity order, so that the public is aware that the undertaking is not carrying out the work out of goodwill but as a result of committing an environmental offence.

4.3.3 Environmental Audit Orders

Again looking to Australia, environmental audit orders may be imposed in certain circumstances, providing that a wrongdoer must carry out a specified environmental audit of activities carried on. Unlike administrative audits, the court can extend this to activities not directly connected with the offence in question. This provides a powerful preventative function. One example in Australia was an order that a company carry out an environmental audit of its entire fleet of vehicles. However, imposition of an environmental audit order would seem to be very rare.⁶⁰ Section 14 of the Waste Management Act, 1996 could be used to such effect if the obligation were included in, say, a section 55 notice under the same Act.

Apart from its preventative functions, mandatory audit orders may perform a deterrent function as the companies would not wish to disclose results to the regulator, nor fund the cost of the auditing.

⁵⁶ See Fisse and Braithwaite “The Impact of Publicity on Corporate Offenders” (State University of New York Press, 1983)

⁵⁷ *Supra* at 69, 243

⁵⁸ In practical terms, triple bottom line accounting means expanding the traditional reporting framework to take into account environmental and social performance in addition to financial performance.

⁵⁹ Mr. Perton (Doncaster), Second Reading in Victorian Assembly, 31st May 2000 at 2051

⁶⁰ See Abbot (*op.cit.*)

However, due to the delay between the committing of an offence and a criminal court hearing, it has been suggested that it may be more effective to invest power to request audits in regulatory bodies rather than the courts. Arguably a local authority or the EPA already has this power where an activity is licensed, to obtain information, for example under the provisions of section 14 of the Waste Management Act, 1996.

It makes sense that an environmental liability risk based approach should be adopted in determining the amount of inspections and audits that should be required in relation to any activity, whether licensed or unlicensed, and in particular SMEs, in the area of environmental compliance.

4.3.4 Environmental Protection Alternative Measures

These are similar to the SEPs and environmental service orders mentioned above. The Canadian Environmental Protection Act of 1999 provides for these measures as an alternative to court prosecution. Environmental Protection Alternative Measures divert the accused away from the court process after the entity is charged and into negotiations between the accused and the Attorney General of Canada in consultation with the Minister of Environment. Examples of measures that may be contained within the environmental protection alternative measure include the development of pollution prevention measures to reduce releases of a toxic substance and to regulate limits, the installation of better pollution control technology and monitoring systems, changes to production to ensure compliance with regulatory requirements and the cleaning up of environmental damage. Again, such measures would appear to be more effective than fines in ensuring compliance with environmental law.

4.3.5 Penalty points and withering of convictions

In appropriate circumstances, a penalty point system for incremental offences could trigger a more serious consequence, such as the imposition of restrictions or the revocation of a licence. This already happens informally, where a poor record of compliance with warnings may result in a prosecution.

Along with incremental offending, the idea of incremental redemption could also be utilised. A criminal record for the breach of a licence condition, recorded against an offender or the environmental licence, remains on the record indefinitely. There is no provision for a “spent conviction” being expunged from the record. For organisations which seek to maintain high standards and a good standing in the community, such a permanent record can be a second penalty in addition to the penalty imposed to mark the transgression. We recommend that where breaches of conditions are treated as offences which are recorded against the offender, whether on its licence or as a matter of criminal record generally, such records should be capable of withering over time where repeat offences do not occur. This suggestion has a foundation in the Irish Intoxicating Liquor Law regime and has the benefit of certainty that over time, if the offender does not repeat-offend, its licence/reputation will be blemish free. This, we believe, would have a very positive effect in deterring repeat offences. Clearly

the repetition of the offence would simply have to be of the same type and not necessarily precisely the same offence.

4.3.6 Corporate responsibility for major environmental damage

In line with the debate on corporate manslaughter, and the Law Reform Commission's recommendations on the creation of such an offence,⁶¹ we recommend that an equivalent offence for corporate responsibility for major environmental damage should be considered. We suggest that gross negligence would have to be systematic and only the acts and omissions of senior managers and corporate officers would determine if the offence was to be considered appropriate for prosecution.⁶²

4.4 Other matters

4.4.1 Environmental Court

In the UK, Macrory and Woods have suggested the establishment of a specialised environmental court to deal with environmental crimes.⁶³ They believe that a court with specialised knowledge would more efficiently and knowledgeably deal with environmental cases. The Environmental Audit Committee was unconvinced, raising the point that there would be a very considerable cost involved in setting up such a court. Whilst the Committee believed that it might give welcome prominence to the concept of environmental crime, it doubted whether it would deal practically with such crimes any more effectively than other proposed alternatives.⁶⁴ Such considerations would also hold true in Ireland. Indeed, a cost-benefit analysis might show that an environmental court in Ireland is even less viable in Ireland than in the UK, given the much smaller number of offences that would come before it.

4.4.2 UK Macrory Report

In November 2006, a report *Regulatory Justice: Making Sanctions Effective* found that reliance on criminal prosecution failed to give regulators adequate means to effectively deal with many cases in proportionate and risk-based way.

The report also found that the use of criminal prosecutions can be a disproportionate response in many instances of regulatory non-compliance and that penalties handed down by the Courts often failed to act as sufficient deterrent or reflect the economic benefit gained. The UK Government has accepted all the recommendation of the Macrory Review of Penalties. The UK Government has stated that it will carefully consider the implications of those recommendations for a tribunal to hear appeals against sanctions for regulatory non-compliance, particularly any funding implications and how they might best be addressed in taking forward the review's recommendations.

⁶¹ *Report on Corporate Killing*, LRC 77-2005. A private member's Corporate Manslaughter Bill 2007 was introduced to the Dáil in April 2007, unopposed by the Government.

⁶² See "Making a Killing" report in the Law Society Gazette December 2005 by Michael O'Neill of the Health and Safety Authority.

⁶³ Woods and Macrory "Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal", Centre for Law and the Environment, UCL

⁶⁴ 6th Environmental Audit Report *op. cit.* at para 44

Of interest are the terms of reference for that report. The terms of reference for the review and ultimately the report were set in September 2005 in agreement with the Chancellor of the Duchy of Lancaster, John Hutton. These were:

To set out general principles for the use of penalties in the enforcement of regulations; and to consider:

- How sanctions can be changed to ensure they act as an effective deterrent and eliminate all of the economic benefits of non-compliance;
- How administrative penalties might best be used to eliminate economic gains and speed up the penalty process;
- How measures can be taken to enhance consistency between and within penalty regimes;
- The role of alternative sanctions for regulatory offences such as restitutive and restorative justice;
- Whether there is a role for a regulatory tribunal in the regulatory system; and,
- To make general recommendations on the use of regulatory penalties and specific recommendations for change where that is thought appropriate.

The recommendations are varied and many but consist of a root and branch review of the drafting and formulation of criminal offences relating to regulatory non-compliance with specific regard to six penalties principles and seven characteristics. The six principles required that any sanction should:

1. Aim to change the behaviour of the offender.
2. Aim to eliminate any financial gain or benefit from a non-compliance.
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction.
4. Be proportionate to the nature of the offence and the harm caused.
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate.
6. Aim to deter future non-compliance.

Without detailing the seven characteristics which should be complied with by regulators, they include the obligation to publish an enforcement policy and justification of choices of enforcement actions taken by regulators on an annual basis.

An idea that also gained the support of the UK Environmental Audit Committee was that of specialist environmental magistrates in each region. The difficulty in Ireland might be that there would not be a sufficient body of work to occupy such magistrates exclusively. Nevertheless, such magistrates should gain an expertise that would lead to more appropriate sentencing. As was stated:

“It is clear that without such concentrated experience and expertise, the courts will continue to be a lottery often unfavourable to deterrence and proper punishment.”⁶⁵

5. RECOMMENDATIONS

The current regime of criminal sanctions only consisting in fines and/or imprisonment is too blunt an instrument to achieve maximum effect. We suggest that the following measures should be employed to open out currently available criminal sanctions:

⁶⁵ *supra* at 45

5.1 Community sanctions

We recommend the institution of environmental community service orders. [Section 4.3]

5.2 Publicising breaches

We recommend that a review should be undertaken of the means whereby enforcement agencies publicise breaches in advance of any action being taken, and also post judgment. The publicity orders discussed in this chapter could be considered as an alternative means of publication as both a deterrent measure and a way of exerting public pressure on undertakings to improve their environmental performance. [Section 4.3.2]

5.3 Mandatory audit orders

We recommend mandatory audits of not only licensed but also unlicensed facilities, and in particular SMEs, should be available to regulating bodies as a form of administrative order. We recommend that an environmental liability risk based approach should be adopted in determining the number of inspections and audits that should be required in relation to any activity, whether licensed or unlicensed, and in particular SMEs, in the area of environmental compliance. [Section 4.3.3]

5.4 Penalty points and withering of convictions

We recommend the use of incremental offences, so that offending organisations would accumulate penalty points in appropriate circumstances. A certain number of penalty points could then trigger a more serious consequence, such as the imposition of restrictions or the revocation of a licence. Along with incremental offending, the idea of incremental redemption could also be utilised. Where breaches of conditions are treated as offences which are recorded against the offender, whether on its licence or as a matter of criminal record generally, such records should be capable of withering over time where repeat offences do not occur. [Section 4.3.5]

5.5 Corporate responsibility for major environmental damage

We recommend that an equivalent offence to corporate killing be considered, imposing corporate and individual responsibility for major environmental damage. We suggest that gross negligence would have to be systematic and only the acts and omissions of senior managers and corporate officers would determine if the offence was to be considered appropriate for prosecution. [Section 4.3.6]

Chapter 2

CITIZEN ENFORCEMENT

“Developing and nurturing a role for the citizens in enforcement efforts could provide the missing ingredient necessary to make environmental protection goals a reality.”⁶⁶

1. INTRODUCTION

The purpose of this chapter is to examine mechanisms for citizen involvement in the enforcement of environmental law in Ireland. It begins by analysing the nature of the environmental protection interest and the appropriateness or otherwise of this avenue of enforcement in Section 2. The main body of the chapter outlines the mechanisms available to a member of the public and/or an NGO⁶⁷ to play such a role. Formal mechanisms of enforcement include the use of citizen civil enforcement action, citizen criminal prosecution, the right to complain to regulatory bodies, administrative appeal and judicial review of decisions of public authorities in relation to environmental matters. Informal mechanisms include inspection and monitoring, the petitioning of regulatory bodies, media coverage and partnerships with regulatory bodies and are discussed in Section 3. Section 4 considers various obstacles to the enforceability of citizen enforcement mechanisms and suggests ways of overcoming such obstacles. This is followed by an analysis of the impact on the “citizen enforcer” of recent legislative developments, namely the EC Directive on Access to Information, the Environmental Liability Directive, the European Convention on Human Rights Act 2003, and the Aarhus Convention (Section 5). The chapter concludes with suggestions for reform in Section 6.

2. THE RATIONALE FOR CITIZEN ENFORCEMENT

This section looks at the nature of “environment protection”. It indicates that members of the public and NGOs have a complementary role in the enforcement of environmental law. It discusses the concept of “tripartism” and highlights the pros and cons of this approach.

⁶⁶ C. Lefkowitz, J.W. Futrell, “The Evolving Role of Citizens in Environmental Enforcement” (Fourth International Conference on Environmental Compliance and Enforcement, INECE) at 2.

⁶⁷ Hereinafter referred to as ‘citizen enforcer’.

2.1 The nature of the environmental interest

The environmental protection interest, although capable of comprising both private and public interests, is primarily a diffuse, collective public interest.⁶⁸ Its very nature presents difficulties in respect of the ability of a citizen enforcer to play an effective role in ensuring the enforcement of environmental protection rules as there is often little at stake to induce a citizen enforcer to seek its protection. In addition, traditional representative democracies, like Ireland, incline against direct public involvement in the enforcement of the public interest as this function is primarily within the domain of State regulatory authorities. The legal standing of a citizen enforcer is largely confined to the protection of the private rather than the public interest.

There has however been a trend in recent years of recognising the importance of the supplementary role of individual members of the public and NGOs as guardians of the environment.⁶⁹ The various provisions made for citizen enforcement of Irish environmental law, outlined below, are testament to this trend. It is submitted that an enhanced role for the citizen enforcer is increasingly important in light of a prevalent lack of confidence in regulatory authorities to effectively enforce the public interest⁷⁰ and in order to assist in ensuring that the environment, which has no voice of its own, “does not die in silence”.⁷¹

2.2 Pros and Cons of Citizen Enforcement

Ayers and Braithwaite recognise that the citizen enforcer can work alongside regulatory bodies in the enforcement of environmental law, by providing information, partaking in negotiations, suing and prosecuting. They label such an approach to enforcement as “tripartism”.⁷²

There are a number of advantages to using this approach. Firstly, public involvement in the enforcement of environmental law renders the enforcement process more open and transparent. This may have the effect of enhancing the democratic accountability of public authorities as regulators of environmental law. Secondly, it may enhance the enforcement, particularly where regulatory authorities have limited law enforcement resources to detect environmental wrongs and ensure

⁶⁸ See M. Cappelletti, “Vindicating the Public Interest through the Courts: A Comparativist’s Contribution”, in M. Cappelletti and B. Garth (eds), *Access to Justice, Vol. III, Emerging Issues and Perspectives* (Sijthoff and Noordhoff, Alphen aan den Rijn, 1979) at 18, defines diffuse interest which includes environmental protection as “collective or fragmented interests”. See also J. Ebbesson ed., “Access to Justice in Environmental Matters in the EU”, (2002, Kluwer Law International) at 4.

⁶⁹ *Rio Declaration on Environment and Development*, 13 June 1992, adopted by the UN Conference on Environment and Development (UNCED) at Rio de Janeiro, UN Doc. A/CONF.151/26 (vol. 1) (1992), Principle 10; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), Article 9.3 available at <http://www.unece.org/env/pp/documents/cep43e.pdf>; European Commission Proposal of Directive on Access to Information COM (2000) 402 Final p3, 4; Decision 1600/2002/EC of European Parliament and Council of 22 July 2002, 1; the 16th European Community Environmental Action Programme calls for more effective implementation of environmental law; R. Stewart, “The Reformation of American Administrative Law”, (1975) 88 *Harvard Law Review* 1669, most recently SI no.133 of 2007, European Communities (Access to Information on the Environment) Regulations 2007 implementing Directive 2003/4/EC on Public Access to Environmental Information.

⁷⁰ *Supra*, Ebbesson, M. Lee, “The Usual Suspects? Public Participation under the Aarhus Convention”, (2003) 66(1) *MLR* 80 at 6; Environmental Justice Project Report (March 2004).

⁷¹ Kramer speech at conference, “Delivering Environmental Law in Contemporary Britain”, (UCL, Defra, 24 November 2003).

⁷² Ayers and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992)

compliance or where they lack the political will to effectively exercise their enforcement role.⁷³ In addition, it may avert the “capture” of regulators by the regulated.⁷⁴ It may act as an important source of information on the environment, thus making it easier to detect environmental wrongs. However, it is important to note that it is not a given that the citizen enforcers’ involvement will enhance the process. There is little empirical data to date supporting this proposition and thus it cannot be simply accepted that public participation in enforcement will have the effect of enhancing the protection of the environment.

There are also potential disadvantages to this approach to enforcement. For instance, the further opening up of the role of the citizen enforcer may be reflective of an expansion of the notion of a liberal representative form of democracy to a more participatory form. It is questionable whether such an opening would require institutional change and whether the political will is there to make such a shift. A tripartite approach may escalate conflict rather than forge solutions to environmental problems in that it may disrupt the co-operative relationship between the regulator and the regulated.⁷⁵ Furthermore, it may lead to inconsistent application of the law. In addition, it is the general experience that a large majority of the public is uninterested in participating in the enforcement of environmental law unless members of that majority are directly affected. There is thus a danger that the mechanisms will be used by so called “cranks” and “busybodies”, that it will lead to the culturing of an elite NGO sector, and that only those with sufficient financial backing or interest will or will be able to voice their concerns.⁷⁶ Finally, a more liberal legal standing to take court proceedings may blur the political/legal divide, placing the courts in the centre of the political process which may diminish the virtue of impartial justice and offend against the separation of powers.⁷⁷

However, political consensus as expressed in the Aarhus Convention and the EU Public Participation Directive⁷⁸ increasingly assumes that participation of NGOs and members of the public in enforcement of environmental law is commendable and is a potentially positive development in terms of enhancing environmental protection and democratic legitimacy.

⁷³ S. Stec and S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide* (New York and Geneva: United Nations/Economic Commission for Europe, 2000), states that public enforcement of the law, “besides allowing the public to achieve the results it seeks, has also proven to be a major help to understaffed environmental enforcement agencies in many countries.”

⁷⁴ Ayers and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, OUP, 1992). “Capture Theory” proposes that the regulator is captured by the regulated. The “revolving door theory” proposes that enforcers have been in the industry and are sympathetic to it, or are interested in a more lucrative employment in the industry in the future. In these circumstances, they are likely to go easy on the regulated and act in the interest of regulated, and not in the public interest.

⁷⁵ Snook, “Environmental Citizen Suits”, 20 W. New Eng. L.Rev. 311

⁷⁶ M. Lee, “The Usual Suspects? Public Participation under the Aarhus Convention”, (2003) 66(1) M.L.R. 80 at 6

⁷⁷ R. Steward, “The Reformation of American Administrative Law”, (1975) 88 *Harvard Law Review* 1660.

⁷⁸ Directive 2003/35 EC of the European Parliament and the Council of May 26 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337 EEC and 96/61 EC.

3. MECHANISMS OF CITIZEN ENFORCEMENT

This section outlines the mechanisms available for citizen enforcement of Irish and EU environmental law. It deals with public law mechanisms, private law mechanisms, informal enforcement tools and mechanisms of European environmental law.

3.1 Introduction

Although the enforcement of environmental law is primarily within the remit of public authorities, namely the local authority and the EPA, a number of environmental law provisions laid down below enable any person, regardless of any proprietary or personal interest, to enforce environmental controls. This gives the citizen enforcer as watchdog for the environment⁷⁹ an important, albeit secondary, role in the enforcement of water, air, odour, litter, noise pollution and waste law. As Denham J. succinctly put it:

“Environmental issues by their very nature affect the community as a whole in a way a breach of a personal right does not. Thus the public interest element must carry some weight in considering the circumstances of environmental law cases and *locus standi* of the parties.”⁸⁰

The Appendix to this study contains a table of enforcement and penalty provisions in Irish environmental law.

3.2 Public law mechanisms of citizen enforcement

3.2.1 Civil enforcement action

Citizen civil enforcement action for breach of environmental law enables the citizen enforcer to seek court orders for the cessation, mitigation or remediation of the environment.

Water

Under section 10 of the Local Government (Water Pollution) Act 1977,⁸¹ “any person”, without being required to show an interest in the waters concerned, may seek an order from the appropriate court, requiring a person who is causing or permitting or has caused or permitted polluting matter to enter the water or who is discharging or causing or permitting or who has caused or permitted the discharge of trade or sewage effluent in breach of 1977 Act, to terminate, mitigate or remedy the situation. The court may order the polluter to pay the investigative and clean up costs and may also require the making good of any other consequential losses such as the replacement of fish stock. Failure to comply with this order is an offence. Under section 11 of the 1977 Act⁸² “any person” can seek similar orders in the High Court in respect of potential pollution of waters and in order to prevent breach of sections 3 and 4 of the Water Pollution Act 1977.

⁷⁹ Barrington J, *Stafford and Bates v. Roadstone* [1980] I.L.R.M.: here the courts in implementing similar provisions in the planning legislation explicitly recognized the important role of the citizen as “watchdog for the environment”.

⁸⁰ *Lancefort v. An Bord Pleanala* [1999] 2 I.R. 270.

⁸¹ As substituted by s.7 of the Local Government (Water Pollution) (Amendment) Act 1990, as affected by s.84(5) EPA Act 1992 and s.40 Waste Management Act 1996.

⁸² As substituted by s.8 of the Local Government (Water Pollution) (Amendment) Act 1990, as affected by s.84(2) EPA Act 1992 and s.40 Waste Management Act 1996.

Air

A citizen enforcer has similar powers of enforcement under the Air Pollution Act 1987.⁸³ For instance, section 28(1) provides that any person may seek an order from the High Court to prohibit or restrict an emission from any premises where it is satisfied that the emission would give rise to a “serious risk” of air pollution which contravenes a licence or is emitted without an appropriate licence. Section 28A of the 1987 Act enables any person to apply to the appropriate court for an order for the occupier to terminate or to mitigate or remedy the effects of an unauthorized emission from a premise.⁸⁴ In addition, the occupier may be ordered to pay to the applicant (or such other person as may be specified) a specified amount to defray all or part of the costs of investigating, mitigating or remedying the effects of the emission.

Noise

Section 108(1) of the Environmental Protection Agency Act 1992 provides that any person affected by “loud, continuous” noise can complain to the District Court, which may in turn order the person making, causing or responsible for the noise to take the measures necessary to reduce the noise level or to limit or prevent the noise.

Foreshore

Section 5 of the Foreshore Act 1992 enables any person, whether or not that person has an interest in the seashore concerned, to apply to the High Court (*ex parte*) for an order, where beach material is being or is likely to be removed or disturbed, otherwise than in accordance with a foreshore licence, or in breach of a prohibition order or prohibition notice. The court, at its discretion, may order cessation of such activity on a permanent or interlocutory basis. Section 6 of the Act enables any person, whether or not that person has an interest in the seashore concerned, to apply to the appropriate court (be it District, Circuit or High Court) for an order requiring cessation of an activity or remediation where there is actual disturbance or removal of beach material in breach of a licence, prohibition order or prohibition notice.

Waste

The Waste Management Act 1996 enables citizen enforcement action against those whose waste activities cause, have caused, or potentially cause environmental pollution or those who operate otherwise than in accordance with a waste collection permit or licence. More specifically, section 57 provides that any person can apply to the High Court for an order, where waste is being held, recovered or disposed of in a manner that causes or is likely to cause environmental pollution, or where a waste activity is conducted otherwise than in accordance with a waste collection permit or waste licence. Under section 58 of the 1996 Act any person can apply to the “appropriate court” for an order where

⁸³ Under s.21 of Air Pollution Act 1987 the Minister can make regulations giving enforcement powers to any other person or body of persons.

⁸⁴ As inserted by s.18, Environmental Protection Agency Act 1992 and as affected by s.84(3) of the EPA Act 1992.

another person is holding, recovering, or disposing of, or has held, recovered or disposed of, waste, in a manner that is causing or has caused environmental pollution or where a waste activity is conducted otherwise than in accordance with a waste collection permit or waste licence. The court has the discretion under both sections to order the discontinuation of such activity, and the performance of actions to mitigate or remedy the effects of such activity, within a specified period.

It may be concluded that most environmental statutes provide a generous legal standing for citizen civil enforcement action, with the exception of litter pollution control.⁸⁵ We believe that this trend should be followed in respect of litter pollution and in newer environmental regulatory control, for instance in relation to genetically modified organisms. Article 9.3 of the Aarhus Convention may provide the impetus for such a development. It is of note that case law interpreting similar citizen enforcement provisions under the planning regime indicate that the court is willing to exercise its discretionary powers to refuse to grant relief where action is taken by frivolous or vexatious litigants.⁸⁶

3.2.2 Criminal Prosecution

The power of citizens to bring a criminal prosecution may be found in statute and common law. At common law, any one can bring a prosecution, unless a statute specifically restricts the right.⁸⁷ There are various statutory provisions which enable citizens to prosecute environmental law offences. For instance, under section 309 of the Fisheries Consolidation Act 1959, any person can summarily prosecute an offence under the Act.⁸⁸ Of particular relevance is the offence of allowing the entry of deleterious matter into waters and failing to prevent the entry of deleterious matter from a receptacle into waters.⁸⁹ Similarly, under article 4 of the Waste Management Regulations 1998 any person may bring summary proceedings for an offence under the Act.⁹⁰ However, it is of note that only the Environmental Protection Agency may prosecute summarily for breach of conditions of a waste licence and breach of any requirement in the Waste Management Act in respect of a waste licence. Previously under the Water Pollution Act 1977, any person could prosecute for the summary offence of permitting the entry of polluting matters to waters and for the offence of contravening the terms of trade and sewage effluent licence. However, this changed with the coming into effect of section 27 of the Water Pollution Amendment Act 1990 which provides that a person must be particularly affected in order to prosecute for a section 3 and 4 type offence under the Water Pollution Act 1977.⁹¹

There is a lack of consistency in the availability of powers of citizens to prosecute environmental offences. As mentioned above, such a mechanism is available in respect of waste, foreshore, fishery offences and to a limited extent water offences. However, there is no specific provision for citizen

⁸⁵ S.15 Litter Pollution Act 1997.

⁸⁶ *Stafford v. Roadstone Ltd.* [1980] ILRM 1 at 19.

⁸⁷ *R v. Steward* 1896 QB 3000

⁸⁸ S.309 of Fisheries Consolidation Act 1959 as amended by s.49 of the Fisheries Act 1980 and as affected by s.65 of the Fisheries Act 1997.

⁸⁹ Ss.171 and 172 of the Fisheries Consolidation Act 1959 (as amended) respectively.

⁹⁰ Waste Management (Miscellaneous Provisions) Regulations (S.I. No. 164 of 1998).

⁹¹ S.30 of the Water Pollution Act 1990 repealed s. 3(4) and s. 4(9) of the Water Pollution Act 1977.

prosecution in respect of air pollution,⁹² litter and noise offences. We recommend the promulgation of an umbrella environmental regulatory instrument granting broad legal standing to members of the public and NGOs to enforce environmental law, to include a number of safeguards against duplication of enforcement and vexatious enforcement action akin to those adopted in other jurisdictions.

The access to justice pillar of the Aarhus Convention, which advocates a broad access to members of the public, may provide the impetus to bring about such changes. However, it is of note that the proposed EC Directive on Access to Justice purporting to align member states with article 9 of the Aarhus Convention specifically excludes its application to criminal proceedings.⁹³

An alternative to actual prosecution, particularly where a citizen lacks the power or will to prosecute, is the making of complaints to the regulatory authorities. This may put pressure on the regulatory authorities to taken enforcement action.⁹⁴ In addition, citizens could alert the Attorney General or the media as to possible environmental crimes, and the Attorney General may in turn decide to prosecute in the public interest.

3.2.3 Third Party Administrative Appeals and Judicial Review

Administrative appeal and judicial review of public authority decisions in environmental matters can be useful tools in the enforcement of environmental law. Such actions enable the citizen enforcer to check that decisions of regulatory bodies adhere to environmental protection standards. They operate as preventative devices. This is an important avenue as much enforcement of environmental law is dependent on various acts or omissions of the relevant regulatory bodies.

Administrative Appeals

“Any person” can appeal the merits of a decision of the Environmental Protection Agency and local authorities in respect of environmental authorisations.⁹⁵ It is of note however that similar provisions in the planning regime restricts the standing of “any person” to those who made submissions or observations in the decision-making stage, with the exception of where notice is inadequate. On the face of it, this may be deemed offensive to the aspiration for “wide” access under the Aarhus Convention and thus caution must be exercised in extending this restrictive trend to environmental matters.

⁹² S.21 of the Air Pollution Act 1987 enables the Minister to confer such power on any other person or body of persons.

⁹³ European Commission, *Proposal for a Directive on Access to Justice in Environmental Matters*, COM (2003) 624 final.

⁹⁴ See, Bell McGillvary, *Environmental Law* (5th Edition, Blackstone Press) at 238: pressure from Friends of the Earth led to the eventual successful prosecution by the Environmental Agency for water pollution. See Friends of the Earth press release, 13 May 1997 (available at <http://www.foe.co.uk/pubsinfo/infoteam/pressrel/index.html>) “Sea Empress Prosecution Welcomed by FoE”, and *R v. Milford Haven Port Authority* [2000] Env LR 632.

⁹⁵ In relation to the granting or refusing of various environmental permits such as air pollution, water pollution and IPPC licences, see the Air Pollution Act 1987 s.34; the Water Pollution Act 1977 s.8 (as substituted by s. 6 of the Water Pollution Act 1990) and the EPA Act s.87 (as amended by s.15 of the Protection of the Environment Act 2003) respectively.

Judicial review

In order for a member of the public to challenge a decision of a public authority relating to the environment, he or she must have legal standing. The legal standing for most judicial review proceedings is one of “sufficient interest”.⁹⁶ This has been interpreted in a fairly broad fashion and includes both individuals and NGO applicants acting in the public interest. However, while the applicant may be able to show sufficient interest in bringing the action, the grounds upon which judicial review can be sought are largely limited to procedural legality of decisions of public authorities. Substantive review on the grounds of “unreasonableness” will only be considered by the courts in “limited and rare” circumstances.⁹⁷ The onus of proof is on the applicant to show that there is no evidence whatsoever upon which a public authority can base its decision for it to be deemed unreasonable.⁹⁸ This stringent approach to reviewing decisions of public authorities indicates a real barrier for citizens to access to the courts and contributes to the mounting cost and time of bringing judicial review proceedings.

3.2.4 Amicus briefs

Another means by which the public and NGOs can influence enforcement action in a court of law is by being granted standing to make submissions during the court hearing, acting as *amicus curiae* or friend of the court to make submissions. The joining of NGOs as *amicus* to a case is recognised in the domestic courts of other jurisdictions, for example in the US, and in international tribunals, such as the WTO Dispute Settlement Body (DSB). It is of note that under the present law it is very difficult to achieve *amicus* status and it can be an expensive process. In a recent High Court case of *Declan O'Brien v. PIAB* the courts in determining whether to allow the Law Society to join the case as *amicus*, looked firstly at the *bona fides* of the applicant, secondly the public law dimension and thirdly the number of people potentially affected by the case.⁹⁹ We believe that detailed criteria and procedures need to be developed in order to make submissions by NGOs workable and effective in practice.

3.2.5 Complaint to and petitioning of regulatory bodies

The making of complaints to regulatory authorities, such as the Environmental Protection Agency and local authorities, in respect of possible environmental wrongs may act as a trigger for enforcement action by regulatory bodies. Such action may include warnings, investigation, the issuing of enforcement notices and prosecution of an alleged environmental offence. Such complaints also constitute a pool of information on possible environmental wrongs, which is of particular importance to a regulatory body with inadequate resources to monitor effectively.

⁹⁶ In respect of planning decisions, s. 50(4) of the Planning and Development Act 2000 specifies that the legal standing is one of “substantial interest”.

⁹⁷ *Aer Rianta cpt v. Commissioner for Aviation Regulation*, unrep. HCT, O’Sullivan J., 15 January 2003 at 48.

⁹⁸ *O’Keeffe v. Bord Pleanala* [1993] 1 I.R. 39 at 72.

⁹⁹ *Declan O’Brien v. PIAB and AG* unrep.,HCT, Finnegan J., 1 December 2004

Much progress has been made in recent times to facilitate citizen complaints in respect of environmental matters. For instance, the EPA's Office of Environmental Enforcement facilitates the making of complaints in respect of EPA licensed activities and local authority environmental responsibilities,¹⁰⁰ which can be submitted online. In addition, many of the Local Authorities have a dedicated officer within their environmental sections to deal with environmental complaints. In addition, a 24 hour hotline 'Dump the Dumper' has been set up to handle complaints relating to large scale illegal dumping.

We recommend putting on a statutory footing the right to complain to regulatory authorities in respect of environmental matters, and that the receipt of such a complaint should set in motion an obligation on the part of the regulatory authorities to take enforcement action if appropriate. Such a remedy is available in other jurisdictions. For instance, under section 17 of the Canadian Environmental Protection Act 1999 any adult resident in Canada may apply to the Minister for Environment to investigate an alleged environmental offence under the Act. In the USA, an NGO or member of the public can make administrative complaints to compel the government to enforce environmental law.¹⁰¹ This complaint propels the Environmental Protection Agency to notify the offender, who is given ten days to respond. Thereafter it is at the discretion of the Environmental Protection Agency whether or not the complaint justifies the taking of enforcement action.

Such a procedure is also in place in respect of planning law¹⁰² and a similar albeit more limited procedure is found in Public Health Act 1878.¹⁰³ However, although such complaints may act as a force for good in that they may flag enforcement problems¹⁰⁴ and are a useful and cheap source of information, they are reactive in nature and may compromise a more strategic approach by the regulatory authorities. For this reason the discretion to proceed beyond an investigation must be left to the regulatory authority.

¹⁰⁰ See "See Something? Say Something!", (EPA, 2007). Also of note is the development by the Environmental Enforcement Network of a national environmental complaints procedure.

¹⁰¹ Endangered Species Act USC ss.1531 -1544 (2003)

¹⁰² S.152 of the Planning and Development Act 2000 provides that in respect of the planning regime, the public has the power to set in motion the issuing of warning letters by the planning authorities against a person etc. who may be in contravention of planning law.

The procedure is as follows:

(i) The planning authority, on receipt of a complaint by the public, is required to respond to and investigate the complaint. It is under a duty to issue a warning letter (within 6 weeks from date of receipt of the complaint), where the complaint is made in writing, and is not frivolous or vexatious.

(ii) The planning authority is required, in making its decision whether or not to issue an enforcement notice, to consider the complaint(s) and submission(s) made by the public. It is required to give reasons for its decision, enter its decision on a register and notify those who made representations to it within two weeks of making its decision.

(iii) The planning authority has discretion to issue an enforcement notice to contravener.

¹⁰³ Public Health Act 1878: In respect of sewage, a "person aggrieved" by the failure of a sanitary authority to fulfil its statutory duty may complain to the Minister for Environment under s.15 of the Public Health (Ireland) Act 1896. The Minister, on receipt of the complaint and on being satisfied that the authority is guilty of a default, is obliged to make an order requiring the local authority to perform its duty within a specified time. See also *R v. Local Government Board*, 9 QBD 600, 10 QBD 309, and Keane, *The Law of Local Government in the Republic of Ireland*, (2nd ed., Dublin, 2003), 117-119.

¹⁰⁴ Commission Communication in relation to the Complainant in Respect of Infringements of Community Law COM (2002) 141 final, 2 states that "complaints are a vital means of detecting infringements of Community Law."

3.3 Private law mechanisms of citizen enforcement

It is not a given that the use of the law of tort is an effective enforcement tool for the protection of the environment by the citizen or that in all instances it will operate to advance the environmental interest. Its aim is to protect private interests, rather than the environment *per se* by way of compensating for the loss to a person or their property and not primarily the remedying of environmental damage. However, it has the potential to enhance the protection of environmental law, in that it may be invoked to remedy environmental damage incidental to harm done to persons or their property. Under the law of tort, a private individual can take action for trespass to land, negligence, private nuisance, under the rule in *Rylands v. Fletcher*,¹⁰⁵ and for breach of statutory duty. Detailed analysis of the avenues may be found in various textbooks.¹⁰⁶

There are a number of obstacles to the use of this avenue to protect the environment. First of all, a citizen must have an interest in property before a damages claim can be brought. In addition, it may be difficult to establish that an action caused the harm (as there may be other factors involved) and that the harm caused was foreseeable in the circumstances.¹⁰⁷ Furthermore, under certain statutory instruments, regulatory authorities are immune from liability in the performance of their functions. For instance, under section 67 of the Waste Management Act 1996¹⁰⁸ the local authority and Environmental Protection Agency are immune from an action for the recovery of damages in respect of injury to persons or damage to property caused or contributed to by a failure to exercise any power.

3.4 Informal enforcement tools

3.4.1 Inspection and monitoring

There is no formal monitoring role for members of the public in Ireland. This is mainly the function of the Environmental Protection Agency and local authorities. In contrast, the USA gives members of the public an active role in the monitoring of environmental law. For instance, they have the ability to report information to a national clearinghouse, which in turn notifies State or Federal agencies.¹⁰⁹ We recommend the establishment of partnerships between members of the public/NGOs and regulatory bodies in the enforcement of environmental law.¹¹⁰ For instance, under section 15 of the Waste Management Act each local authority and the Environmental Protection Agency must carry out or *cause to be carried out* monitoring in respect of waste activities as it considers necessary for the performance of its functions under the Waste Management Act.¹¹¹ The public could play a partnership role with the regulatory authorities in respect of this and other similar legislative provisions requiring inspection and monitoring by regulatory bodies. UNEP suggests “local level social contracts” between

¹⁰⁵ LR 3 HL 300 (1868)

¹⁰⁶ See McMahon & Binchy, *Law of Torts in Ireland* (Butterworths 2000) and Y. Scannell, *Environment and Land-Use Law* (Sweet & Maxwell 2006).

¹⁰⁷ See *Cambridge Water v. Eastern Counties Leather plc* [1994] 1 ALL ER 53.

¹⁰⁸ (1) No action or other proceeding shall lie or be maintainable against the Agency or a local authority for the recovery of damages in respect of any injury to persons, damage to property or other loss alleged to have been caused or contributed to by a failure to exercise any power or carry out any duty conferred or imposed on the Agency or local authority by or under this Act.

¹⁰⁹ See INECE Fourth International Conference on Environmental Compliance and Enforcement at 6.

¹¹⁰ *Ibid.*, at 6. Mexican Federal Ecology Law provides for such ‘coordination agreements’.

¹¹¹ Waste Management Act, s.15(1)(a).

the government and the citizen.¹¹² It sees a role for local government in providing leadership, in empowering the citizen and making “synergies” between them. Such initiatives could be built upon the inspection and monitoring partnerships mentioned above.

3.4.2 Ombudsman

The public have recourse to complain to the Ombudsman about regulatory authorities’ action or inaction.¹¹³ The Ombudsman has power to investigate allegations of maladministration on the part of public authorities and to make recommendations.¹¹⁴ However, this avenue constitutes a limited mechanism of enforcement for the citizen enforcer of environmental law as the Ombudsman’s findings are not binding and he or she lacks jurisdiction in respect of appellate tribunals such as An Bord Pleanála and the Environmental Protection Agency, and also a local authority when exercising its reserved functions.

3.5 Other informal mechanisms of enforcement

Other possible effective enforcement tools for the citizen enforcer include direct action by way of boycott, the use of the media, participation in negotiations such as compliance agreements, the lobbying for law reform and wider access to information. The last will be discussed in more detail below.

3.6 Private enforcement of European environmental law

Private individuals can enforce European environmental law by using a number of doctrines developed by the European Court of Justice, namely the doctrines of direct effect, public effect and State liability. The direct effect doctrine enables private parties to enforce unimplemented or mal-implemented European environmental legislation in the national courts, provided they have the requisite legal standing at national level. The direct effect doctrine is mainly concerned with individual rights and is thus not very amenable to diffuse interests such as the environment. The development of the public effect doctrine avoids reference to direct effect, and rather looks at whether the provisions impose a clear obligation on Member States, and to the effectiveness of EC law.¹¹⁵

A citizen enforcer can take action alleging State liability where the State breaches European environmental law. This avenue is restricted in that it must be shown that the breach is “sufficiently serious”; there must be a causal connection between the breach and the damage¹¹⁶ and the relevant legal provisions must be shown to confer individual rights. The latter requirement is the most difficult to satisfy in respect of environmental matters, given its diffuse nature. Also most environmental

¹¹² *An Introductory Guidebook on Building Partnerships between Citizen and Local Government for Environmental Sustainability* (UN Environment Programme).

¹¹³ Ombudsman Act 1980

¹¹⁴ Ombudsman Act 1980 s.4(2)(b), s.3(9). Legal standing for access to the Ombudsman is broad, in that it encompasses those not personally affected by action or inaction of public authorities.

¹¹⁵ Case C-72/95 *Aanemersebedrijf PK Kraaijeveld BV v. Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403. In *Linster* the court stated that the effectiveness of law would be “diminished if the individual could not rely on it in legal proceedings”. Case C-287/98 *Luxembourg v. Linster* [2000] ECR I-6917, para. 32.

¹¹⁶ C-6/90 and C9/90 *Francovich and Bonifaci v. Italian State* [1991] ECR I-5357.

directives (with the exception of perhaps the Environmental Impact Assessment Directive and the Access to Information Directive) impose obligations on Member States rather than conferring individual rights in respect of environmental protection.

Finally, any European citizen who suspects an infringement by a Member State of any European law can make a complaint to the Commission. On receipt, the complaint is filed in a register of complaints. The Commission investigates, enters negotiations with the Member State to broker a settlement, and if unable to do so will give a reasoned opinion and ultimately may take infringement proceedings against the Member State. The advantage of this mechanism of enforcement is that the complainant does not need to have any legal interest in the matter to make such a complaint and it is a cost effective, albeit potentially lengthy, avenue of enforcement. The publicity alone could lead to an improvement of enforcement of environmental law by the Member State. The disadvantage of this avenue of redress is that once the complainant has made a complaint, with the exception of being kept informed of the process, the complainant has no further role in this process.¹¹⁷ It has also been widely noted that this avenue lacks transparency, is reactive in nature and is easily swayed by political influence.

4. IMPEDIMENTS TO CITIZEN ENFORCEMENT

4.1 Introduction

Although environmental law is enforceable by a member of the public and/or an NGO by means of the above-mentioned mechanisms, these tools may be ineffective in practice. Impediments to effective citizen enforcement include possible lack of clear environmental standards as well as a number of procedural, technical and cultural obstacles.

4.2 Clear environmental standards

Environmental standards are often expressed in vague and qualifying language which does not render them easily susceptible to enforceable obligations and duties. There is a need for clearer standards to enable a citizen enforcer to effectively assess whether there is a potential violation of environmental law.

4.3 Procedural and technical barriers

4.3.1 Access to information

Access to information on the environment is the cornerstone of effective citizen enforcement, as it enables the identification of potential violations of environmental law and enhances the ability of the public to effect a monitoring and supervisory role.¹¹⁸ The public have access to information under the various planning and environment statutes and a public right of access to environmental information

¹¹⁷ See further Cashman, "Commission Compliance Promotion and Enforcement in the Field of the Environment", [2006] JEEPL 5 385

¹¹⁸ The Environmental Protection Agency announced that, as of the 15th August 2005, details of new incidents reported to the Agency will be published on its website (www.epa.ie).

under the EC (Access to Information on the Environment) Regulations 2007 ('AIE')¹¹⁹ and the Freedom of Information Acts 1997-2003 ('FOI'). The access regime has been greatly strengthened (at least on paper) compared to the regime pre the 2007 AIE Regulations and is largely in line with that envisaged under the recent EC Directive on Access to Environmental Information¹²⁰ and the access to information pillar of the Aarhus Convention.¹²¹ For instance, "public authorities" covered by the AIE regime is no longer confined to those with environmental responsibilities and now includes *inter alia*, natural or legal persons performing "public administrative" functions in relation to the environment.¹²² This may be interpreted as meaning that privatisation "cannot take public services or activities out of the realm of public involvement, information and participation".¹²³ Furthermore, the scope of the grounds for refusal for a request to access to information under AIE is more limited than before.¹²⁴ The AIE now incorporates the overarching principle of restrictive interpretation of exemptions to disclosure and requires the application of the public interest test in determining whether to grant access to information.¹²⁵ The AIE Regulations 2007 and their accompanying Guidance Notes¹²⁶ make it clear that the public can seek information on the environment either under the FOI or AIE or both, whichever is best suited to their circumstances. Finally, the appeals mechanism under AIE is dramatically improved in that in addition to the right to internal review, the public can now also appeal unfavourable decisions to the newly established Office of Commissioner for Environmental Information, who is independent in the performance of its functions. Furthermore if the public authority fails to comply with the Commissioner's decision, the Commissioner has the option to apply to the High Court for an order directing compliance.

The new AIE Regulations increase public access to information on the environment, which should improve the ability of the private individual or NGO to play an effective enforcement role. However, this will largely be dependent on how the AIE Regulations are implemented in practice. Under the FOI Act cost is proving to be a significant barrier to accessing information. Although both the AIE and the FOI apply a reasonable costs principle, the ambit of what constitutes reasonable cost is not specified. We are concerned that, particularly in respect of FOI requests, the imposition of advance payment of

¹¹⁹ S.I. No.133 of 2007 (which came into effect 1 May 2007) purports to give effect to 2003/4 Directive on Public Access to Environmental Information (O.J. No. L41, 14.02.2003)

¹²⁰ Directive 2003/4/EC of the European Parliament and of the Council of the 28 January 2003 on Public Access to Environmental Information (O.J. No. L41, 14.02.2003) and repealing Council Directive 90/313/EEC [2004] O.J 141/26. Ireland was over two years late in implementing this directive, which was required to be implemented by 14 February 2005.

¹²¹ Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (UN ECE, 1998)

¹²² EC (Access to Information on the Environment) Regulations 2007, reg. 3, SI No.133 of 2007. See also arts.2.2 (b) and (c) of the Aarhus Convention.

¹²³ S. Stec and S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide* (New York and Geneva: United Nations Economic Commission for Europe, 2000).

¹²⁴ AEI Arts.7 and 8 AEI, and FOI ss.19-31. The Freedom of Information (Amendment) Act 1997-2003 broadened the scope for exemptions. According to the *Review of Operation of the FOI (Amendment) Act 2003* at 1, usage since the amendment had fallen by 50% (available at: www.oic.gov.ie, Speeches and Publications).

¹²⁵ In the FOI regime only some exemptions are tempered by a harm test and a public interest test. According to McDonagh, "the range of exemptions is broad when compared with its overseas counterparts". See McDonagh, "Freedom of Information in Ireland – 5 years on" at 7, (2002) available at <http://www.freedominfo.org/reports/ireland.htm>.

¹²⁶ Guidance for Public Authorities and others in relation to implementation of the Regulations (Department of Environment Heritage and Local Government, 2007)

fees before the performance of a request¹²⁷ and the current steep fees set for access to information¹²⁸ and the fees for internal reviews and appeals to the Information Commissioner¹²⁹ may operate as a real barrier to effective access, despite the discretion of public authorities to reduce or waive fees in situations of national importance.¹³⁰ We recommend the increased use of the discretion of public authorities to reduce or waive fees where the public interest is concerned and the delimiting of the exemption grounds to access requests and the wider use of the harm and public interests test.

4.3.2 Legal standing

Traditionally legal standing is granted where individual interests or rights are affected. Such an approach is an impediment in respect of the enforcement of environmental standards because the environment (as mentioned above) is largely a diffuse collective interest. As can be seen from the discussion in Section 3 this has been ameliorated somewhat. However, it is of note that there is no uniform ability of a member of the public or NGO to take civil enforcement action or criminal action in respect of contravention of environmental law. We suggest that the approach of having an umbrella environmental regulatory instrument for citizen enforcement of environmental law, as provided for in other jurisdictions, is an attractive option. For instance the Canadian Environmental Protection Act 1999 (CEPA) lists a wide array of environmental offences, in respect of which any adult resident in Canada can take enforcement action, when it is shown that the regulatory authorities failed to do so.¹³¹ Similarly, section 27 of Environmental Offences and Penalties Act 1989 of New South Wales, Australia allows the citizen to enforce any law if the breach is likely to cause harm to the environment. Section 33 of the South African National Environmental Management Act 1998 (NEMA) enables any person in the public interest or in the interest of protecting the environment to take enforcement action for breach of environmental law. More specifically section 32(1) of NEMA provides that a citizen enforcer with legal standing includes a person or group of persons acting in their own interest or in the interest of, or on behalf of, a person who is for practical reasons unable to institute enforcement proceedings, or those acting in the interest of or on behalf of a group or class of persons whose interests are affected, or those acting in the public interest and in the interest of protection the environment. In the USA citizen civil enforcement action is enabled in various environmental statutes. However, legal standing to take action is qualified in a number of respects in order to minimise duplication of enforcement and vexatious claims. For instance, a citizen is precluded from bringing a suit where a State Agency commences and diligently prosecutes civil or criminal action. The citizen is also required to give the regulatory authority notification of (usually) 60 days prior to commencing a citizen suit. In

¹²⁷ FOI s. 47(6).

¹²⁸ S.I. Nos. 139 of 1998, 13 of 1997, and 264 of 2003: €20.95 charge per hour of search and retrieval.

¹²⁹ €75 for applications for internal review and €150 for appeals.

¹³⁰ S.47(5) FOI. It is worrying to note that figures released since the imposition of the new charging fees show that the overall use of FOI has fallen sharply. Source: Dail Eireann Vol. 577 18 December 2003: written answers Freedom of Information. See also 2 of Information Commissioner Report 2004, "Review of the Operation of the Freedom of Information (Amendment) Act 2003, An investigation by the Information Commissioner into the effects of the Amendment Act and the introduction of fees on access requests". (It states that overall usage of the access to information regime under the FOI Act (since the introduction of the 2003 FOI (Amendment) Act has fallen by 50%).

¹³¹ CEPA, s.22.

this context we refer to the recommendation above that broad legal standing be granted to members of the public and NGOs to enforce environmental law.¹³²

4.3.3 *Burden of proof*

The onerous evidential requirement, particularly in respect of criminal prosecution, operates as a barrier to the practical usefulness of this avenue for the citizen enforcer.

4.3.4 *Cost to the citizen enforcer*

The cost of taking citizen enforcement action is the single largest impediment to effective citizen enforcement of environmental law. The gathering of evidence alone is costly and time consuming, not to mention the exorbitant cost of bringing court proceedings.¹³³ There is uncertainty at the outset what these costs will be. The indemnity rule, (which requires the loser to pay his own costs in court proceedings and in some circumstances requires the provision of security for costs¹³⁴ before the full hearing of a judicial review), compounds matters.¹³⁵ However, the harshness of court costs may be ameliorated in a number of respects. Firstly, the indemnity rule and the discretion to impose security for costs may not be ordered where “the issue is of genuine public interest”.¹³⁶ Secondly, the courts may in “exceptional” cases make pre-emptive or protective cost orders.¹³⁷ Such orders may provide for limited or no costs being awarded against the applicant regardless of the outcome, once the application is made in the public interest, the case has merit and the respondent has sufficient financial resources.¹³⁸ Finally, various provisions in pollution control legislation expressly enable the payment of costs to be made by the polluter where the court considers this appropriate.¹³⁹ Nevertheless it is worthy to note that Kevin Costello is of the opinion that there is “little consistency in the application of this public interest exception”.¹⁴⁰ The recommendation in chapter 4 that standard criteria be developed in relation to costs in public interest cases reflects this criticism.¹⁴¹

¹³² At 3.2.2.

¹³³ *REC Doors to Democracy: Current Trends in Public Participation in Environmental Decision-making in Western Europe* (Szentendre: Regional Environmental Centre for Central and Eastern Europe, June, 1998) ch.5. See also the Civil Legal Aid Report (FLAC July 2005) which argued that many people were being denied access to the courts due to the high cost of litigation and that this was contrary to our international obligations. Another example of the cost barrier is *Greenpeace v. ICI*, wherein Greenpeace, an NGO, was ordered to pay £20,000 towards ICI’s costs.

¹³⁴ See *Lancefort v. Bord Pleanála* [1999] 2 I.R. 270, a case in which the applicant company was incorporated for the purpose of challenging a planning decision.

¹³⁵ *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The unsuccessful party pays both sides’ costs.

¹³⁶ *Village Residents v. An Bord Pleanála* [2000] 2 I.R. 321 Laffoy J.; *McEvoy v. Meath Co. Council* (No.2) [2003] IEHC 31.

¹³⁷ So exceptional that no such order has been made in this jurisdiction, although a small number have been made in England and Wales.

¹³⁸ See further ch.4 of this study. *R v. Lord Chancellor, ex parte Child Poverty Action Group* [1998] 2 ALL ER 755 was applied in Ireland in case of *Village Residents v. An Bord Pleanála* [2000] 2 I.R. 321. Law Reform Commission Report: Consultation Paper on Judicial Review Procedure (LRC-CP20-2003) at page 98 recommends only use in exceptional circumstances. See also the approach in South Africa: the National Environmental Management Act 1998 s.32(2) provides for waiver of costs “if the court is of the opinion that the person or group of persons acted reasonably out of concern for the public interest or the interest of the protection of the environmental and that no other means had been reasonably available for obtaining the relief sought.”

¹³⁹ The Air Pollution Act 1987, s. 9(1)(b), the Local Government (Water Pollution) Act 1977, s. 10(1)(a)(ii)(III) as substituted by the Local Government (Water Pollution) (Amendment) Act 1990, s.7 and the Waste Management Act 1996 s.57(1)(c) and s.58.

¹⁴⁰ K. Costello “Costs, Principles and Environmental Judicial Review” (2000) 35 Ir. Jur. 121 at 142.

¹⁴¹ Ch.4 at 10.1.

4.3.5 *Civil legal aid*

The general lack of public assistance or legal aid in public interest cases applies to all aspects of public law including environmental law. Under the Civil Legal Aid Act 1995, eligibility is excluded for:

“a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest.”¹⁴²

If an individual has an interest which is also a public interest and which is not excluded under other provisions of the Act,¹⁴³ he or she can apply for legal aid. The fact that the case may set a precedent will not deter the granting of aid if the application qualifies. We are not aware of any environmental cases that have been funded in this way, but the possibility is not excluded. It may be that certain environmental cases are eligible but are not funded because there is a perception that they are ineligible, and legal aid is not applied for.

In Australia, legal aid is granted for environmental matters affecting the public interest. It includes advice and representation and undertaking to pay any cost order against the person seeking legal aid. A specific environmental advice agency was also established under the title of the Environmental Defenders’ Office, thus putting at public disposal some of the resources which might otherwise increase the enforcement capabilities of the public authorities.¹⁴⁴

In the UK, some public funding is available through the Community Legal Service (CLS). A Funding Code includes ‘public interest’ as one of the criteria of eligibility. A consultation process defined ‘wider public interest’ as

“The potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question).”

The CLS interprets ‘benefit’ to cover everything from direct financial gain to intangible issues such as quality of life and the protection of the environment. With limited resources, the CLS needs to deploy them to the best advantage, and it uses a Public Interest Advisory Panel to classify applications as having ‘significant’, ‘high’ or ‘exceptional’ public interest. The number of people who may be affected and the nature of the benefit are two of the matters considered. Obtaining ‘significant’ classification, for example, has considerable advantages, including

- Instead of a 50% + likelihood of success, the success prospect need only be borderline, that is, an arguable case;
- The cost-benefit equation is more favourable than usual: the public benefits are weighed up against the cost, and the case may be funded even though the individual applicant is likely to receive no significant personal benefit in the outcome; and

¹⁴² We also refer to a letter of 24th February 2004 from the Legal Aid Board which stated that “aid is not granted in respect of planning or Board Pleanála matters nor are NGOs or public interest groups entitled to civil legal aid.”

¹⁴³ For example defamation, land disputes, conveyancing, licensing matters and election petitions, see s.28 of the Civil Legal Aid Act 1995.

¹⁴⁴ Maria Adebowales, “Using the Law: Barriers & Opportunities for Environmental Justice” (Capacity Global 2003) 7 recommendation 4.

- The statutory charge may be waived, so that if the litigant wins, the benefit s/he gains is not subject to the usual charge in favour of the LSC when a case is won with LSC funding.¹⁴⁵

The CLS publishes an analysis of applications, cases and costs on its website. It may refuse to fund a case if there are other persons or bodies who would benefit and who could reasonably be expected to bring the case themselves, but it will also work in collaboration with other bodies, sharing costs. Its expenditure on public law cases is relatively miniscule,¹⁴⁶ and with its experience since 2001, it appears to be developing useful expertise on how to get good value from its funds. It would be a valuable model and resource if the funding of public interest law in this jurisdiction were to be considered.¹⁴⁷ Making legal aid funding available could be viewed as supplementing the enforcement activities of local authorities.

The wider issue of public funding of public interest law and litigation is outside the scope of this chapter, but it deserves further debate and investigation, not least because of the terms of the Aarhus Convention and particularly article 9.2 creating a right of access to a review procedure before a court of law or other independent or impartial body to challenge the substantive and procedural legality of environmental decisions. Article 9.4 speaks of a duty to ensure that such procedures provide adequate and effective remedies and are fair, equitable and not prohibitively expensive. Article 9.5 imposes an obligation to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. The preamble to the Convention articulates concern that effective judicial mechanisms should be available to the public in environmental cases, so that its legitimate interests are protected and the law is enforced.

We recommend that the remit of the Legal Aid Board should be expanded to encompass public interest actions taken by special interest groups, and that criteria and guidelines for the identification of appropriate cases be developed to ensure value for what funding can be made available.

4.4 Cultural attitudes

Finally the cultural attitude towards environmental protection may pose an obstacle to effective enforcement of environmental law. Apathy and ignorance are prevalent, and short-term economic gains often outweigh long-term environmental protection goals. However, the environment is now more newsworthy than previously, which may indicate a growing concern among the general public as to the maintenance of environmental standards and the minimisation of environmental damage. We believe that the more information is available to the public on the environment, the more awareness the public will have, which in turn may lead to more concern for the protection of the environment.

¹⁴⁵ The handling of public interest law cases by the LSC and an analysis of their subject matter and breakdown of costs is described in the David Hall Memorial Lecture, 27 July 2006 by Brookes LJ., "Environmental Law: The Cost Barrier", JEL 2006 18 (3):341-356

¹⁴⁶ In 2004, c. £7m, with possibly a share of the "miscellaneous" expenditure of £15m.

¹⁴⁷ The issue of Public Interest Law and Litigation was explored by FLAC in a series of conferences in the course of 2006, the papers of which are available. A summary report is due.

5. IMPACT OF RECENT REGULATORY DEVELOPMENTS

5.1 EC Environmental Liability Directive

The Directive does not provide for civil suits against the regulators or the regulated in environmental matters.¹⁴⁸ Rather it is an administrative instrument, with enforcement powers in the hands of the regulatory bodies to remedy and prevent environmental damage. However, it does impact somewhat on the citizen enforcer in that it provides an additional point of entry for enforcement purposes. Individuals and interest groups can request action of competent authorities¹⁴⁹ and seek judicial review of a regulator's decisions on liability.¹⁵⁰

5.2 Impact of the European Convention on Human Rights Act 2003

The European Convention on Human Rights (ECHR) was implemented in Irish law by way of the European Convention on Human Rights Act 2003. Although the Convention does not explicitly refer to the environment, it is a living instrument and its case law, which is applicable in the national courts, indicates that certain of its provisions afford a degree of environmental protection. For instance, the European Court of Human Rights has interpreted article 8 of the ECHR (the right to private and family life) as imposing a duty on a regulatory authority to protect the environment¹⁵¹ and to provide information on environmental matters.¹⁵² Section 3 of the ECHR Act creates a new tortious action for breach of statutory duty, in that state authorities must perform their functions in a manner that is ECHR compliant. A person or organisation can seek damages where he, she or it suffered as a result of a breach of this duty. Therefore the ECHR Act 2003 may constitute a new avenue of challenge for the citizen enforcer and may supplement the limitations of existing remedies available at common law and under statute.

5.3 Impact of the Aarhus Convention

The *Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters* is a regional instrument which entered into force on 30 October 2001.¹⁵³ As its full title suggests, it proposes to guarantee a public right of access to environmental information, participation in environmental decision-making and access to justice in environmental matters. These procedural rights of the public to participate are intended to enable the protection of the right to a healthy environment and to ensure that the duty to protect and improve the

¹⁴⁸ Directive 2004/35 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage [2004] OJ L143/56.

¹⁴⁹ Art. 12

¹⁵⁰ Art. 13

¹⁵¹ *Lopes Ostria v. Italy* [1990] 12 EHRR 330.

¹⁵² *Guerra v. Italy* (1998) 26 EHRR 357.

¹⁵³ Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (UN ECE, 1998)

environment for the benefit of present and future generations can be achieved.¹⁵⁴ It concretises the notion that environmental issues are best dealt with by way of public involvement.¹⁵⁵ Ireland is under a double obligation to enforce these participatory rights of the public because on ratification of the Convention, Ireland will be required to take legislative or other appropriate steps to implement and enforce obligations thereunder.¹⁵⁶ As a Member State of the European Union, it is also under an obligation at EU law to transpose and comply with directives¹⁵⁷ adopted which purport to align member states to the Convention's requirements. There are a number of mechanisms available at international, EU and national level to ensure Ireland's compliance with its Aarhus obligations.¹⁵⁸

The access to information and justice pillars of the Convention will have the most impact from a citizen enforcer's perspective. Firstly, as alluded to above in Section 4.3.1, the access to information pillar of the Aarhus Convention signalled a broadening of public access to environmental information beyond that already provided for under the Irish regime on access, now reflected in the Access to Information on the Environment Regulations.¹⁵⁹ In respect of access to justice, article 9.3 of the Convention recognizes the role of "members of the public" in safeguarding the environment. It enables the latter to directly or indirectly ensure compliance and enforcement of domestic law relating to the environment by public authorities and private entities alike. Given the broad margin of appreciation of the Convention Parties in determining the scope of article 9.3 and the citizen enforcement provisions provided for under the various environmental statutes (see Section 3), it is doubtful that article 9.3 will have any major substantive impact on the citizen enforcer. However it may act as a policy dynamic in forging the way forward for enhanced citizen enforcement of environmental law. The proposed European Directive on Access to Justice purporting to implement article 9 of the Convention does not fully impose the basic minimum obligations of article 9.3. The standing of members of the public is restrictive and its provision in respect of public enforcement against private entities is merely aspirational. At a cursory glance it is doubtful that such a proposal will have a large impact in Ireland. The most significant impact the Convention may have in Ireland is the requirement that public access to justice is "timely and not prohibitively expensive".¹⁶⁰

6. RECOMMENDATIONS

¹⁵⁴ *Ibid.*, Art.1 and recitals 6, 7 and 8.

¹⁵⁵ J. Black, "Proceduralising Regulation:Part I", (2000) O.J.L.S 597.

¹⁵⁶ Aarhus Convention art 9.3.

¹⁵⁷ Directive 2003/4 of the European Parliament and of the Council of the 28 January 2003 on Public Access to Environmental Information and repealing Council Directive 90/313/EEC [2004] O.J. L41/26; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for Public Participation in Respect of the Drawing Up of Certain Plans and Programmes Relating to the Environment and Amending with Regard to Public Participation and Access to Justice; Council Directives 85/337/EEC and 96/61/EEC O.J.L156/17; Proposal for Directive on Access to Justice (COM) (2003) 624.

¹⁵⁸ See art 10.2 of Aarhus Convention, Decision I/7 of 23 October 2002. Compliance Committee supervisory function (Decision I/7 para.19(c) para. 35, 13(b); Decision I/8 para 3,4. Also complaints may be made to the European Commission in respect of the EC Directives.

¹⁵⁹ SI No.133 of 2007.

¹⁶⁰ Art.9.4 of the Aarhus Convention.

6.1 Legal standing of citizen enforcer to take enforcement action

We recommend the promulgation of an umbrella environmental regulatory instrument granting broad legal standing to members of the public and NGOs to enforce environmental law, to include a number of safeguards against duplication of enforcement and vexatious enforcement action akin to those adopted in other jurisdictions [Section 4.3.2]

6.2 The right to complain to regulatory authorities

We recommend putting on a statutory footing the right to complain to regulatory authorities in respect of environmental matters, and that the receipt of such a complaint should set in motion an obligation on the part of the regulatory authorities to take enforcement action if appropriate. [Sections 3.2.5]

6.3 Partnership

We recommend the establishment of partnerships between members of the public/NGOs and Regulatory Bodies in the enforcement of environmental law. [Section 3.5]

6.4 Access to information

We recommend the increased use of the discretion of public authorities to reduce or waive fees where the public interest is concerned and the delimiting of the exemption grounds to access requests and the wider use of the harm and public interests test. [Section 4.3.1]

6.5 Costs

We recommend that the remit of the Legal Aid Board should be expanded to encompass public interest actions taken by special interest groups, and that criteria and guidelines for the identification of appropriate cases be developed to ensure value for what funding can be made available. [Section 4.3.4]

Chapter 3

ENVIRONMENTAL AGREEMENTS

1. INTRODUCTION

This chapter discusses the potential of voluntary environmental agreements in Irish law in the transposition and implementation of EC environmental directives.

Any serious exercise concerned with putting forward proposals for the reform of an area of law should ideally outline the leading-edge legal and regulatory solutions employed in comparable jurisdictions and promote consideration of such solutions by policy-makers. Among the most innovative and potentially far-reaching legal measures for environmental protection routinely employed in a number of EU Member States are schemes involving voluntary contractual arrangements, concluded between the public regulatory authorities and the relevant regulated community, by which such States transpose and implement certain Community environmental directives. The use of voluntary, negotiated agreements has obvious implications for ensuring compliance with and enforcement of norms, values and standards set down under relevant Community directives, with proponents claiming that the early and meaningful involvement of the regulated community ensures improved compliance, while the inclusion of appropriately tailored enforcement provisions among the essential terms any such agreement enhances effective enforcement.

At first glance, Ireland would appear to be a jurisdiction which would have much to gain from the use of environmental agreements as a means of implementing a range of European Community environmental directives. It is a relatively small economy with a correspondingly limited number of commercial actors in each relevant sector. Similarly, due to its small geographical size and population and to the relative homogeneity of the country, the administration is quite centralised. As with most smaller Member States, the administration is quite limited in terms of personnel and resources and the environmental authorities have in recent years clearly struggled to cope with the deluge of environmental rules emanating from Brussels, both in terms of legislating for national transposing measures¹⁶¹ and in terms of monitoring compliance with and enforcing these measures.¹⁶² Furthermore, the Irish legislature would appear to have made implicit provision for the use of environmental agreements, at least in respect of measures to reduce production and promote recovery

¹⁶¹ See, for example, the decision of the European Court of Justice of 28 October 2004 in Case 460/03, *Commission v. Ireland*, declaring that Ireland had failed to fulfil its obligations under Directive 2000/53/EC on end-of-life vehicles.

¹⁶² See, for example, the decision of the European Court of Justice of 26 April 2005 in Case 494/01, *Commission v. Ireland*, [2005] OJ C143/5, declaring that there had been a general and structural infringement of the Waste Framework Directive by Ireland.

of waste, by authorising the relevant Minister to approve by regulations arrangements which exempt participants from more prescriptive rules which the Minister has wide powers to specify.¹⁶³ Also, Irish legislation expressly confers broad powers on public authorities to enter into arrangements for the purpose of promoting, supporting or facilitating the recovery of waste.¹⁶⁴ Further, a number of statutory provisions would appear to facilitate the use of agreements by permitting the relevant Minister to make regulations exempting operators from key legislative obligations provided they comply with specified conditions.¹⁶⁵ However, environmental agreements have not been widely used in Ireland with the exception of the 1996 REPAK agreement on packaging waste, entered into by the Department of the Environment and a number of trade associations.

This chapter begins by examining the background to the use of environmental agreements for the purposes of implementing Community environmental law at the national level. Secondly, it outlines the advantages and risks usually associated with the use of environmental agreements in this context. Thirdly, it comments briefly on the guidelines provided by the European Commission on the use of environmental agreements. Finally, it examines the likely compatibility of environmental agreements with the EC Treaty, having regard in particular to Community rules on the internal market, competition and State aid, and with relevant provisions of international trade law.

2. BACKGROUND TO ENVIRONMENTAL AGREEMENTS

The relative success of environmental agreements in a number of countries has long been noted. The Netherlands, for example, had concluded at least 70 such agreements by 1997 and over 100 by 2001, covering such areas as waste management (*e.g.* packaging, recovery of asbestos, plastics), the reduction of emissions (*e.g.* volatile organic compounds, SO₂ and NO_x from electricity suppliers, ammonia from livestock), clean-up of contaminated soil (petrol stations), energy saving, and reduction strategies for industrial noise.¹⁶⁶ The framework for the conclusion of such “covenants” in the Netherlands is set down under the 1989 and 1990 National Environmental Policy Plans and it has been calculated that by 2001 such arrangements “set environmental objectives for 16 industry sectors, involving some 12,000

¹⁶³ For example, s.29(4)(s) of the Waste Management Act 1996 provides that regulations may provide for “exempting from all or any of the requirements of regulations under this section a person who is certified by an association or body corporate formed or established for the purpose of carrying on waste recovery activities and approved by the Minister in accordance with regulations ...”

¹⁶⁴ For example, s.29(2) of the Waste Management Act 1996 provides that “For the purpose of promoting, supporting or facilitating the recovery of waste, any Minister of the Government or a local authority may provide to any person such support or assistance, including financial assistance, as he or she or the local authority considers appropriate, including the provision of moneys in relation to research and development projects ...”

¹⁶⁵ For example, s.39(4) of the Waste Management Act 1996 provides that
The Minister may by regulations provide that [the requirement to hold a waste licence] shall not apply in respect of –
(a) the disposal in a specified manner of a specified class or classes of waste at its place of production, or
(b) the recovery in a specified manner of a specified class or classes of waste,
If and for so long as the person carrying out the disposal or recovery of the waste ... complies with specified conditions in relation to the carrying out of such disposal or recovery.

¹⁶⁶ G. Van Calster and K. Deketelaere, “The Use of Voluntary Agreements in the European Community’s Environmental Policy”, in E. W. Orts and K. Deketelaere (eds.), *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer Law International, The Hague / London / Boston, 2001) 199-246, at 243.

companies responsible for over 90 percent of industrial pollution in the Netherlands”.¹⁶⁷ Indeed, the European Commission’s 1996 *Communication on Environmental Agreements* pointed out that over 200 of the 300 agreements concluded at the national level by 1996 had been agreed in the Netherlands and Germany,¹⁶⁸ though also that practice seemed to be picking up in other Member States, particularly in the waste sector.¹⁶⁹ Also, though in most Member States environmental agreements are not regulated by formal legislation, the Flanders Region of Belgium adopted on 15th June 1994 a decree concerning environmental policy agreements, which establishes a framework for the conclusion of such instruments and which defines an environmental policy agreement as

“every agreement between the Flemish Region, represented by the Flemish Government, and one or more representative umbrella organisations of companies, with the goal to prevent environmental pollution, to limit or avoid its consequences, or to promote sound environmental management.”¹⁷⁰

2.1 EC’s Fifth Action Programme on the Environment, 1992

The formal origins of the debate relating to use of environmental agreements in the context of Community environmental policy can be traced back to the adoption of the European Community’s Fifth Action Programme on the Environment in 1992,¹⁷¹ which reviewed the range of instruments available to achieve environmental control and improvement and sought to move away somewhat from the traditional “command and control” approach that had hitherto characterised Community environmental law-making.¹⁷² The Fifth Action Programme stated that

“environmental policy will rest on four main sets of instruments: regulatory instruments, market-based instruments (including economic and fiscal instruments and *voluntary agreements*), horizontal supporting instruments (research, information, education, *etc.*) and financial support mechanisms.”¹⁷³

It further placed emphasis on the concept of “shared responsibility”, which involves the use of mixed instruments and the collaboration of various governmental and non-governmental actors at the appropriate levels. Indeed, this concept “implies, in particular, a reinforcement of the dialogue with industry and the encouragement, in appropriate circumstances, of voluntary agreements and other forms of self-regulation”.¹⁷⁴ Also, a 1992 Council Resolution on the relationship between industrial

¹⁶⁷ *Ibid.*

¹⁶⁸ For a brief account of the development of environmental agreements in Germany, see E. Rehbinder, “Market-Based Incentives for Environmental Protection”, in R. L. Revesz, P. Sands and R. B. Stewart (eds.), *Environmental Law, The Economy and Sustainable Development: The United States, the European Union and the International Community*, (Cambridge University Press, 2000) 245, at 250-258.

¹⁶⁹ COM(96) 561 final. See Van Calster and Deketelaere, *ibid.*, at 227.

¹⁷⁰ *Belgian State Gazette*, 8 July 1994. Reproduced in English in “Title 7 – Environmental Covenants”, in H. Bocken and D. Ryckbost, *Codification of Environmental Law – Draft decree on Environmental Policy* (prepared by the inter-university commission for the revision of environmental law in the Flemish Region), (Kluwer Law International, London, 1995), at 191-194. See further, Van Calster and Deketelaere, *ibid.*

¹⁷¹ COM(92) 23 final, *Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development*, adopted by means of a 1993 Council Resolution, [1993] OJ C138/1.

¹⁷² For a detailed account of the development of community policy in relation to environmental agreements, see generally, Van Calster and Deketelaere, *supra*, n. 166. See further, J. Verschuuren, “EC Environmental Law and Self-Regulation in the Member States: in Search of a Legislative Framework”, (2000) 1 *Yearbook of European Environmental Law*, 103-122.

¹⁷³ *Supra*, n. 171 (emphasis added).

¹⁷⁴ Fifth Environmental Action Programme, *supra*, n. 171. See Van Calster and Deketelaere, *ibid.*, at 204.

competitiveness and environmental protection sought to justify the use of environmental agreements on the basis of cost-effectiveness.¹⁷⁵ It invited the Commission to

“have regard to the most cost-effective instruments to achieve the Community’s environmental policy objectives, taking into account, in particular, the scope for voluntary action by industry and the advantages of economic instruments as an alternative or complement to regulation.”¹⁷⁶

2.2 Commission Progress Report, 1995 and Communication, 1996

A 1995 Commission Progress Report¹⁷⁷ on implementation of the Fifth Environmental Action Programme acknowledged, despite the increased use of environmental agreements in individual Member States, the difficulties inherent in broadening the range of instruments employed in environmental protection and called for the development of common frameworks for environmental agreements “in which Member States are allowed to follow their own timetables and can introduce their own measures”. The Report cited the need to safeguard the internal market and to stimulate convergence as the policy justifications for the development of such frameworks. Finally, in its 1996 Communication on Environmental Agreements,¹⁷⁸ the Commission set out a framework for the conclusion and application of environmental agreements in the Community, with the objective of promoting the use of such agreements with industry. The stated purposes of the 1996 Communication are to:

- develop guidelines for the effective use of environmental agreements at national or local level, whether in application of a Community directive or independently from Community legislation;
- set out the conditions under which such agreements can be used for the purpose of implementing certain provisions of Community directives; and
- ascertain how environmental agreements can be used at Community level.¹⁷⁹

The guidelines aim to ensure the effectiveness, transparency, credibility and reliability of environmental agreements and recommend, *inter alia*:

- that there should be consultation with all interested parties (including the public) during the negotiation of an agreement;
- that agreements should be legally binding, especially where they are used to implement specific provisions of Community directives;
- that the objectives of an agreement should be quantified in figures, as opposed to “best effort” clauses;
- that intermediate objectives should be set and milestones established;

¹⁷⁵ 1992 Council Resolution concerning the relationship between industrial competitiveness and environmental protection, [1992] OJ C331/5.

¹⁷⁶ Para. 15(ii).

¹⁷⁷ COM(95) 624.

¹⁷⁸ *Supra*, n. 169.

¹⁷⁹ *Ibid.*, para.4, at 6. To date, there has been limited practice on the use of environmental agreements at the Community level relating to the use of legally non-binding agreements in the form of unilateral commitments promoted or recognised by the Commission. Such commitments have, for example, concerned the phasing out of CFCs and the labelling of detergents. Van Calster and Deketelaere suggest, *supra*, n. 166, at 199, that “the limited use of such EC-wide agreements is to an important extent outweighed by the considerable access that European industry has to the legislative process, through official consultation and lobbying.” Also, it is apparent that environmental agreements are only likely to be concluded at the European level in industries with a limited number of large-scale operators, such as the automotive or chemical industries. It is unlikely that the environmental consequences of industries dominated by small or medium-sized enterprises (SMEs) could be regulated by EC-wide agreements as SMEs would be less likely to be comprehensively represented by a manageable number of business associations.

- that all relevant information should be made publicly available;
- that there should be effective monitoring and independent verification of results.¹⁸⁰

The 1996 Communication clearly states that, where a directive is intended to create rights and obligations for individuals, an agreement will be inadequate implementation unless the directive in question expressly provides that instruments other than formal statutory measures, such as voluntary agreements, will suffice.¹⁸¹ The Commission has undertaken that, where Community legislation becomes necessary, it will “carefully consider whether certain provisions of these legislative measures will allow for implementation by binding environmental agreements and will include, if appropriate, such provisions in its proposals”.¹⁸²

Environmental agreements are rarely truly voluntary, but are more commonly set against a background of the threat of more formal, binding regulation. Nevertheless, they do involve a negotiated, consensual framework between industry and regulator and often offer increased flexibility for industry in meeting targets, an improved relationship between regulator and industry (thus enhancing the influence of regulators over industry), and greater legitimacy of the environmental objective from the perspective of industry. Also, voluntary agreements can normally be put in place and amended more quickly than formal regulation. However, environmental agreements may lead to less stringent environmental targets and, due to a lack of compulsion, there are often problems of enforceability. In the context of extended producer responsibility for waste, for example, environmental agreements are considered a potentially effective means of influencing the overall management of the regulated organisation (*i.e.* producer) as it encourages that organisation to consider its own practices. The Commission has identified directives creating an obligation to set up reduction programmes and achieve general targets as particularly appropriate for environmental agreements.¹⁸³ Also, the Commission notes that a market which is in the hands of relatively few commercial actors is particularly amenable to the use of agreements.¹⁸⁴

For the purposes of the 1996 Communication, “environmental agreements” “represent agreements between industry and public authorities on the achievement of environmental objectives”¹⁸⁵ and would also appear to include unilateral commitments on the part of industry recognised by public authorities. Referring to the Dutch National Environmental Policy Plan, Bierkart describes environmental

¹⁸⁰ *Ibid.*, para.5, at 6, and paras.17-25, at 11-14.

¹⁸¹ *Ibid.*, para.31, at 17-18. Referring to Case C-29/84, *Commission v. Germany* [1985] ECR I-1661, the Commission concludes that

“...where Directives intend to create rights and obligations for individuals, for instance by setting limit values of general application aimed to protect human health, the transposing acts need binding force and appropriate publicity. Only in this case can the persons concerned be able to ascertain the full extent of their rights, relying on them, where appropriate, before national courts.”

Referring to Case C-339/87, *Commission v. The Netherlands* [1990] ECR I-851, the Commission concludes that

“... the fact that a practice is consistent with the protection afforded under a Directive does not justify the failure to implement that Directive in the national legal order.”

See further, Case C-340/96, *Commission v. The United Kingdom and Northern Ireland* [1999] ECR I-2023.

¹⁸² *Supra*, n. 169, para.48, at 22.

¹⁸³ *Ibid.*, para.32, at 18.

¹⁸⁴ *Supra*, n. 169, para.16, at 10.

¹⁸⁵ *Ibid.*, para.4, at 6.

agreements as “agreement[s] between national, provincial and / or local authorities and a group of companies regarding the reduction of adverse environmental consequences from production processes, energy use, or products”.¹⁸⁶ Such arrangements are often commonly referred to in the academic literature as “voluntary agreements”, “negotiated agreements” and “covenants”, and have been collectively described as “contracts that are created via consensus between government and industry and which, more recently, involve the participation of NGOs and other third parties”.¹⁸⁷ However, there does not exist any broadly recognised definition in EC law and, despite a number of studies on the use of environmental agreements at Member State level,¹⁸⁸ some uncertainty remains over what instruments or initiatives fall within the scope of the term. Nevertheless, a number of environmental directives expressly provide for the possibility of using environmental agreements as a means of implementation,¹⁸⁹ or strongly imply that agreements might be used to achieve the objectives contained therein.¹⁹⁰ Also, there exist numerous examples of Member States using environmental agreements to implement directives that do not expressly authorise their use.¹⁹¹ In addition, a Council Recommendation¹⁹² was adopted alongside the 1996 Communication which aims to provide a clear framework for the use of environmental agreements to implement Community environmental directives that expressly allow for implementation by means of such agreements. This Recommendation includes conditions against which a draft agreement could be tested, including that it should take the form of an enforceable contract, specify quantified objectives, and be accessible to the public.¹⁹³ A 1997 Council Resolution recognised a similar set of requirements for a valid environmental agreement and called upon the Commission to indicate in its proposals for directives which provisions could be implemented by means of environmental agreements.¹⁹⁴ The strategy set out in the Fifth Environmental Action Programme is apparent in the “key priorities” identified in a 1998 Decision,¹⁹⁵ the second of which is “broadening the range of instruments”, and this strategy has been continued under the Sixth Environmental Action Plan.¹⁹⁶

¹⁸⁶ J. W. Bierkart, “Environmental Agreements between Government and Industry: a Dutch NGO’s Experience”, (1995) 4/2 *Review of European Community and International Environmental Law* 106, at 106.

¹⁸⁷ P. Bailey, “The Creation and Enforcement of Environmental Agreements” [1999] *European Environmental Law Review* 170-179, at 171. See also, S. Wood, “Voluntary Environmental Codes and Sustainability”, in B. J. Richardson and S. Wood (eds.), *Environmental Law for Sustainability: A Reader* (Hart Publishing, Oxford and Portland, 2006) 229, at 230.

¹⁸⁸ See, for example, European Commission DG III, *Study on Voluntary Agreements Concluded between Industry and Public Authorities in the Field of the Environment*, (Final Report, January 1997); European Environment Agency, *Environmental Agreements: Environmental Effectiveness*, (Copenhagen, 1997).

¹⁸⁹ Directive 2000/53/EC on End-of-Life Vehicles, [2000] OJ L269/34, article 10(3).

¹⁹⁰ For example, Directive 85/339/EEC on containers of liquids for human consumption, [1985] OJ L176/18, and Directive 94/62/EEC on Packaging and Packaging Waste, [1994] OJ L365/10. In relation to the Packaging Waste Directive, Van Calster and Deketelaere submit, *supra*, n. 166, at 200, that

“Even though the Directive does not expressly mention voluntary agreements, it is generally understood that the reference in article 7 with respect to return, collection, and recovery systems, together with the need to involve the economic operators in the sectors concerned in the design and operation of such systems, is a reference to voluntary agreements.”

¹⁹¹ For example, in relation to Directive 88/609/EEC on limitation of emissions of certain pollutants into the air from large combustion plants, [1988] OJ L336/1.

¹⁹² Commission Recommendation concerning Agreements Implementing Community Directives, [1996] OJ L333/59.

¹⁹³ See further, Verschuuren, *supra*, n. 172, at 105.

¹⁹⁴ Council Resolution 7 October 1997 on Environmental Agreements, [1997] OJ C321/6. See, Verschuuren, *ibid*.

¹⁹⁵ Decision 2179/98, [1998] OJ L275/1.

¹⁹⁶ *Environment 2010: Our Future, Our Choice*, COM(2001) 31 final, adopted under Decision 1600/2002/EC, (2002) OJ L242/1.

2.3 European Commission's 2001 White Paper on European Governance

The use of voluntary environmental agreements is further supported by the European Commission's 2001 White Paper on European Governance,¹⁹⁷ which contains a set of institutional proposals for the reform of rule-making at the Community level and expresses the Commission's commitment to "promote greater use of different policy tools" including, *inter alia*, "co-regulatory mechanisms".¹⁹⁸ This White Paper goes on to elaborate on the "framework of co-regulation", within which implementing measures may be prepared under certain conditions. It briefly outlines the conditions for the use of co-regulation in a manner consistent with the Commission's 1996 Communication on Environmental Agreements,¹⁹⁹ stating that "it is only suited to cases where fundamental rights or major political choices are not called into question"²⁰⁰ and, further, that "the organisations participating must be representative, accountable and capable of following open procedures in formulating and applying agreed rules".²⁰¹ The White Paper expressly refers to the "environment sector" as an example of one in which this approach has already been used and hints at some of the difficulties which might arise in relation to voluntary agreements, cautioning that

"the resulting co-operation must be compatible with European competition rules and the rules agreed must be sufficiently visible so that people are aware of the rules that apply and the rights they enjoy. Where co-regulation fails to deliver the desired results or where certain private actors do not commit to the agreed rules, it will always remain possible for public authorities to intervene by establishing the specific rules needed."²⁰²

In relation to the specific issue of environmental enforcement and compliance, the White Paper notes that

"Co-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical experience. The result is wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement. This often achieves better compliance, even where the detailed rules are non-binding."²⁰³

2.4 Types of environmental agreement

Despite the lack of a formal definition of environmental agreements under EC law,²⁰⁴ Bailey sets out an entire scheme for their classification,²⁰⁵ noting that there are three principal methods: classification in

¹⁹⁷ COM(2001) 428. See further, M. P. Chiti, "The Principles of Co-Regulation as a New Method of Technical Control", in A. Biondi, M. Cecchetti, S. Grassi and M. Lee (eds.), *Scientific Evidence in European Environmental Rule-Making: The Case of the Landfill and End-of-Life Vehicles Directives* (Kluwer Law International, The Hague/London/New York, 2003) 91.

¹⁹⁸ *Ibid.*, at 5. Indeed, in the context of this commitment, the White Paper clearly states, *ibid.*, that

"When legislating, the Union needs to find ways of speeding up the legislative process. It must find the right mix between imposing a uniform approach when and where it is needed and allowing greater flexibility in the way that rules are implemented on the ground. It must boost confidence in the way expert advice influences policy decisions."

Elsewhere, at 33, it suggests that the proposals in the White Paper will:

"Support the clearer definition of EU policy objectives and improve the effectiveness of EU policies by combining formal legislation with non-legislative and self-regulatory solutions to better achieve those objectives."

¹⁹⁹ *Supra*, n. 169. On the advantages and risks associated with the use of environmental agreements, see further *infra*.

²⁰⁰ *Supra*, n. 197, at 21.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ Though an agreement has been defined for the purposes of the Packaging and Packaging Waste Directive, *supra*, n. 190, art. 3(12) as

terms of their relationship to regulatory instruments;²⁰⁶ classification according to the nature of their objectives;²⁰⁷ and, classification by legal characteristics. Using the latter method of classification, she further distinguishes between “agreements of a regulatory nature” and “agreements to ensure implementation and/or compliance”.²⁰⁸ The former would often take the place of formal legislation, though they might also supplement framework legislation, and might include formalised environmental policy targets, prohibitions on certain conduct, obligations regarding emissions or the reduction of waste, environmental standards, adjustment schedules, and permit requirements. The latter correspond more closely to the Commission’s vision of environmental agreements as “an implementation tool rather than a means of deregulation”²⁰⁹ and may be used to ensure correct implementation of the broad requirements of environmental directives while being sufficiently flexible to reflect the needs of a particular region, operator or facility or the level of technology or resources available. In the Netherlands, the use of covenants to provide for the transfer of an undertaking’s plans to achieve environmental compliance into permit requirements has been particularly successful.²¹⁰

3. ADVANTAGES AND RISKS

The 1996 Commission Communication on Environmental Agreements attempts to set out the key advantages and disadvantages of using environmental agreements as an alternative or complement to prescriptive regulation. In so doing, it identifies three core benefits of such self-regulation: the encouragement of a pro-active approach from industry; cost-effectiveness; and faster achievement of objectives.²¹¹

3.1 The encouragement of a pro-active approach from industry

First of all, the Commission suggests that the process of negotiating environmental agreements should encourage the early involvement of and the adoption of a pro-active approach by industry. Central to this perceived advantage is the acknowledged benefit of making optimal use of the technical and organisational knowledge of enterprises of their own processes and of what improvements are likely to be technically or economically feasible. The Communication states that the process of negotiation “can

“the formal agreement concluded between the competent public authorities of the Member State and the economic sectors concerned, which has to be open to all partners who wish to meet the conditions of the agreement with a view to working towards the objectives of this Directive.”

²⁰⁵ *Supra*, n. 187, at 171-172.

²⁰⁶ Using this method it is possible to identify: “preparatory environmental agreements” which create rules before legislation has been passed or in anticipation of legislation; “replacement /temporary agreements” which replace legislation for a specified period and might permit certain breaches of standards or limits subject to particular conditions; and, “supplementary environmental agreements” which provide for goals more strict than those in existing legislation. See Bailey, *ibid.*, at 171.

²⁰⁷ This method divides environmental agreements into four categories: “target agreements” which set specific targets for environmental performance; “performance agreements” which set less precise targets and may relate both to operating procedures and final environmental performance; “research and development agreements” which relate to co-operative efforts to develop a particular technology; and, “monitoring and reporting agreements” which simply commit operators to providing information regarding their impact on the environment. See Bailey, *ibid.*, at 171-172.

²⁰⁸ *Ibid.*, at 172.

²⁰⁹ *Supra*, n. 169, para.6, at 7.

²¹⁰ See Bailey, *supra*, n. 187, at 172. See also, E. Rehbinder, “Self-regulation by Industry”, in G. Winter (ed.), *European Environmental Law* (Walter de Gruyter, Berlin, 1996), at 249.

²¹¹ *Supra*, n. 169, paras.7-9, at 7-8.

lead to a common understanding of environmental problems and mutual responsibilities” and that “agreements should be seen as the continuation of the partnership between authorities and industry rather than just the result of it”.²¹² However, Van Calster and Deketelaere suggest that industry already engages very fully and proactively in the regulatory process, at least at the European level.²¹³

3.2 Cost effectiveness

Secondly, the Commission suggests that, by permitting industry the freedom to decide, at the enterprise or sectoral level, on how to reach specified environmental objectives, environmental agreements allow industry to find the most cost-effective solutions which are tailored to the specific circumstances of the particular business or sector. For example, such agreements could take account of previous investments by industry in determining the appropriate environmental abatement technology to be employed. In contrast, it is often argued that command and control regulation lacks economic efficiency by imposing uniform reduction targets and technologies while ignoring the variable pollution abatement costs facing individual firms depending on such factors as the age and location of plant.²¹⁴ The 1996 Communication further suggests that the flexibility facilitated by the use of environmental agreements encourages creative solutions and technological innovations which may not only reduce compliance costs but also entail spin-off benefits, in that such innovative environmental solutions may yield competitive advantages. In contrast, traditional regulatory measures might stifle innovation as firms are forced to switch over to expensive, state-of-the-art equipment regardless of the existence of other, sometimes more effective, solutions at lower cost.²¹⁵ This flexibility stems from the relative lack of procedural formality which characterises the adoption and amendment of environmental agreements, in contrast to the requirements of parliamentary procedures for the adoption or amendment of traditional regulations. Further, the Communication points out that governmental regulatory agencies would need to expend fewer resources in drafting technologically detailed, site-specific environmental permits. However, one could argue that technological innovation should be a normal part of the industrial cycle and that it will be encouraged by market forces, regardless of the use of environmental agreements. Similarly, in relation to the technical complexity of permit requirements, Van Calster and Deketelaere point out that environmental permits do not always contain a detailed set of technical rules on how to achieve the relevant environmental objectives.²¹⁶ Indeed, the relevant legislation, and EC legislation in particular, often includes a significant amount of technical detail, “thus obviating the need for the administrative authorities to formulate such details in the permit”.²¹⁷ Further, the same

²¹² *Ibid.*, para. 7, at 7.

²¹³ *Supra*, n. 166, at 205.

²¹⁴ Verschuuren, *supra*, n. 172, at 107. See further, J. Golub, “New Instruments for Environmental Policy in the EU: Introduction and Overview”, in J. Golub (ed.), *New Instruments for Environmental Policy in the EU* (Routledge, London, 1998) 3. On the disadvantages of traditional command-and-control measures for environmental regulation generally, see R. I. Steinzor, “Reinventing Environmental Regulation: the Dangerous Journey from Command to Self-control”, (1998) 22 *Harvard Environmental Law Review* 117.

²¹⁵ See, Verschuuren, *ibid.*, and Golub, *ibid.*

²¹⁶ *Supra*, n. 166, at 206.

²¹⁷ *Ibid.*

commentators point out that one can argue that “flexibility in permits merely serves to shift the timing of costs borne by the government”.²¹⁸ They explain that

“Enforcement and control are arguably easier and less expensive when the government has already specified all details at the moment of drawing up the permit. Flexibility in the means to reach more generally specified goals may mean that the government may later face additional costs in having to assess the effectiveness of various methods used to reach these goals.”²¹⁹

3.3 Faster achievement of objectives

The 1996 Communication further suggests that environmental agreements might normally be concluded and implemented rather more quickly than legislation can be adopted. In relation to the timeframe required for the effective implementation of Community environmental legislation, the Commission points out that

“the average time between the Proposal for an environmental Directive and its adoption is well over two years with usually another two-year period for transposition by the Member States. Once a Directive is transposed, which in quite a number of cases happens belatedly, it still has to be implemented and applied.”²²⁰

Therefore, it suggests that “agreements might be a quicker and thus potentially more effective way of action, even if the negotiation and conclusion of an agreement takes more than a couple of months”.²²¹ However, there is no reason to suppose that the negotiations leading to environmental agreements would not be complex and protracted and so this advantage cannot be assumed. More significantly, seeking to conclude environmental agreements might actually result in delay where negotiations fail and the legislative process must be initiated belatedly. Indeed, environmental non-governmental organisations (NGOs) and the European Parliament have expressed their concern that negotiators are not legally accountable where negotiations falter and, consequently, that industry might employ negotiations as a means of delaying justified regulatory action.²²² Further, it appears that a possible solution to this drawback – the parallel negotiation of legislative measures and environmental agreements – would not be feasible²²³ and would anyway erode many of the cost efficiencies put forward by proponents of agreements.

3.4 Other advantages

Further arguments have been put forward for environmental agreements and for self-regulation generally. For example, Bailey notes that, in the experience of industry, “once implemented, environmental agreements are not subject to as much political influence and variation in interpretation as traditional legislation; thus, they are viewed as providing greater stability for long-term business planning.”²²⁴ Also, of particular significance for jurisdictions with federal or highly decentralised

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Supra*, n. 169, para. 9, at 8.

²²¹ *Ibid.*

²²² See Van Calster and Deketelaere, *supra*, n. 166, at 203 and 205.

²²³ *Ibid.*, at 207.

²²⁴ *Supra*, n. 187, at 173. See further, D. Liefverink, “New Environmental Policy Instruments in the Netherlands”, in J. Golub (ed.), *supra*, n. 214.

environmental regulatory decision-making structures, Bailey cites the approach taken by the Dutch authorities with a view to ensuring the achievement of uniform environmental standards. This approach envisages that “by targeting particular industrial sectors, similar standards will be applied to all firms, and municipalities will be discouraged from enacting legislation which prescribes different forms of treatment and/or standards.”²²⁵ In addition, Verschuuren suggests that such self regulation might lead to higher compliance rates due to the direct relationship which would exist “between those who conceive the rules and those bound by them”²²⁶ and, further, that “the active and direct participation of the actors involved may be regarded as a more direct form of democracy ...”²²⁷ He also suggests that, by taking a more environmentally pro-active role, enterprises might generally improve their image so as to stimulate environmentally responsive consumer behaviour and facilitate easier business dealings with banks and insurance firms.²²⁸

3.5 Risks

In addition to setting out the possible advantages of using environmental agreements, the 1996 Commission Communication outlines “certain risks”, which include:

- the need to define clear objectives from the outset, to aid transparency and to allow all stakeholders to participate equitably and effectively;
- the inclusion of clear enforcement mechanisms and sanctions; and
- avoiding the problem of “free riders”.²²⁹

In relation to the first, the Communication recommends that general environmental targets should be set through legislation as there will exist established and legally guaranteed procedures for public participation. This is particularly appropriate if, as Verschuuren suggests, “individuals and NGOs are no match for industry in the elaboration of self-regulatory rules”, so that “[S]elf-regulation harbours the risk that industry and business may come to dominate the regulatory process ...”²³⁰ The Commission suggests that the elaboration of legislative general targets will ensure that such targets are not lowered during negotiations. However, such an approach combining legislative instruments and agreements once again raises questions as to cost-effectiveness.

In relation to the inclusion of clear enforcement mechanisms and sanctions, the Communication refers to additional credible mechanisms for discouraging non-compliance including the application of public pressure, by offering the public opportunities for scrutinising implementation and compliance, and the prospect of introducing regulatory measures. However, where operators cannot be confident that a relevant legislative measure will not subsequently be introduced, perhaps due to changes in government or policy or due to the non-compliance of other operators, there exists a major disincentive to participating in an environmental agreement in the first place. As Verschuuren observes, “such

²²⁵ *Ibid.* See further, J. Koster, “Dutch environmental agreements”, *European Environment Review* (February 1993) 2, at 3.

²²⁶ *Supra*, n. 172, at 108-109.

²²⁷ *Ibid.*, at 109. See also, Golub, *supra*, n. 214, at 6.

²²⁸ *Ibid.*

²²⁹ *Supra*, n. 169, paras. 10-12, at 8-9.

²³⁰ *Supra*, n. 172, at 110.

‘legislative threats’ may frustrate the successful development of an effective regime of self-regulation”.²³¹

Finally, in relation to the problem of free-riding, where individual operators within the relevant sector do not sign up to the agreement, possibly because they are not members of the industry association with whom the agreement was negotiated, experience in the Netherlands has shown that this is likely to present a significant problem which could undermine the use of voluntary agreements as a viable means of self-regulation.²³² The Commission notes in the 1996 Communication that “the risk of free-riding rises with the marginal abatement costs implied by an agreement” and thus where there are greater competitive advantages on offer for those who do not participate.²³³ It suggests that the use of a mix of instruments including the introduction of certain benefits or incentives for those entering into an agreement might help to discourage free-riding. Another possible means of discouraging free-rider behaviour is by granting the parties the right to request that statutory authority be conferred upon the agreement, as is permitted in limited circumstances under the Dutch Environmental Management Act.²³⁴

4. GUIDELINES ON THE USE OF ENVIRONMENTAL AGREEMENTS

The 1996 Communication is primarily concerned with providing a set of guidelines for the use of environmental agreements, both in the application of Community law and in achieving environmental objectives totally independent of Community law.²³⁵ The Communication also contains a useful checklist for environment agreements which sets out a general schematic outline for the issues to be considered in choosing to use an agreement, for the actual content of such an agreement, and for ensuring compliance with the EC Treaty.²³⁶ In providing such guidance, the Communication reproduces all of the key conditions set out under the 1994 Flemish Decree²³⁷ and so this decree provides a useful model of “a legislative instrument in which the conditions and reservations regarding voluntary agreements are directly addressed”.²³⁸ Verschuuren favours such an approach, which he terms “conditional self-regulation”, where a generic legislative measure creates a legal framework within which self-regulation can operate, or where such a legal framework is provided on an *ad hoc*

²³¹ *Ibid.*

²³² J. W. Biekart, “Negotiated Agreements in EU Environmental Policy”, in J. Golub (ed.), *supra*, n. 214, 186. See Verschuuren, *ibid.*, at 111.

²³³ *Supra*, n. 169, para. 12, at 9.

²³⁴ Article 15.36 of the Environmental Management Act confers such a right in relation to “waste disposal fees” (levies imposed on products by the producers themselves, enabling them to take back and recycle their products when disposed of by consumers). See Verschuuren, *supra*, n. 172, at 115.

²³⁵ *Supra*, n. 169, paras. 17-30, at 11-17.

²³⁶ *Ibid.*, at 23.

²³⁷ *Supra*, n. 170.

²³⁸ See Van Calster and Deketelaere, *supra*, n. 166, at 207.

basis, for example under a permit.²³⁹ The Commission guidelines address a number of specific requirements discussed below.

4.1 Consultation / inclusiveness

The negotiating process should provide all interested stakeholders with the opportunity to comment on the draft agreement. The 1996 Communication states that

“In addition to those actually negotiating the agreement, all relevant business associations or companies concerned, environmental protection groups, local or other public authorities concerned should therefore be appropriately informed and comments should be taken into consideration in the final negotiation of the agreement.”²⁴⁰

In relation to the identification of the parties, Bailey explains that, in order to ensure that an agreement is not rendered meaningless, it is necessary not only to identify the industrial sectors directly involved, but also those sectors that could have a secondary impact, such as suppliers.²⁴¹ She also suggests that, where trade associations are involved, it is necessary to specify whether each trade association has the authority to act on behalf of its members or is acting in its own right.²⁴² In relation to public consultation, she suggests that

“it is important to distinguish between, and prioritise, the interests of those individuals directly affected (for example, the inhabitants of a municipality where a facility will be sited), and the interests of general environmental and consumer groups, whose agendas will often vary significantly.”²⁴³

In addition, those drafting an agreement should attempt to take account of all third parties, broadly defined. The Communication explains that

“Since Environmental Agreements are of public interest and part of environmental policy, third parties, including those that are not members of a business or trade association, should have *the right to join*. The conditions and procedure for adherence should therefore be defined.”²⁴⁴

Finally, all parties to an environmental agreement should be kept informed of proposed revisions and affected or interested third parties should be given adequate opportunity to review and comment on any such proposals.²⁴⁵

4.2 Contractual form

The Commission suggests that a contract provides the most appropriate legal format for concluding environmental agreements as contracts are binding on both parties and enforceable by the courts and can provide a clear framework for implementation including, for instance, sanctions in the case of non-compliance. A contract can function to clearly determine the precise rights and obligations of all the

²³⁹ *Supra*, n. 172, at 113-116.

²⁴⁰ *Supra*, n. 169, para.18, at 11.

²⁴¹ *Supra*, n. 187, at 173-174.

²⁴² *Ibid.*, at 174.

²⁴³ *Ibid.*

²⁴⁴ *Supra*, n. 169, para. 26, at 14 (original emphasis).

²⁴⁵ Bailey, *supra*, n. 187, at 174.

parties. For example, where a trade association is involved, there may be one set of obligations for its members (such as the reduction of emissions), and another set of obligations for the association itself (such as the collection of data). Also, for sectoral agreements it is necessary to indicate the contribution of each firm within the sector.²⁴⁶

Of course, an environmental agreement may often be enforced as a private contract, where one party can claim damages or injunctive relief in private law for breach of contract against another party to the agreement. Where one competitor in a market suffers loss by virtue of another's failure to comply with its obligations under the agreement, damages could be assessed in a manner similar to those awarded under competition law or under so-called "economic torts" of common law jurisdictions. Having regard to the possibility of enforcing environmental agreements as contracts, Bailey, referring to the structural divisions in continental civil code legal systems, usefully suggests that

"Each environmental agreement should indicate whether it is subject to civil or public law, where appropriate given the legal system of the relevant Member State. This definition of its legal nature may determine the applicable contract law, the system of liability to which it is subject, and the tribunal having jurisdiction to determine its legality."²⁴⁷

However, uncertainties as to the appropriate scope of application of public and private law might persist in certain Member States. For example, despite the fact that under Dutch law environmental covenants are considered private contracts for legal purposes, the Dutch courts have held that government cannot use a private law power to override a legal obligation existing in public law. In the *Hydro Agri* case, a firm was granted a surface waters emissions permit under a covenant with a permitting authority but a court overturned the permit as it did not have regard to the underlying instrument of public law requiring reductions greater than those under the covenant.²⁴⁸

4.3 Quantified objectives

The Commission strongly proposes that the contract should include quantitative targets, rather than "best effort clauses", involving a more general obligation to reach a certain but open-ended goal.²⁴⁹ Van Calster and Deketelaere point out that "in practice, this means that either absolute numbers will have to be set out (*e.g.*, emission limits) or relative numbers (*e.g.*, a percentage reduction of emissions compared to a base year)".²⁵⁰

4.4 Staged approach / interim goals

The Commission strongly recommends the setting of clear interim environmental goals in the agreement, involving a defined timetable and "milestones".²⁵¹ However, this is not so much to impose interim obligations on industry as to facilitate the early detection of problems with the operation of the

²⁴⁶ See generally, Bailey, *ibid.*

²⁴⁷ *Ibid.*, at 178. Bailey goes on to present a detailed contractual analysis of environmental agreements under the headings of: *Offer, Acceptance and Consideration; Third Party Beneficiaries; and Damages, ibid.*, at 178-179.

²⁴⁸ See further, Bailey, *ibid.*, at 178.

²⁴⁹ *Supra*, n. 169, para. 20, at 12.

²⁵⁰ *Supra*, n. 166, at 208.

²⁵¹ *Supra*, n. 169, para. 21, at 12.

agreement. Such early detection might assist the authorities in determining at an early stage whether legislation to complement or substitute the agreement would be necessary.

4.5 (Central) monitoring of results

The Commission notes that the results of agreements must be monitored and collected and implies that this should be done centrally by emphasising that “it is important to ensure sufficiently complete, comparable and objective data, i.e. monitoring must be organized in such a way as to give sufficient guarantees of reliability and accuracy”.²⁵² It further suggests that existing Community legislative instruments and institutions, such as the Eco-management and Audit Scheme (EMAS)²⁵³ and the European Environment Agency (EEA),²⁵⁴ could have an important role to play in this regard. EMAS, in particular, could provide a framework within which industrial operators could measure their environmental performance. However, the entire issue of monitoring, and in particular the question of who, among industry, government or third parties, should be given responsibility to conduct the monitoring, may prove controversial.²⁵⁵

4.6 Transparency / public access to information

The Commission suggests that all environmental agreements should be published either in the Official Journal of the European Communities or in a similar and equally accessible official publication.²⁵⁶ It also proposes that a central register should be maintained which would provide an official database of such agreements. Clearly, the EEA could undertake this function. The Communication also suggests that amendment of the Directive on the Freedom of Access to Information on the Environment²⁵⁷ should be considered, whereby the companies or public authorities which are party to an agreement would be obliged to grant any individual access to all relevant information relating to the agreement. However, Bailey suggests that subjecting private enterprises to the same procedures as public authorities under the directive, or under corresponding national transposition measures, might prove unduly burdensome and therefore create a disincentive to companies to participate in agreements.²⁵⁸ She suggests that it would be more appropriate for the environmental agreement simply to provide that the public authorities involved in the negotiation or supervision of the agreement must make information and reports on the agreement available to the general public.

4.7 Independent verification of results

The Commission suggests that the independent verification of results might be necessary in certain circumstances, specifically where, due to a lack of Community harmonisation, differing measuring

²⁵² *Supra*, n. 169, para.22, at 12.

²⁵³ Council Regulation 1836/93 of 29 June 1993 allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme, [1993] OJ L168/1.

²⁵⁴ Regulation 993/99, amending Regulation 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network, [1999] OJ L117/1.

²⁵⁵ See further, Bailey, *supra*, n. 187, at 174-176.

²⁵⁶ *Supra*, n. 169, para. 23, at 13.

²⁵⁷ Directive 90/313, [1990] OJ L158/56.

²⁵⁸ *Supra*, n. 187, at 176.

methodologies are employed, or where disclosure of results needs to be restricted on grounds of commercial confidentiality.²⁵⁹ However, it also suggests that the requirements in relation to independent verification should be set down in the agreement rather than under legislation. The use of independent third parties to monitor and verify the results of environmental agreements has been crucial for the success of a number of Dutch regimes.²⁶⁰ For example, a secondary group independent of government, NOVEM, was established in the early 1990s to analyse data collected from firms or trade associations party to environmental agreements.²⁶¹ More specifically, the *Overleggroep Chemische Industrie* (OCI), composed of representatives of both public authorities and the chemicals industry, analyses the total results of the environmental plans prepared by companies participating in the 1993 Chemicals Covenant and compares them with the objectives of the Covenant.²⁶² Similarly, and independent organisation, RIVM, was established to collect and publish the results of the Dutch Covenant on Packaging waste.²⁶³

4.8 Additional guarantees / measures to ensure effective implementation

While the Commission would appear to rely primarily on the possibility of enforcing environmental agreements through the courts or arbitration, the Communication also makes mention of the following means of enforcement.²⁶⁴

4.8.1 Fines and penalties in the case of non-compliance

There would appear to be a need for formal sanctions in all agreements and they would often contain provisions whereby parties agree to resolve disputes about compliance and sanctions before a mediator, arbitrator or independent panel. However, ultimate recourse to the courts would always need to be available. Problems may arise where the obligations on parties to an agreement are expressed in vague terms, for example, where they refer only to goals or aspirations as opposed to clearly enforceable commitments. Also, if the relevant governmental agencies have not been granted proper statutory authority to act the courts may be reluctant to enforce the terms of agreements that have not been entered into pursuant to the government's legislative powers. This problem would not arise in the case of jurisdictions such as Denmark, where the 1991 Environmental Protection Act authorises the Environment Minister to establish framework rules for environmental agreements and to set out penalties for failure to comply or for delay in compliance.²⁶⁵

²⁵⁹ *Supra*, n. 169, para. 24, at 13.

²⁶⁰ See further, Bailey, *supra*, n. 187, at 175.

²⁶¹ *Ibid.* Though Bailey reports that a Dutch court has ruled that, while it may be possible to establish an independent body to collect, evaluate and verify results, the government cannot delegate responsibility for the provision to the public of all information concerning the covenants.

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Supra*, n. 169, para. 25, at 14.

²⁶⁵ See further, Bailey, *supra*, n 187, at 176.

4.8.2 *Amendments to the relevant permits, when they come up for renewal or in the event of non-compliance with the agreement*

The Commission recognises that linking unilateral commitments to licensing procedures, whereby the commitment and sanctions can be a condition of a corresponding licence or licence renewal, makes such commitments significantly more enforceable. Bailey reports that such a system is popular in the Netherlands, where some covenants operate alongside permitting procedures and allow the authorities to impose stricter conditions under the permit in the case of non-compliance with the covenant.²⁶⁶

4.8.3 *The determination of the authorities to introduce regulatory measures if agreements fail to reach the set target*

Bailey points out that the Danish Environmental Protection Act of 1991 also authorises the Environment Minister to prepare parallel regulations in order to sanction free-riders and to provide an incentive to companies to join and to comply fully with environmental agreements.²⁶⁷

4.9 General (formal) provisions

The 1996 Communication also lists a number of “general provisions”, relating to the form which environmental agreements should take. Many of these “core” provisions are stipulated under the 1994 Flemish Decree.²⁶⁸ The Commission strongly recommends that the following provisions be included in all agreements:²⁶⁹

1. The parties to the environmental agreement must be clearly indicated. Where business associations are involved, it should be indicated whether they act on behalf of their members or on their own authority.
2. It is necessary to make clear the specific responsibilities of all parties in relation to the objectives. For instance, where business associations are party to the agreement, it is necessary to clearly distinguish between their obligations and those of their members.
3. All key terms, including, in particular, technical terms, must be clearly defined having regard to existing definitions in relevant legislation.
4. Relevant third parties, including industrial operators who are not members of a business association, should have the right to subscribe to the agreement. The conditions and procedure for so joining should therefore be defined.
5. The duration of the environmental agreement should be indicated.
6. A revision of the agreement must be possible in order that new findings, adaptations to technical progress, or altered market conditions can be taken into account.
7. Unilateral termination of a binding agreement must be allowed by either party in response to non-compliance (or, possibly, a lack of good faith). Industry may be allowed to revoke its commitment if, contrary to the common understanding when the agreement was concluded, additional regulatory measures or taxes directly relating to the subject matter of the agreement are introduced.
8. The agreement should specify a dispute settlement procedure.

²⁶⁶ *Ibid.*, at 177.

²⁶⁷ *Ibid.*, at 176.

²⁶⁸ *Supra*, n. 170. See further, Van Calster and Deketelaere, *supra*, n. 166, at 209-210.

²⁶⁹ *Supra*, n. 169, para.26, at 14-15.

5. COMPATIBILITY WITH THE EC TREATY

The case law of the European Court of Justice (ECJ) is quite clear that, where the Community legislation to be implemented creates rights and duties for individuals, it may only be transposed at the national level by means of formal statutory instruments.²⁷⁰ Equally clearly, environmental agreements must comply with the substantive provisions of the EC Treaty and with legislation adopted under the Treaty to give effect to these provisions.²⁷¹ Such agreements have the potential to run counter to substantive Treaty rules in three main areas: the rules relating to the creation of the internal market, EC competition rules, and rules relating to permissible state aid. A related issue concerns the significance of the cross-cutting “principle of integration” set out under article 6 of the EC Treaty, which impacts upon the application of Community internal market, competition and State aid rules to environmental protection measures such as environmental agreements.²⁷² In addition, such agreements ought to be fully compatible with international trade rules, in particular the Technical Barriers to Trade Agreement, adopted under GATT and WTO rules.²⁷³

5.1 Internal market

Even in the absence of relevant Community harmonising measures or standards, an agreement may not in any way hinder the free movement of goods provided for under articles 28-30 (ex articles 30-36) of the EC Treaty, except to the extent that such a restriction on trade is justified under the policy exceptions listed under article 30 (ex article 36) or under the so-called “rule of reason” as developed by the ECJ.²⁷⁴ For the purposes of article 28 (ex article 30), the Court has broadly interpreted “measures having an effect equivalent to quantitative restrictions” as including any trading rules enacted by Member States that are capable of hindering, either directly or indirectly, actually or potentially, intra-Community trade,²⁷⁵ and so any agreement requiring that certain product standards be met or providing fiscal or other incentives for products which meet such standards could clearly qualify. Indeed, the ECJ has on several occasions considered whether voluntary agreements might qualify under the so-called *Dassonville* formula. In *Commission v. Ireland*, which concerned a Government-sponsored “Buy Irish” campaign, the Court considered the extent to which the voluntary programme had the potential to impact adversely on imports, and so affect trade between Member States, and found that the non-binding nature of the measures, which included a publicity campaign and a “Guaranteed Irish”

²⁷⁰ *Supra*, n. 181.

²⁷¹ See the 1996 Commission Communication on Environmental Agreements, *supra*, n. 169, paras. 27-29, at 15-17. See also, the 2001 Commission White Paper on European Governance, *supra*, n. 197, at 21.

²⁷² Art. 6 provides that

“Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in article 3, in particular with a view to promoting sustainable development”.

²⁷³ Commission Communication, *supra*, n. 169, para. 30, at 17.

²⁷⁴ In the *Cassis de Dijon* case, Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, the ECJ held, at 662, that obstacles to the free movement of goods within the Community relating to the marketing of products must be accepted in so far as the relevant provisions are necessary to satisfy mandatory requirements relating “in particular” to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defence of the consumer.

²⁷⁵ Case 8/74, *Procureur du Roi v. Benoit and Gustave Dassonville*, [1974] ECR 837, at para.5.

symbol, did not make them incapable of falling within the scope of ex article 30 (new article 28).²⁷⁶ In *Apple and Pear Council v. Lewis*, the Court held that, where a charge on growers intended to finance the promotion and improvement of indigenous fruit was imposed by national regulations, it was capable of falling within article 30 irrespective of the fact that the entire scheme was introduced and continued with the support of growers after consultation.²⁷⁷ The Court considered State involvement to be a very significant factor, stating that

“a body such as the development council, which is set up by a government of a Member State and is financed by a charge imposed on growers, cannot under Community law enjoy the same freedom as regards the methods of advertising as that enjoyed by producers themselves or producers’ associations of a voluntary character.”²⁷⁸

Similarly, in *R. v. The Pharmaceutical Society, ex parte API*, the Court held, in relation to codes of professional ethics issued by a legally recognised body, that

“measures adopted by a professional body on which national legislation has conferred powers of that nature may, if they are capable of affecting trade between Member States, constitute ‘measures’ within the meaning of article 30 of the Treaty.”²⁷⁹

The exceptional grounds listed under article 30 include, *inter alia*, “the protection of health and life of humans, animals and plants”, which might in certain circumstances encompass environmental objectives. The “rule of reason” effectively expands upon the narrowly interpreted list of policy exceptions set out under article 30 by identifying a number of “mandatory requirements”, which might in certain circumstances justify barriers to trade, including, *inter alia*, that of environmental protection or improvement.²⁸⁰ Though a comprehensive account of the detailed conditions applying to the application of article 30 or of the “rule of reason” is beyond the scope of this work, it is widely accepted that each involves the application of a “proportionality” test to determine the necessity of any resulting restriction on trade having regard to the legitimacy of the policy aim, in this case an environmental objective, being pursued.²⁸¹

Similarly, where national measures set higher environmental standards than any existing at the Community level, either on the basis of a right to do so under the Treaty²⁸² or under the relevant

²⁷⁶ Case 249/81, [1982] ECR 4005. See R. Khalastchi and H. Ward, “New Instruments for Sustainability: An Assessment of Environmental Agreements under Community Law”, (1998) 10 *Journal of Environmental Law* 257, at 276.

²⁷⁷ Case 222/82, [1983] ECR 4083.

²⁷⁸ *Ibid.*, at para.17.

²⁷⁹ Case 266/87, Judgment, para.15. This case was followed in Case 292/92, *Ruth Hünermund and Others v. Landesapothekerkammer Baden-Württemberg*, which concerned professional conduct rules of the professional association of pharmacists in the State of Baden-Württemberg.

²⁸⁰ Case 302/86, *Commission v. Denmark (Danish Bottles)* [1988] 1 ECR 4607.

²⁸¹ On the application of the proportionality test to trade restrictive national environmental measures, see further, O. McIntyre, “Proportionality and Environmental Protection in EC Law”, in J. Holder (ed.), *The Impact of EC Environmental Law in the United Kingdom* (Wiley, Chichester, 1997) 101.

²⁸² In the case of Community environmental measures adopted under art. 175 (ex art. 130s), Member States may, under art. 176 (ex art. 130t), maintain or introduce more stringent protective measures, provided that these are compatible with the Treaty and are notified to the Commission. In addition, under art. 174(2) (ex art. 130r(2)), Member States may adopt provisional measures for non-economic reasons and these measures are subject to Commission inspection. In the case of Community internal market measures adopted under art. 95 (ex art. 100a), Member States may, on grounds of protection of the environment or working environment or of new scientific evidence, maintain or introduce more stringent protective measures under arts. 95(4) and (5). Again, such measures must be notified to the Commission for approval.

Community Directive,²⁸³ the Member State concerned must notify the Commission of such measures. The Commission must then satisfy itself that the measures are compatible with the objectives of the Treaty, in particular that of the free movement of goods. Such compatibility is determined on the basis of a similar application of the proportionality test.²⁸⁴ In addition, where a national measure seeks to introduce product standards or other technical specifications, Community law sets down a procedure whereby the Commission must first be notified and other Member States are then given the opportunity to inform the State concerned of any objections they may have.²⁸⁵ This would also apply to any environmental agreement seeking to introduce such standards or specifications. Therefore, the European Commission would often be required to act as a “clearing house”, assessing the compatibility of individual environmental agreements with governmental authorities which are likely to in any way restrict the free movement of goods.

5.2 Competition law

Whereas the Treaty’s internal market trade provisions apply exclusively to Member States, its competition provisions, primarily set out in articles 81 and 82 (ex articles 85 and 86), apply to undertakings and might act to restrict any collaboration between industrial competitors which has the effect of restricting access to markets or fixing prices. It is quite clear that agreements under which industrial undertakings agree to share information on technology or costs or to buy, sell or use particular environmentally sound products, might fall foul of Community competition rules.²⁸⁶ Also, though the competition provisions apply exclusively to undertakings, article 10 requires Member States generally to “abstain from any measure which could jeopardise the attainment of the objectives of this Treaty”, an obligation which has been interpreted to mean that States are under a duty “not to adopt or maintain in force any measure which could deprive the competition laws of their effectiveness”.²⁸⁷ Therefore, a Member State might be in breach of its general obligations under the Treaty where its public authorities enter into an environmental agreement which could adversely affect competition. Of course, article 81 only applies to a freely concluded agreement and so “could not apply where State intervention, even if it does not translate into a legally binding measure, exerts a *decisive influence* on the undertakings’ behaviour” and “all possibilities of competition have been eliminated”.²⁸⁸ Indeed, there is likely to be a significant measure of overlap between the trade and competition provisions as the ECJ has noted in *Inno v. ATAB*:

“In any case, a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between member states will generally be incompatible with

²⁸³ See, for example, art. 14 of Directive 79/409/EEC on the conservation of wild birds, [1979] OJ L103/79, which states that “Member States may introduce stricter protective measures than those provided for under this Directive”. See further, Case C-169/89 *Gourmellerie Van den Burg* [1990] ECR 2143.

²⁸⁴ See McIntyre, *supra*, n. 281.

²⁸⁵ Directive 98/34 laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L204/37.

²⁸⁶ See further, Khalastchi and Ward, *supra*, n. 276, at 279 *et seq.*, and H. H. B. Vedder, “Competition Law and the Use of Environmental Agreements: The Experience in Europe, an Example for the United States”, in E. W. Orts and K. Deketelaere (eds.), *supra*, n. 166, 247.

²⁸⁷ Case 13/77 *Inno v. ATAB*, [1977] ECR 2115.

²⁸⁸ For an account of the case law of the ECJ on this point, see D. Geradin, “EC Competition Law and Environmental Protection: Conflict or Compatibility?”, (2002) 2 *Yearbook of European Environmental Law* 117-154, at 132-133 (original emphasis).

articles 30 and 34 [new article 28], which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect.”²⁸⁹

In relation to the question of which measures might apply to an agreement offending against both trade and competition rules, Khalastchi and Ward point out that the scope of application of article 28 and articles 81 and 82 differ in a number of respects.²⁹⁰ For example, it is clear that article 28 does not apply in relation to trade with third countries,²⁹¹ while articles 81 and 82 apply to anti-competitive practices involving enterprises in third countries which have an adverse effect of trade within the European Community. However, by pointing out that in *Inmo v. ATAB* the government measure did not actually involve industry, and thus that article 30 (new article 28) was invoked, these commentators suggest that the key consideration might be the involvement of industry in causing a distortion of competition, in which case the competition provisions would be applied first.²⁹²

5.3 Article 81

Article 81 generally applies to prohibit and render void

“all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.”

It is quite clear that voluntary agreements between undertakings for environmental objectives could fall within the scope of article 81(1), which expressly lists as examples of offending arrangements between undertakings, *inter alia*, those which “directly or indirectly fix purchase or selling prices”, limit or control production, markets, technical development or investment, or “share markets or sources of supply”. Indeed, Geradin, citing examples, lists five categories of environmental agreement to which article 81 can be applied:²⁹³

- Agreements aiming at the development of common technical standards, or labels certifying conformity of labelled products with certain environmental norms;
- Agreements aiming at the joint development (for instance through the creation of joint ventures or cooperation agreements) of new, less polluting production methods or products;
- Agreements pursuant to which competitors agree to reduce, by a certain margin, the energy consumption of their products;
- Agreements between undertakings pursuant to which they decide to set up common waste-collection and recycling schemes; and
- Agreements in which competitors agree to pass on to consumers the costs of compliance with certain environmental measures through a uniform price increase.

Prominent examples include the German DSD (*Duales System Deutschland GmbH*) agreement between more than 400 undertakings for the recycling of packaging waste, which provided for the awarding of the “Green Dot”. The German Federal Cartel Office found that the general intention of parties to the agreement to buy or sell only goods in packaging bearing the “Green Dot” amounted to “a

²⁸⁹ *Supra*, n. 287. See Khalastchi and Ward, *supra*, n. 276, at 280.

²⁹⁰ *Ibid.*

²⁹¹ Case 51/75, *EMI Records v. CBS United Kingdom*, [1976] ECR 811.

²⁹² *Supra*, n. 276, at 281.

²⁹³ *Supra*, n. 288, at 122-123.

possible violation of the German cartel ban which results necessarily from the fact that there is only a single system, the DSD”. However, the German authorities gave approval for this scheme on condition that it does not obstruct technological development of new, environmentally sound packaging methods and is not applied in a discriminatory manner.²⁹⁴ Similarly, in the *International Fruit Container Organisation (IFCO)* case, which involved a company established by a group of German fruit and vegetable traders to promote a system of re-usable plastic crates and, for a fee, to produce, supply, take back and clean the crates, the Commission considered that, due to its allegedly exclusive character and the collective fixing of costs between traders of the packaging, the system was liable to affect competition from third parties by hindering their access to the market. Ultimately, in order to qualify for “negative clearance” or an exemption under article 85 (now article 81), *IFCO* undertook to make some necessary changes to the scheme.²⁹⁵

Article 81(3) provides for an exemption where such an arrangement “contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit”, and where the restrictions imposed are “indispensable to the attainment of these objectives” and the undertakings concerned are not afforded “the possibility of eliminating competition in respect of a substantial part of the products in question”. Such exemption may take the form of an individual exemption or a block exemption. In practice, where an individual exemption is applied for, the Commission may either declare that the agreement does not fall within the prohibition contained in article 81(1), *i.e.* grant “negative clearance”, or grant an exemption to which conditions may be attached. A number of classes of block exemption exist and apply to all agreements of a certain type which meet the requirements set down under various Commission regulations, a number of which may be applicable to certain environmental agreements.²⁹⁶ Further, though article 81 does not list environmental protection among the positive conditions allowing the grant of an exemption,²⁹⁷ in its 1995 Report on Competition Policy, the Commission acknowledged that “voluntary [environmental] agreements ... may contain restrictions of competition under [ex] article 85(1) of the Treaty” but conceded that exemptions would be granted where the environmental benefits of the agreement outweigh its anti-competitive effects.²⁹⁸ This language suggests strongly that a proportionality test will be central to an assessment of the validity of such agreements which may operate to restrict competition and the Commission Report expressly states that

²⁹⁴ See further, Khalastchi and Ward, *supra*, n. 276, at 281-282.

²⁹⁵ Case IV/34.415, [1997] OJ C48/4. See Khalastchi and Ward, *ibid.*, at 282.

²⁹⁶ Including Regulation 417/85 on specialisation agreements (as amended by Regulation 151/93), Regulation 418/85 on research and development agreements (as amended by Regulation 151/93), Regulation 2349/84 on patent licensing (as amended), Regulation 556/89 on know-how licensing (as amended), Regulation 240/96 on technology transfer agreements, and Regulation 4087/88 on franchise agreements. See Khalastchi and Ward, *ibid.*, at 282-283.

²⁹⁷ Geradin notes, *supra*, n. 288, at 123, that

“Some authors have suggested the introduction of the principle of integration into the Treaty has had the effect of adding a third negative condition to Art. 81(3) EC pursuant to which no agreement can be exempted unless it is proved it has no negative impact on the environment.”

However, he himself concludes that such a test would be extremely difficult to apply in practice, requiring an environmental impact assessment of all notified agreements, and suggests that it appears more logical to integrate this dimension into the analysis of proportionality.

²⁹⁸ XXV Report on Competition Policy (1995).

“When the Commission examines individual cases, it weighs up the restrictions of competition arising out of an agreement against the environmental objectives of the agreement and applies the principle of proportionality in accordance with [ex] article 85(3).”²⁹⁹

Therefore, the Commission assumes that the Treaty requires a balancing of the objectives of competition policy and environmental policy and, in this way, seeks to give effect to the principle of integration, under which environmental concerns are to be integrated into the implementation of all areas of Community policy.³⁰⁰ In this instance, the Commission is required to take the environmental benefits of an agreement into account in deciding, under the established exemption procedure under article 81(3), whether or not to tolerate potentially anti-competitive practices. In addition, the 2000 guidelines on the applicability of article 81 to horizontal cooperation³⁰¹ expressly refer to environmental agreements and have been applied in relation to such an agreement in the *CECED* case.³⁰²

5.4 Conditions for the grant of an exemption

It is clear from a reading of article 81(3) that, in addition to the requirement of a proportionate balancing of environmental and competitive objectives, there exists an exhaustive list of four conditions for the grant of an exemption, two positive and two negative, all of which must be satisfied.

5.4.1 Improving the production or distribution of goods or promoting technical or economic progress

In the *Assurpol* case, the Commission exempted agreements relating to a French co-reinsurance pool covering risks of environmental damage on the grounds that the long time delays often involved in cases of environmental damage and the lack of reliable statistical data made environmental damage risks difficult to insure. It stated that the cooperation involved made it “possible to improve the knowledge of risks, create financial capacity and develop technical expertise in insuring environmental damage risks”.³⁰³ Therefore the pool ensured wider availability on the market of a more effective insurance product.³⁰⁴ In relation to this decision, Geradin suggests that “this flexible interpretation of the concept of “technical and economic progress”, which takes into account environmental considerations, appears to be in conformity with the principle of integration found in article 6 EC”.³⁰⁵ In the *Carbon Gas Technology* case, the Commission granted an exemption, on the grounds of its potential to promote technical progress, to an agreement concluded between a number of German companies aimed at developing a process for coal gasification, noting that “using the resulting gas in the conversion process of power stations should be more efficient and less harmful to the environment

²⁹⁹ *Ibid.*

³⁰⁰ *Supra*, n. 272.

³⁰¹ Competition Rules Relating to Horizontal Cooperation Agreements – Communication Pursuant to article 5 of Council Reg. (EEC) No. 2821/71 on the Application of Art. 81(3) EC to Categories of Agreements, Decisions and Concerted Practices Modified by Reg. (EEC) No. 2743/72, [1972] OJ C118/3, [2000] OJ C3. See Geradin, *supra*, n. 288, at 129.

³⁰² Commission Decision 2000/475/EC, [2000] OJ L47/54. See Geradin, *ibid.*

³⁰³ Commission Doc. 92/96/EEC, [1992] OJ L37/16.

³⁰⁴ T. Portwood, *Competition Law and the Environment* (Cameron May, 1994), at 146. See further, Khalastchi and Ward, *supra*, n. 276, at 283-284.

³⁰⁵ *Supra*, n. 288, at 124.

than direct combustion of coal”.³⁰⁶ In the *BBC Brown Boveri* case, the Commission, in approving on grounds of promoting technical or economic progress an agreement between that company and a Japanese rival relating to the joint development of high performance batteries for use in electrical vehicles, noted the close link between that ground and that of benefiting consumers, stating that:

“An electrically driven vehicle causes no damage to the environment through harmful exhaust emissions or loud engine noise. There is therefore much to be said for the co-operation agreement in terms of improvement of the quality of life of consumers through the development of batteries for vehicles.”³⁰⁷

At any rate, it is quite clear that environmental benefits may in many instances be equated with improving the production or distribution of goods or promoting technical or economic progress.

5.4.2 *Allowing consumers a fair share of the resulting benefit*

In the *KSB/Goulds/Lowara/ITT* case, the Commission expressly equated the “environmentally beneficial” characteristics of pumping technology developed under a joint research, development and production agreement with forms of technical progress of which consumers would get a fair share.³⁰⁸ Similarly, in the *Exxon/Shell* case, the Commission considered the environmental benefits of a joint venture in assessing the benefit to consumers, stating that the avoidance of certain environmental risks “will be perceived as beneficial by many customers at a time when the limitation of natural resources and threats to the environment are of increasing public concern”.³⁰⁹

5.4.3 *The restriction must be indispensable to the environmental aim*

The test of “indispensability” corresponds with that of “necessity” as elaborated and applied in the context of the general principle of proportionality.³¹⁰ In other words, the Commission must balance the competition restrictions inherent in any environmental agreement with its environmental aims and ensure that there exists no less restrictive alternative, in terms of competition policy, capable of achieving those environmental aims.³¹¹ For example, in the *VOTOB* case, which concerned an agreement between six undertakings offering tank storage facilities to third parties in the Netherlands to impose a uniform “environmental charge” to cover the cost of investment required to reduce VOC vapour emissions from members’ tanks, the Commission found that the application of a uniform charge was not necessary and that a charge calculated independently by each member undertaking, on the basis of cost of necessary investment and having regard to prevailing market conditions and to its own competitive position, would have sufficed and would have had a less restrictive effect on

³⁰⁶ Commission Decision 883/669, [1983] OJ L376/27. See Portwood, *supra*, n. 304, at 144, Khalastchi and Ward, *supra*, n. 276, at 284.

³⁰⁷ Commission Decision 88/541, [1988] OJ L301/68. See Khalastchi and Ward, *ibid.*

³⁰⁸ Commission Decision 91/38, [1991] OJ L19/25.

³⁰⁹ Commission Decision 94/322, [1994] OJ L144/20. See Geradin, *supra*, n. 288, at 124.

³¹⁰ For a detailed account of the principle of proportionality, and its component test of necessity, as applied in the context of environmental protection and the free movement of goods, see McIntyre, *supra*, n. 281.

³¹¹ In its *XXIII Report on Competition Policy* (1993), the Commission stated, at para. 170, that it will

“have to weigh the restrictions of competition in the agreement against the environmental objectives that the agreement will help to attain, in order to determine whether, under the proportionality analysis, it can approve the agreement.”

See Geradin, *supra*, n. 293, at 124.

competition.³¹² The association had introduced the charge after concluding a covenant with the Dutch Government relating to the emissions standards applying to the storage of VOCs but the covenant did not provide for the introduction of a uniform, fixed price increase. Similarly, in the *Ansac* case, which involved an agreement by six producers of natural soda ash to conduct export sales exclusively through a jointly-owned company and thereby fixing prices, the Commission, while acknowledging the environmental superiority of natural soda ash over many alternative materials used in glass-making, applied the principle of proportionality in deciding not to grant an exemption.³¹³

5.4.4 No possibility of eliminating competition

Though the Commission will normally focus on market share in relation to this requirement, an exemption may still be granted where the co-operating undertakings have a very large share of the market but where there are exceptional circumstances. For example, in the *United Reprocessors* case, the Commission exempted a joint research, development and marketing agreement between three major reprocessors of nuclear fuels, who together had a 90 per cent market share with no effective competition in the Community outside the parties, after having regard to the special characteristics of the market, forecast trends and the limited duration of the exemption.³¹⁴ The *Oliebranches Faelleråd* case provides an instructive indication of the factors which the Commission might consider in relation to environmental agreements for the remediation of contaminated land.³¹⁵ It concerned the establishment by a Danish association of oil companies of an “Environmental Pool”, intended to finance the clean-up of polluted petrol station sites, and funded by a charge payable on oil sales by participating companies. The rules of the scheme stated that, where the Danish authorities ordered the clean-up of a polluted petrol station site and the owner did not have the necessary funds, the fund would pay for the remediation operations, provided that the site would remain closed after these were completed. If the site owner wished to reopen the station within ten years of the clean-up, he would have to reimburse the clean-up costs to the fund and pay an additional sum of DKR 250,000 (€33,616), ostensibly to prevent speculative applications to the fund. The Commission was concerned that the restrictions on reopening were unrelated to environmental protection and might be used to encourage independent operators to withdraw from the market and, generally, to regulate the number of stations. Therefore, it persuaded the parties to amend the rules so as to abolish the reopening penalty and to require any owner reopening to take out adequate insurance covering the risk of future pollution. Therefore it would appear that an environmental agreement to facilitate the remediation of contaminated land, whether self-funded by the relevant commercial sector or funded by government, for example by means of tax breaks, would not fall foul of article 81 provided it does not restrict future use of the remediated land in a way that might impact adversely upon competition.

³¹² XXII *Report on Competition Policy* (1992), at 177-186. See Khalastchi and Ward, *supra*, n. 276, at 285.

³¹³ OJ (1991) L152/54. See Portwood, *supra*, n. 304, at 148, Khalastchi and Ward, *ibid.*, at 285-286.

³¹⁴ Commission Decision 76/248/EEC. See Portwood, *ibid.*, at 157, Khalastchi and Ward, *ibid.*, at 286.

³¹⁵ XXIV *Competition Report* (1994), at 368. See Geradin, *supra*, n. 288, at 126.

5.5 Article 82

Article 82 (ex article 86) prohibits undertakings which enjoy considerable market power from using such power in an abusive manner and, though it does not expressly provide for exemptions, an informal system of exemptions has developed in practice, whereby the Commission balances any abusive practice against any benefit achieved.³¹⁶ The market “dominance” of an undertaking is measured relative to both the relevant product market and the relevant geographic market, and is found to exist where such undertakings “have power to behave independently ... without taking into account their competitors, purchasers or suppliers”.³¹⁷ Clearly, where undertakings establish special waste collection and recycling schemes, with a view to achieving economies of scale, they will usually do so on a collective basis and so will often occupy a dominant position in the market for collecting and recycling such waste. It is, however, the abuse of such a position that is prohibited and so such schemes are expected to refrain from behaviour such as that listed under article 82, including unfair pricing, the limiting of markets, discriminatory treatment of other trading parties, or “tying” trading parties to supplementary obligations. There is the potential for environmental protection objectives to conflict with the competition objectives of article 82 in two principal situations.³¹⁸ First of all, a dominant undertaking might set out to improve its own environmental performance by using its market power to force its suppliers to meet certain environmental criteria or standards. More commonly, however, a waste or packaging collection and recycling scheme in a dominant market position might refuse to allow undertakings access to its facilities for the purpose of placing their products on the market.

In *SPA Monopole v. GDB*, the Commission had to deal with a complaint by a Belgian mineral water producer against an association of German mineral water producers (GDB), which had established a recycling system for standardised refillable glass bottles and crates, over GDB’s refusal to allow it access to its pooling system for standardised refillable glass bottles.³¹⁹ In view of the fact that the recently introduced German Packaging Ordinance effectively banned non-refillable bottles unless there was an available system for their recycling, the Commission, while acknowledging the importance of environmental protection, took the view that refusal of access to certain producers constituted an abuse of a dominant position as the establishment of a new pool of refillable bottles was not a viable option. In so doing, the Commission adopted the concept of an “essential facility”, to which access must be granted in exchange for adequate compensation. The essential facilities doctrine will generally be allowed when two conditions are satisfied:

- there must be no viable alternative for the facility; and
- refusal of access will exclude competitors from an “upstream” market.³²⁰

³¹⁶ See Khalastchi and Ward, *supra*, n. 276, at 286, and Portwood, *supra*, n. 304, at 164.

³¹⁷ Case 6/72, *Europemballage Corp. v. Continental Can Co. Inc.* [1973] ECR 215.

³¹⁸ See further, Geradin, *supra*, n. 288, at 136.

³¹⁹ XXII *Report on Competition Policy* (1993), para. 240. See Khalastchi and Ward, *supra*, n. 276, at 286-287.

³²⁰ For an account of the case law of the ECJ on this point, see Geradin, *supra*, n. 288, at 137-138.

5.6 Rules on State aid³²¹

While environmental agreements might often purport to grant subsidies from public authorities or tax exemptions or relief as an incentive to undertakings to enter into such arrangements, such incentives might constitute State aid in breach of article 87 (ex article 92) of the Treaty, which contains a general prohibition on

“any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods ... insofar as it affects trade between Member States.”

It is clearly established that either direct subsidies or tax exemptions granted not only by central government, but also by regional or local authorities, will qualify as State aid for the purposes of article 87, but that so-called “regulatory subsidies”, whereby certain categories of undertakings are exempted from the scope of environmental rules, will not.³²² For example, in 1999, the Commission decided that a State subsidy for the decontamination of a polluted site has the effect of favouring the undertaking that owns the site, except where that undertaking is subsequently bound to repay the State-financed clean-up costs.³²³ Articles 87(2) and 87(3) provide, respectively, a list of exemptions that are compatible with the Treaty *per se*, and a list of classes of State aid which may be exempted. The potential exemptions of most relevance to environmental agreements are those contained under article 87(3)(b), which refers to “aid to promote the execution of an important project of common European interest”, and article 87(3)(c), which refers to “aid to facilitate the development of certain economic activities” which “does not affect trading conditions to an extent contrary to the common interest”. Certain procedures have emerged in relation to the approval of State aid generally, including notification requirements and a *de minimis* standard below which State aid is presumed not to have any effect on the common market.³²⁴

Despite cautious statements in the introduction to the Commission’s 1994 *Guidelines on State Aid for Environmental Protection*,³²⁵ it is quite clear that it was Commission policy to facilitate Member State initiatives which aim to encourage higher standards of environmental protection through the provision of governmental incentives, whether in the form of direct financial contributions, tax exemptions or a redistribution of revenues from levies. Indeed it has been suggested that, under both the Fifth Environmental Action Programme and the 1994 Guidelines, State aid for environmental protection was no longer regarded as an instrument belonging to a “transitional” period, but rather as one of the “new” instruments of environmental policy.³²⁶ More specifically, the Commission’s 1994 guidance on when

³²¹ See generally, G. Van Calster, “State Aid for Environmental Protection: Has the EC Shut the Door?”, (1997) No. 3, *Environmental Taxation and Accounting*, 38.

³²² For an account of the relevant ECJ case law and Commission practice, see Geradin, *supra*, n. 288, at 145.

³²³ Commission Decision 1999/272/EC on the Measure Planned by Austria for the Clean-Up of the Kiener Deponie Bachmanning Landfill, [1999] OJ L109/51. See Geradin, *ibid*.

³²⁴ See, *inter alia*, the Commission Decision of February 1990, OJ (1990) C40/2, amended by the Communication of 2 July 1992, OJ (1992) C213/10 and by the notification to the Member States of March 1996, OJ (1996) C68/9; Regulation 659/1999, OJ (1999) L83/1. See Van Calster and Deketelaere, *supra*, n. 166, at 215.

³²⁵ *Community Guidelines on State Aid for Environmental Protection*, [1994] OJ C72/3. The introduction to the 1994 Guidelines states that “[A]ids are not encouraged; aids are a second-best solution”. These guidelines expired on 31 December 2000.

³²⁶ Van Calster and Deketelaere, *supra*, n. 166, at 216.

State aid for the purpose of environmental protection might be permitted explained that, despite the fact that State aid would appear to conflict with the so-called “polluter pays principle”,³²⁷ the Commission aimed to strike a balance between the requirements of competition and environmental protection, to the extent that the State aid is only justified where the adverse effects on competition are outweighed by the benefits to the environment.³²⁸ The 1994 guidelines clearly envisaged investment aid associated with environmental agreements where they referred to “aid granted in the absence of mandatory standards on the basis of agreements whereby firms take major steps to combat pollution without being legally required to do so or before they are legally required to do so”, and authorised the grant of such aid “up to a maximum of 30 per cent gross of the eligible costs”.³²⁹ However, the rules applying are demanding³³⁰ and for aid to qualify under this heading it is required that:

- the investment allows significantly higher levels of environmental protection to be attained than those required by mandatory standards, and
- the level of aid actually granted is proportional to the improvement of the environment achieved.

Further, where both Community and national environmental standards exist, the stricter standard applies in order to assess the improvement achieved and, when a project involves both adaptation to standards and improvement on standards, the eligible costs relating to each element are considered separately for the purpose of applying the relevant percentage limits. In addition, the Member State must provide the Commission with convincing figures that mandatory environmental standards will effectively be met and improved upon significantly.³³¹ These same rules also apply in the absence of mandatory standards.³³² The Commission’s 1994 guidelines also referred to the relevant general exemptions set out under the Treaty and provide, in relation to aid exempted under article 87(3)(b), that Member States may be permitted to grant aid beyond the 30 per cent gross ceiling.³³³ However, in order for this exemption to apply,

“the aid must be necessary for the project to proceed and the project must be specific and well-defined, qualitatively important, and must make an exemplary and clearly identifiable contribution to the common European interest.”³³⁴

The Commission has approved aid proposed by the Netherlands in order to support a scheme promoting the recycling and environmentally responsible storage and disposal of manure.³³⁵ It had regard to ex article 130r (new article 174), setting down the objectives and guiding principles of Community environmental law-making, in order to conclude that, although the aid was likely to affect

³²⁷ As included among the guiding principles of Community environmental law-making under art. 174(2).

³²⁸ See Khalastchi and Ward, *ibid.*, at 288. The 1994 Guidelines replaced earlier guidance dating from 1974, see Communication from the Commission to the Member States of 6 November 1974, S/74/30807, and have now themselves been replaced by new guidelines issued in 2001, OJ (2001) C37.

³²⁹ Indeed, if the investment is made by an SME, the guidelines allow the grant of an extra 10 percentage points of aid. See See Khalastchi and Ward, *supra*, n. 286, at 288.

³³⁰ See further, Van Calster and Deketelaere, *supra*, n. 166, at 216.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ Guidelines, *supra*, n. 325, at para.3.7.

³³⁴ Khalastchi and Ward, *supra*, n. 286, at 288.

³³⁵ Commission Decision 92/316/EEC, OJ (1992) L170/34, reproduced in P. Sands and R. Tarasofsky (eds.), *Documents in European Community Law* (Manchester University Press, 1995), at 254.

trade and distort competition between Member States, it was compatible with the common market under ex article 92(3)(c) (new article 87(3)(c)).³³⁶ Indeed, after an assessment of the relevant Commission practice, leading commentators have concluded that “in the context of environmental agreements, where the State chooses to provide some form of subsidy, article 92 [new article 87] may not present too great an obstacle”.³³⁷

In 2001 the Commission published new *Community Guidelines on State Aid for Environmental Protection*,³³⁸ which explicitly aim to facilitate a number of environmental initiatives including, for example, contaminated land remediation. These guidelines replace the 1994 guidelines, under which aid for brownfield redevelopment did not receive express mention and could only be assessed on a case-by-case basis.³³⁹ The new guidelines contain a specific subsection E.1.8, under the heading of *Investment Aid*, which concerns the rehabilitation of polluted industrial sites where the person responsible for the pollution is not identified or cannot be made to bear the cost.³⁴⁰ Therefore, the 2001 Guidelines are quite specific and only apply to “orphaned” liability and where the remedial measures are to be undertaken by private enterprises rather than by public authorities. The Commission has approved a number of notified measures under subsection E.1.8, including the Dutch Soil Protection Agreement, or *Bedrijvenregeling*,³⁴¹ concerning a voluntary environmental agreement promoted by the Dutch authorities whereby they would reimburse up to 70% of the eligible costs of remediation where at least 80% of the pollution dates from before 1 January 1975 – the date before which no person can be held liable under Dutch law. Other examples include a scheme of State aid granted by the Italian government to encourage the remediation of polluted industrial sites in the Tuscany Region³⁴² and another Dutch measure to provide financial support to ensure the remediation of polluted former gas sites in the province of South Holland.³⁴³

³³⁶ See further, Khalastchi and Ward, *supra*, n. 286, at 289.

³³⁷ *Ibid.*

³³⁸ [2001] OJ C37/1.

³³⁹ Only one application to provide State aid for brownfield redevelopment was approved by the Commission under the 1994 Guidelines, *i.e.* the UK Gap funding case, Commission Decision of 22 December 1999 on aid scheme C 39/99 (ex E 2/97), EP/PIP Scheme, OJ (2000) L145. See further, B. Vanheusden, “Towards a Legal Framework in the EU for Brownfield Development”, (2003) 12 *European Environmental Law Review* 178, at 182-183.

³⁴⁰ The relevant subsection provides:

“Interventions made by firms repairing environmental damage by rehabilitating polluted industrial sites may come within the scope of these guidelines. The environmental damage concerned may be damage to the quality of the soil or of surface water or groundwater.

Where the person responsible for the pollution is clearly identified, that person must finance the rehabilitation in accordance with the “polluter pays” principle, and no State aid may be given. By “person responsible for the pollution” is meant the person liable under the law applicable in each Member State, without prejudice to the adoption of Community rules in the matter.

Where the person responsible for the pollution is not identified or cannot be made to bear the cost, the person responsible for the work may receive aid.

Aid for the rehabilitation of polluted industrial sites may amount to up to 100% of the eligible costs, plus 15% of the cost of the work. The eligible costs are equal to the cost of the work less the increase in the value of the land.”

³⁴¹ Commission Decision of 27 February, State aid N 520/2001 – Netherlands, OJ (2002) C146.

³⁴² Commission Decision of 15 November 2002, State aid N 424/2001 – Italy – Tuscany Region, OJ (2003) C78.

³⁴³ Commission Decision of 3 December 2002, State aid N 414/2002 – Netherland – Province of South Holland, OJ (2003) C82.

6. INTERNATIONAL TRADE AND WTO RULES

It should also be noted that there exists the potential for tensions between environmental agreements establishing product standards and international trade rules, in particular the Technical Barriers to Trade (TBT) Agreement.³⁴⁴ The 1996 Commission Communication on Environmental Agreements notes that

“the principle of national treatment of GATT article III, which requires imported goods to be treated in the same way as domestically produced goods, has to be respected. It is thus important to ensure that foreign producers are allowed to enter into an agreement under no less favourable conditions than national industry, if that agreement has effect on international trade.”³⁴⁵

The Commission Communication further points out that technical specifications for products, whether mandatory “technical regulations” or merely non-mandatory “standards”, must comply with the rules governing consultation and non-discrimination in the TBT.³⁴⁶ Article 2(2) of the TBT Agreement establishes a general prohibition on trade restrictive technical regulations, even where such regulations are non-discriminatory, but exempts measures that are necessary and proportionate to achieve a legitimate goal, including protection of the environment.³⁴⁷ Clearly agreements which are sanctioned under government regulations and intended to set higher environmental standards for products or waste than the minimum standards strictly required under Community law could turn out to be in breach of article 2(2). More specifically, article 2(8) of the TBT Agreement requires that “wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics”, and so statutorily sanctioned agreements might fail to comply which, for example, restricted products containing certain substances, in spite of the fact that performance requirements could have achieved the same objective.

7. CONCLUSION

This chapter has attempted to demonstrate that environmental agreements have a potentially significant role to play in overcoming the problems inherent in trying to introduce national legislative measures to transpose and implement the ever growing body of Community environmental legislation. In addition

³⁴⁴ See further, E. Tufet-Opi, “Life After End of Life: The Replacement of End of Life Product Legislation by a European Integrated Product Policy in the EC” (2002) 14 *Journal of Environmental Law* 33, at 39-42.

³⁴⁵ *Supra*, n. 169, para. 30, at 17.

³⁴⁶ *Ibid.*

³⁴⁷ Art. 2(2) provides that:

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; *protection of human health or safety, animal or plant life or health, or the environment*. In assessing such risks relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.” (Emphasis added).

to the resources involved, Community environmental law may be beset by legal uncertainties³⁴⁸ and environmental agreements allow Member States some flexibility to proceed, in the face of such uncertainty, to take action to encourage or compel operators to conduct their operations in an environmentally sound manner. Indeed, environmental agreements might be effectively used to overcoming serious legal indeterminacy in any aspect of national or Community environmental law. While it would clearly be preferable to have a formal and detailed legislative framework designed specifically to regulate the use of environmental agreements (and other forms of self-regulation), the absence of such a framework at the Community level does not necessarily preclude their use.³⁴⁹ Also, while a line of ECJ case law suggests that directives must be implemented by means of binding legal instruments unless the directive in question provides otherwise,³⁵⁰ creative interpretation of directive provisions would allow agreements to be used more widely. For example, the 1999 VOCs Directive, defines an authorisation as “a written decision by which the competent authority grants permission to operate all or part of an installation”,³⁵¹ which would appear to be sufficiently broad to encompass many forms of environmental agreement. Indeed, as the ECJ appears increasingly prepared to interpret directive provisions in the light of the qualitative standards and guiding principles set out under article 174,³⁵² one might expect that the Court would favour the interpretation of directive requirements so as to permit the most environmentally advantageous regulatory solution.³⁵³ Of course, voluntary agreements could generally be used to implement a wide range of less strictly normative provisions of environmental directives. According to the Commission’s 1996 Communication on Environmental Agreements

“where a provision of a Directive provides for the setting up of general programmes or for the achievement of general targets, the full achievement of the set objectives or targets does not necessarily require regulatory action.”³⁵⁴

³⁴⁸ See, for example, the legal uncertainty as to the application of Community waste management law to the problem of historically contaminated land caused by the ECJ’s decision in Case C-1/03: *Van de Walle and others*, Judgment of the Court (Second Chamber), 7 September 2004. See further, O. McIntyre, “The All-Consuming Definition of ‘Waste’ and the End of the ‘Contaminated Land’ Debate?”, (2005) 17 *Journal of Environmental Law* 109-127; L. Bergkamp, “A new court-made environmental liability regime for Europe”, (2004) 12/4 *Environmental Liability* 171; L. Kramer, “Decontamination of soil and EU waste legislation”, (2004) 12/6 *Environmental Liability* 263.

³⁴⁹ In relation to this approach of “conditional self-regulation”, see, Verschuuren, *supra*, n. 172, at 113-116.

³⁵⁰ Case 97/81, *Commission v. Netherlands* [1982] ECR I-1819, Case C-361/88, *Commission v. Germany* [1991] ECR 2567, and Case C-340/96, *Commission v. UK and Northern Ireland*, *supra*, n. 181. See Verschuuren, *ibid.*, at 113.

³⁵¹ Directive 1999/13/EC on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations, (1999) OJ L085/1, art.2(7).

³⁵² In the *Van de Walle* case itself, *supra*, n. 348, Judgment, para.45, the Court stated that

“... the verb ‘to discard’ must be interpreted in the light of the aim of ... art.174(2), which states that Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and on the principle that preventive action should be taken. The verb ‘to discard’, which determines the scope of ‘waste’, therefore cannot be interpreted restrictively.”

³⁵³ The guiding principles of environmental law-making are increasingly being used by the Court to interpret the normative content of substantive provisions of Community environmental legislation. See for example, Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Anr v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Judgment, 7 September 2004), where the Court took account of the precautionary principle in determining the appropriate steps to be taken and the appropriate assessment to be made by national authorities concerning the potential of particular plans and projects to impact adversely on habitats protected under article 6 of Directive 92/43/EEC, (1992) OJ L206/7, (the “Habitats Directive”).

³⁵⁴ *Supra*, n. 169, para 32, at 18.

8. RECOMMENDATIONS

8.1 Identification of suitable uses of environmental agreements

We recommend the identification of those sectoral areas of Community environmental law where directives might be most easily transposed and implemented by means of voluntary environmental agreements.

8.2 Development of legislative framework for environmental agreements

We recommend the development of a formal and detailed legislative framework designed specifically to regulate and inform the use of environmental agreements (and other forms of self-regulation), that is consistent with relevant Commission guidance and facilitates easy and effective compliance with the broader corpus of Community rules on the internal market, competition and State aid.

Chapter 4

PRE-EMPTIVE COSTS ORDERS

1. INTRODUCTION

1.1 Policy on judicial review in planning and environmental cases

As Irish environmental and planning legislation relies almost exclusively on the mechanism of judicial review for facilitating challenges to administrative and regulatory decisions,³⁵⁵ the various factors impacting upon access to justice in Irish environmental judicial review proceedings are well known and understood in terms of their policy objectives.³⁵⁶ For example, in the interests of avoiding undue delay which might prejudice a respondent, it is quite clear that the tight time-limits within which judicial review proceedings must be brought against any decision made under the Environmental Protection Agency Act 1992³⁵⁷ or the Planning and Development Act 2000³⁵⁸ will be very strictly applied.³⁵⁹ All grounds of challenge to the decision must be specified within the time-limits and no expansion of grounds is permitted after that time, despite the fact that the decision might involve matters of great technical complexity.³⁶⁰ In addition, it is generally required under Order 84 Rule 21(1) of the 1986 Rules of the Superior Courts that an application for judicial review be made “promptly” and it appears that, in certain circumstances, but particularly where an application may cause major infrastructural projects to be delayed or stalled, an application for leave to apply for judicial review might be refused on grounds of delay, even where it was made within the applicable statutory eight week time-limit.³⁶¹

³⁵⁵ See, for example, s.85 of the Environmental Protection Agency Act 1992, s.50 of the Planning and Development Act 2000, s.55A of the Roads Act 1993 (as inserted by s.6 of the Roads (Amendment) Act 1998), and s.12 of the Transport (Dublin Light Rail) Act 1996. See further, C. Bradley, “Procedural Exclusivity in the Judicial Review of Transportation Planning” (1999) 6 *Irish Planning and Environmental Law Journal*, at 3.

³⁵⁶ For an excellent account of the law and issues relating to access to justice in Irish judicial review proceedings, see Further, Á. Ryall, *Effective Judicial Protection and the EIA Directive in Ireland* (Oxford, Hart Publishing, forthcoming 2007), ch. 6.

³⁵⁷ S.85(8) stipulates that judicial review proceedings must be brought within two months of any decision, the validity of which is at issue.

³⁵⁸ S.50(6) of the Planning and Development Act 2000 as amended by the s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, which replaces S.82(3B)(a)(i) of the Local Government (Planning and Development) Act 1963 (as amended by s.19(3) of the Local Government (Planning and Development) Act 1992), stipulates that judicial review proceedings must be brought within eight weeks of any decision, the validity of which is at issue. The High Court may now extend this time-limit under s.50(8) where “there is good and sufficient reason for doing so” (s. 50(8)(a)) and where “the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension” (s. 50(8)(b)).

³⁵⁹ For example, in *KSK Enterprises Ltd v. An Bord Pleanála* [1994] 2 IR 128, where proceedings were invalidated when a notice of motion was filed within the time-limit but was not served on all required notice parties, Finlay CJ, on behalf of the Supreme Court, noted “that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authority”.

³⁶⁰ For example, in *Keane v. An Bord Pleanála* [1997] 1 IR 184, at 200, Murphy J. observed that “to permit an amendment at a later stage, however well founded the new ground might appear, seems to me to be impermissible”. Similarly, in *Ni Eili v. EPA* [1997] 2 ILRM 458, Kelly J. stated that “to allow such a thing to occur would run counter to the statute, negate its intent, and in effect permit of no time-bar at all in respect of the additional relief sought”. See also, *White v. Dublin Corporation* (Unrep., Supreme Court, 10 June 2004), *O’Shea v. Kerry County Council* (Unrep., High Court, 1 September 2003), *Casey v. A Bord Pleanála* (Unrep., High Court, 14 October 2003).

³⁶¹ *Sloan v. An Bord Pleanála* [2003] 2 ILRM 61. See also, *O’Connell v. EPA* [2001] 4 IR 494, at 500-501 (per Herbert J.).

This suggests that the courts will also consider the scope for prejudice to the public as a result of unnecessary delay in bringing challenges.

Similarly, the statutory requirement in relation to certain specified planning decisions³⁶² that leave to apply for judicial review will not be granted “unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid”³⁶³ has received considerable judicial clarification.³⁶⁴ It would appear also that the requirement of “substantial grounds” must be established alongside the traditional requirement of “sufficient interest” (or “substantial interest”³⁶⁵) for the purposes of establishing *locus standi* and the Supreme Court stated in *Lancefort* that “it must be presumed that the Oireachtas intended that an applicant, in addition to establishing “substantial grounds” must also have a “sufficient interest” in the matter as expressly required by Order 84 Rule 20(4)”.³⁶⁶ Indeed, the requirement of sufficient interest has itself been the subject of considerable judicial deliberation,³⁶⁷ where the courts have generally tended to take a reasonably liberal approach to the question of standing.³⁶⁸ In recent years, for example, the Irish courts have tended to allow standing where applicants have used limited liability companies to shield themselves against an award for costs.³⁶⁹ In her dissenting Supreme Court judgment in *Lancefort*,³⁷⁰ Denham J. provided an insight into

³⁶² S.50(2) of the Planning and Development Act 2000, as amended by s.12 of the Planning and Development (Amendment) Act 2002, lists the categories of planning decision to which s. 50 of the 2000 Act applies.

³⁶³ S.50(4)(b) of the Planning and Development Act 2000, which replaces s.82 (3B) of the Local Government (Planning and Development) Act 1963 [s. 19(3) of the Local Government (Planning and Development) Act 1992].

³⁶⁴ For example, in *Scott & Others v. An Bord Pleanála and Arcon Mines Ltd* [1995] 1 ILRM 424, Egan J. suggested that, in order to be “substantial”, grounds must be reasonable. In *McNamara v. An Bord Pleanála* [1995] 2 ILRM 125, at 130, Carrol J. stated that “in order for a ground to be substantial, it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous”, though she stressed that establishing grounds as substantial did not amount to an attempt to ascertain the eventual outcome, except to the extent that a ground which clearly had no prospect of success “could not be said to be substantial”. This application of the test was adopted and followed by Geoghan J. in *Village Residents Association v. An Bord Pleanála* [2000] 1 IR 65.

³⁶⁵ In relation to certain planning decisions listed under s.50(2) of the Planning and Development Act 2000, as amended by s.12 of the Planning and Development (Amendment) Act 2002, the test for *locus standi* is now, by virtue of s.50(4)(b) of the 2000 Act, that of “a substantial interest” in the matter which is the subject of the application for judicial review. It is not yet clear whether this new test entails a more onerous standard than the “sufficient interest” test, but s.50(4)(c) of the 2000 Act creates yet another condition for the grant of leave to seek judicial review of specified planning decisions, *i.e.* that of establishing that the applicant has participated in the statutory planning process or that there were “good and sufficient reasons” for non-participation.

³⁶⁶ [1998] 2 ILRM 401, at 403. O. 84 r. 20(4) of the Rules of the Superior Courts 1986 provides that:

“The Court shall not grant leave [to apply for judicial review] unless it considers that the applicant has a sufficient interest in the matter to which the application relates”.

³⁶⁷ See, for example, *Law v. Min. for Local Government* (Unrep., High Court, 7 May 1974), *State (Lynch) v. Cooney* [1982] IR 369, *E.S.B. v. Gormley* [1985] IR 129, *Cunningham v. An Bord Pleanála* (Unrep. High Court, 3 May 1990).

³⁶⁸ See, for example, *Chambers v. An Bord Pleanála* [1992] ILRM 296, [1992] IR 134, where the Supreme Court rejected the argument that, where the plaintiffs had failed to be involved in the statutory planning appeal, they had therefore lost *locus standi* by their conduct. Also, Egan J. found that the plaintiffs were justified in taking the action by reference to their involvement with an environmental association:

“The learned trial judge was correct in finding that the plaintiffs were not named objectors in the application before Cork County Council but they were certainly involved with a body known as RICH (‘Responsible Industry for Cork Harbour’) who were objectors and who subsequently appealed to the Board. The plaintiffs stated that they left it to RICH to deal with the appeal and their attitude in this regard can readily be understood, particularly as there were 19 applicants in all.”

³⁶⁹ Whereas in *Malahide Community Council Ltd v. Fingal County Council* (Unrep. SCT, 14 May 1997), Lynch J. expressed *obiter* views to the effect that a limited company, being insensible to the environment, could not have *locus standi* to challenge a planning decision and that such decisions could only affect a limited company by “increasing or diminishing its assets value if it owns land or buildings favourably or unfavourably affected by such decisions”, in *Blessington Heritage Trust Ltd. v. Wicklow Co. Co., Min. for Environment and Roadstone Dublin Ltd* (Unrep. HCT., 21 January 1998), McGuinness J. took a more liberal line stating that while “over-reliance on the incorporation of companies may tip the balance too far in favour of objectors... blanket refusal of *locus standi* to all such companies may tip the balance too far in favour of the large scale and well resourced developer”. In *Lancefort Ltd v. An Bord Pleanála* [1997] 2 ILRM 508, though the applicant company had been formed after the decision to grant planning permission, Morris J. found that the *bona fides* of its promoters and the fact that denying *locus standi* would deprive objectors of access to the courts justified a departure from the normal rule of standing. A lack of assets could be

the Irish judiciary's liberal approach to standing in environmental judicial review cases. Citing with approval the remarks of Otton J. in *R v. HM Inspectorate of Pollution ex parte Greenpeace Ltd*,³⁷¹ she stated that "the public interest element must carry some weight in considering the circumstances of environmental law cases and the *locus standi* of its parties". She further remarked that

"The issue of environment presents unique problems ... In litigation on the environment however, there are unique considerations in that often the issues affect a whole community as a community rather than an individual *per se*. This affects the concept of *locus standi* also. The 'sufficient interest' required by the Rules and Statutes should be interpreted accordingly".

This approach, which seeks to take full account of the public interest element, has been followed in *Murphy v. Wicklow County Council*, where the High Court, quoting Denham J.'s judgment in *Lancefort*, found that the applicant, who did not have any proprietary interest in the matter and was only concerned with the issue from a public interest perspective, was "in a position to present expert evidence on a range of points, all of which are pertinent to the huge stake the public at large have in relation to the proper and lawful management of the Glen of the Downs".³⁷²

It is quite clear that the central policy objective behind these legislative restrictions on access to judicial review in planning and environmental matters, and underlying their judicial interpretation and application, is that of preventing unnecessary delays and vexatious and frivolous challenges and of encouraging early public participation in planning and environmental decision-making procedures, while ensuring that the public interest in effective environmental protection and planning control is represented and considered.

2. COSTS

However, it is the issue of legal costs, and the 'costs follow the event' rule³⁷³ for the allocation of such costs in particular, which has the potential to create the greatest practical barrier to applicants in the taking of environmental judicial review proceedings. As the Australian Office of Regulation Review has noted in relation to litigation costs generally, "... the English rule tends to increase defence

overcome by the making of an order requiring the applicant company to provide security for costs under s.390 of the Companies Act 1963 as Morris J. subsequently did in *Lancefort Ltd v. An Bord Pleanála (No. 3)* [1998] 2 IR 511. The Supreme Court at [1998] 2 ILRM 401, [1999] 2 IR 270, eventually ruled that there is no objection in principle to a limited company litigating matters under the planning legislation, even where that company cannot point to any property or economic interests being affected by the impugned planning decision, stating that:

"Our law, however, recognises the right of persons associating together for non-profit making or charitable activities to incorporate themselves as limited companies and the fact that they have chosen to do so should not of itself deprive them in every case of *locus standi*."

See further, G. Simons, "*Lancefort Ltd. v. An Bord Pleanála*" (1998) 5 *Irish Planning and Environmental Law Journal* 131.

³⁷⁰ *Ibid.*

³⁷¹ [1994] 2 All ER 329.

³⁷² (Unrep., HCt., 19 March 1999). However, genuine interest alone will not suffice and, in *Springview Management Co. Ltd v. Cavan Co. Co.* [2000] 6 ILRM 401, at 445, O'Higgins J. observed that "concerning *locus standi*, there is a clear distinction between the protection of public rights and the protection of private interests" and found that the company in that case, which was formed long after the planning permission was granted, "has no property right in this matter and it has no public interest right".

³⁷³ This rule, also commonly referred to as the 'English rule' or the 'cost indemnity rule', provides that the loser in legal proceedings will be liable for the legal costs of both sides and contrasts with the 'party-party' rule, also commonly known as the 'American rule', which provides that each party bears its own costs regardless of the outcome of the proceedings.

expenditures which, when coupled with a general risk aversion, may encourage people with meritorious claims to abandon their actions ...”.³⁷⁴ The Australian Office of Regulation Review further noted in relation to the effects of the incentives created by the English rule that “such an outcome (*i.e.* encouraging people with meritorious claims to abandon their actions) decreases efficiency because there will be an under-supply of precedents”.³⁷⁵

In relation to the costs of litigation and the rules applying to their allocation, certain “cost shifting” arrangements have been mooted in various jurisdictions to achieve a number of objectives.³⁷⁶ These objectives will always include facilitating, to the greatest extent possible, the equitable access to justice of claimants of limited means, an objective pursued in many jurisdictions by a combination of means, including the provision of civil legal aid from State funds. However, they might also include the optimisation of the public benefits of litigation by encouraging the efficient emergence of clear precedent to inform the application of complex areas of law.³⁷⁷ Such clarity could be argued to render the application of the law more predictable, thereby encouraging parties to settle disputes. In time, more predictable rules would ensure more efficient implementation of the law by reducing non-compliance. Costs rules might be used to promote the timely creation of precedent, allowing the law to adapt efficiently to major legislative, technological or societal changes. Of course, any mechanism for allocating the costs of litigation which seeks to produce such benefits must ensure that “appropriate” or “necessary” cases are encouraged.³⁷⁸ Whereas litigation costs rules have traditionally focused on achieving justice in individual circumstances, it can be argued that they should also facilitate consideration of the “efficiency” of creating precedents, which can be assessed having regard to the extent to which legal uncertainty is minimised at acceptable cost.³⁷⁹ Of course, such an economic analysis of costs rules may also present a case for the allocation of increased government funding, in the form of targeted legal aid schemes, to the production of the most “valuable” precedent, representing the greatest public benefit rather than simply ensuring equitable access to justice, but that is beyond the scope of the present study. This chapter proposes that the courts may be assisted by a legislative framework for the allocation of costs as between the parties to judicial review proceedings in public interest cases.

³⁷⁴ Office of Regulation Review, *The use of cost litigation rules to improve the efficiency of the legal system*, submission to the Australian Law Reform Commission review of the litigation cost rules (March, 1995), at 8.

³⁷⁵ *Ibid.*, at 8.

³⁷⁶ See, for example, the discussion of cost shifting arrangements set out in the 1995 submission of the Office of Regulation Review, *ibid.*

³⁷⁷ See, for example, H. Gravelle, “The Efficiency Implications of Cost-Shifting Rules” (1993) 13 *International Review of Law and Economics* 3 and W. Schwarzer, “Fee-shifting Offers of Judgment – An approach to reducing the Cost of Litigation” (1992) 76 *Judicature* 147.

³⁷⁸ For example, the Australian Office of Regulation Review, in a discussion of the case for the allocation of increased government funds to the production of valuable precedents through, for example, extended legal aid schemes, stresses, *ibid.*, at 6

“the need for the targeting to be aimed at test cases, where the public good aspect of precedent is greatest, rather than simply targeted at disadvantaged groups where the benefits of the litigation are largely private.”

Of course, this argument is even more persuasive in the case of pre-emptive/protective costs orders, where the financial burden of promoting “appropriate” publicly beneficial litigation might fall on a private notice party as well as on the State as the successful defendant.

³⁷⁹ See generally, G. Priest, “Regulating the Content and Volume of Litigation: An Economic Analysis” (1982) 1 *Supreme Court Economic Review* 163, G. Miller, “An Economic Analysis of Rule 68”, (1986) 40 *Journal of Legal Studies* 93, and R. Posner, *Economic Analysis of Law* (4th ed.) (Little Brown & Co., Boston, 1992).

3. COSTS IN PUBLIC INTEREST CASES

3.1 Public bodies' position of strength

Public bodies can be more resistant to public interest interventions than may seem warranted by the issues at stake. With their much greater resources, they can afford not to negotiate or accommodate, and can intimidate potential objectors with the costs they are prepared to incur, which all parties know may fall to be awarded against the objectors. In contrast to most environmental activists, the officials concerned are not spending their own time or money. In relation to costs, the courts sometimes award costs to applicants acting in the public interest where the defendants have been less than reasonable or there are public interest considerations. Arguing for this to become an accepted practice in England and Wales,³⁸⁰ Richard Clayton QC writes

“If public bodies were on notice from the outset that resisting public interest claims carried a cost penalty, this might (i) spur defendants into making earlier concessions; (ii) reduce public expenditure by discouraging numerous claimants from taking proceedings where there is a common public interest issue; (iii) discourage the practice of a defendant cherry picking which particular case it wishes to use to contest the public interest issue; and (iv) ensure that the Legal Costs Commission recovers its costs in public interest cases.”³⁸¹

The last consequence does not directly apply in this jurisdiction, where environmental cases are not legally aided. However, an award of costs would equally enable an NGO to use those resources to good effect in other work.

The costs barrier to access to justice is real and can have grave consequences, particularly in environmental cases where the effects of decisions can impact on large numbers of people. We also recognise that the problem of costs is as real for respondents as it is for applicants. To reduce recourse to litigation, we recommend the development of mechanisms to achieve agreement and to promote negotiation and compromise. A commitment to this on the part of public bodies and those charged with environmental matters could make a contribution to the problem of the costs barrier. The Ombudsman has no jurisdiction in planning matters where recourse may be had to An Bord Pleanála, but a properly resourced role for the Ombudsman to examine procedures, mediate and encourage the achievement of compromises could be a valuable one.

3.2 Public interest cases where costs independent of decision

3.2.1 *McEvoy and Smith v. Meath County Council*

The statement of what constitutes a public interest challenge made by Dyson J. in the *CPAG* case³⁸² was adopted by Quirke J. in *McEvoy and Smith v. Meath County Council*.³⁸³ In the context of his jurisdiction to make a protective costs order (PCO), Dyson J. stated:

³⁸⁰ The following are authorities for costs not following the event in England and Wales: *R v SSETR, ex parte Challenger* [2001] Env LR 209 (Harrison J), *R (Friends of the Earth & Greenpeace) v. SSEFRA* [2001] EWCA Civ 1950, *R v. Commissioner of Police of the Metropolis, ex parte Blackburn* (No. 3) [1973] 1 QB 241, *New Zealand Maori Council v. Attorney General of New Zealand* [1994] 1 AC 466 and *R v. Secretary of State for the Environment, ex parte Shelter* [1997] COD 49.

³⁸¹ Clayton, “Public interest litigation, costs and the role of legal aid” Public Law, Autumn 2006 429 at 442.

³⁸² [1999] 1 WLR 347

“The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own.”

In this case the applicants were an elected member of Kildare County Council and the chairman of An Taisce, and clearly neither was seeking to protect a private interest. Quirke J. held, at the close of the proceedings, that because the proceedings had been unnecessarily prolonged by the need to analyse and consider documentation on issues which could have been agreed, and since the majority of those issues of fact had been found in favour of the applicants, and other circumstances of the case, he awarded a proportion of costs against the respondent to the unsuccessful applicants.

3.2.2 *Dunne – Carrickmines Castle*

In *Dunne v. The Minister for the Environment, Heritage and Local Government and Others*,³⁸⁴ Laffoy J. awarded costs to the plaintiff even though he was not successful on any issue. She said:

“... as a matter of principle, I do not consider that the Court’s discretion as to costs in this type of public law litigation is in any way dependent on one or more of the issues of fact or law raised being decided in favour of the plaintiff or applicant.”

The case was instituted to prevent road works being carried out on the site of Carrickmines Castle, and subsequent cases in relation to the same objective were successful, leading to the enactment of the National Monuments (Amendment) Act 2004 to enable road works to continue without providing for input from any party to the Minister for the Environment or the local authority. Under these circumstances, she considered the issues raised as “truly ones of general public importance”, adopting the words of Dyson J. in the *CPAG* case.

3.2.3 *Harrington*

In *Harrington v. An Bord Pleanála, Ireland and the AG*,³⁸⁵ the applicant did not succeed in his judicial review, nor was he personally disinterested in the outcome of the case, being a near neighbour to the development in question. Nevertheless, Macken J. awarded him costs for the leave application for judicial review as against the respondents and the notice parties. She was satisfied that the applicant had raised serious legal issues of “Irish and Community law which were of general importance and interest, although it was possible to find considerable assistance in the existing jurisprudences.” She also held that the requirement in Dyson J.’s decision in the *CPAG* case, that in order to qualify as a public interest case, the applicant should have no personal or private interest in the outcome, could not be valid in relation to cases brought under the Planning and Development Act 2000, section 50, which required an applicant to have a substantial interest.

Macken J. did not award the applicant costs for his unsuccessful application for a certificate for leave to appeal against her judgment on the leave application. She pointed out that in the context of such an

³⁸³ [2003] 1 IR 208 at 229

³⁸⁴ [2005] IEHC 79

³⁸⁵ [2006] IEHC 223

application pursuant to section 50(4)(f) of the Planning and Development Act 2000, it was not sufficient merely to establish that the point of law raised was of general public importance. The applicant also had to establish that a question of exceptional public importance arose out of the decision which it was in the public interest should be determined by the Supreme Court, and she held that the applicant did not meet these criteria. In those circumstances, she awarded costs for the leave to appeal to the respondents and notice parties.

4. PRE-EMPTIVE COSTS ORDERS

4.1 The PCO as innovative solution

In recent years, the administrative law courts in a number of common law jurisdictions have employed innovative solutions to ensure that impecunious litigants are not denied the opportunity of raising questions of public law which are of public importance. Chief among these are orders issued at an interlocutory stage which provide that a particular party will not be faced with an order for costs against him or her at the conclusion of the proceedings or, alternatively, that the size of any order for costs made against that party be capped. Such orders, referred to either as “pre-emptive costs orders” or “protective costs orders” (PCOs), have an obvious role to play in the enforcement of planning and environmental law, where they can be used to mitigate the deterrent effect of the possibility of ruinous costs being imposed on an unsuccessful litigant. According to one commentator

“A ‘pre-emptive costs order’ (or a ‘protective costs order’) is one mechanism that holds the potential to address the chilling effect of costs in the planning and environmental law context. ... The advantage of such an order is that it eliminates the uncertainty regarding potential future liability for costs which may otherwise deter a potential challenger.”³⁸⁶

The extent of the deterrent that costs can represent in Irish planning law was illustrated in March 2006 when an environmental objector, Mr. Vincent Salafia, was ordered by the High Court to pay legal costs arising from his unsuccessful challenge to the proposed routing of the M3 motorway near the Hill of Tara.³⁸⁷ He was found liable for the costs incurred by the State, Meath County Council and the National Roads Authority in opposing his challenge, which could exceed €600,000.

³⁸⁶ A. Ryall, “Access to Justice and the EIA Directive: the implications of the Aarhus Convention”, in J. Holder and D. McGilivray (eds.), *Taking Stock of Environmental Assessment: Law, Policy and Practice* (London: Routledge-Cavendish, 2007).

³⁸⁷ *Irish Times*, 16 March 2006.

5. ENGLAND AND WALES

5.1 Background

5.1.1 *Costs as a barrier to justice*

The question of costs, and the likelihood that they might amount to an effective barrier to access to the courts in judicial review proceedings, has long been a cause of concern in England and Wales, despite the relatively generous regime for the provision of civil legal aid in that jurisdiction. For example, responses to a 1993 Law Commission consultation exercise suggested that judges should have the power to award costs out of central government funds in certain civil cases, particularly where there was no other source from which the costs could be paid and where the interests of justice so required, and that the court should be empowered to grant legal aid for the application for leave or for the substantive hearing.³⁸⁸ The Commission eventually recommended that costs should be available from central funds

- in favour of a successful party, at the judge's discretion or
- in favour of an unsuccessful applicant where a case has been allowed to proceed to a substantive hearing on the basis of either a public interest challenge or for the purpose of seeking an advisory declaration.³⁸⁹

The Government did not accept either of these recommendations. However, during the course of the mid-late 1990s, the courts in England and Wales showed themselves to be more prepared to depart from the "costs follow the event" principle out of concern to protect unsuccessful litigants who reasonably bring public law proceedings in the public interest.³⁹⁰ The principal means of offering such protection employed by the English courts has been that of the "protective costs order", under which the court can "allow claimants of limited means access to the court to advance their case without the fear of an order for substantial costs being made against them, a fear which would inhibit them from continuing with the case at all".³⁹¹

5.1.2 *Widening legal standing*

The origins of PCOs in England and Wales can be traced back to the progressively more liberal approach taken by the courts to the rules on standing (*locus standi*) in judicial review proceedings since the early 1980s. Lord Diplock's seminal statement in *IRC v. National Federation of Self-Employed and Small Businesses Ltd.* exemplifies this approach and is based on a functional analysis of the purpose of judicial review, *i.e.* to vindicate the rule of law and bring a stop to unlawful conduct:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. ... It is not, in my view, a sufficient answer to

³⁸⁸ Law Commission, Consultation Paper No. 126, *Administrative Law: Judicial Review and Statutory Appeals* (1993), at paras. 11.1-11.14.

³⁸⁹ See further, *R (Corner House Research) v. The Secretary of State for Trade and Industry* [2005] EWCA Civ 192, reproduced in (2005) 17 *Journal of Environmental Law* 413-445, at para.32.

³⁹⁰ See, for example, *R v. Secretary of State for the Environment, ex parte Shelter* [1997] COD 49, where Carnwath J. refused to make an order against Shelter as the unsuccessful applicant in judicial review proceedings. See further, *infra*.

³⁹¹ *Corner House Research, ibid.*, at para.6.

say that judicial review of the actions of officers or departments of Central Government is unnecessary because they are accountable to the Parliament for the way in which they carry out their functions. ... they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.”³⁹²

5.1.3 *Award of costs not following the event*

It was always abundantly clear, however, that relaxation of the traditional requirements for standing would in many cases prove meaningless where the applicant could not afford to risk liability for an often better resourced defendant’s costs, should the action ultimately prove unsuccessful. In 1994, the Privy Council suggested means by which this obstacle might be overcome in *New Zealand Maori Council v. Attorney-General of New Zealand*,³⁹³ where it declined to make an order against the unsuccessful applicants where they were not pursuing the proceedings out of any motive of private gain, but in the interest of the national cultural heritage. It was also considered significant that the lower courts had left an undesirable lack of clarity in an important area of the law that required definitive judicial determination. Three years later, in *R v. Secretary of State for the Environment, ex parte Shelter*,³⁹⁴ Carnwath J. refused to make an order for costs against Shelter as the unsuccessful applicant in judicial review proceedings on the grounds that:

- there were already pending before the court a sequence of individual cases raising precisely the same issue;
- the legal question raised was of genuine public interest;
- the applicant’s involvement had assisted the court in determining the issue speedily; and
- had the matter been determined in separate proceedings, it was likely that any applicant would have been legally aided, and thus the burden of his/her costs would have fallen upon the taxpayer and the respondent would not have obtained an order for his/her costs.³⁹⁵

5.2 *Child Poverty Action Group (CPAG)*

In *R v. Lord Chancellor, ex parte Child Poverty Action Group (CPAG)*,³⁹⁶ where CPAG sought a PCO to enable it to continue judicial review proceedings concerning the availability of legal aid to cover some cases before social security tribunals and commissioners, (and where, in a joined application, Amnesty International UK sought a similar order in relation to its challenge to the decision of the DPP not to prosecute individuals for possession of an unlicensed electroshock baton), Dyson J. found that the discretion of the courts to make a PCO in a case involving a public interest challenge should only be exercised in the most exceptional circumstances.³⁹⁷ He set down four tests which must be satisfied before such an order would be granted:³⁹⁸

1. The court must be satisfied that the issues raised are truly ones of general public importance;
2. the court must be satisfied, following short argument, that it has a sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make the order;

³⁹² [1982] AC 617, at 644E-G, quoted in *Corner House Research, supra*, n. 389, at para. 29. See the examples of English judicial review cases which followed Lord Diplock’s approach cited above.

³⁹³ [1994] 1 AC 466. See further, *Corner House Research, ibid.*, at para.26.

³⁹⁴ *Supra*, n. 27.

³⁹⁵ See, *R (Corner House Research) v. The Secretary of State for Trade and Industry, supra*, n. 389, at para.39.

³⁹⁶ [1999] 1 WLR 347. See further, *Corner House Research, ibid.*, at paras.44-46.

³⁹⁷ *Ibid.*, at 349 F.

³⁹⁸ *Ibid.*, at 358 C-E.

3. the court must have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue; and
4. the court will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.

Though, on the facts before him, Dyson J. could not justify granting a PCO to either applicant, his formulation of the tests to be applied has been followed in several cases. In *R v. Hammersmith and Fulham LBC ex parte CPRE*,³⁹⁹ Richards J. stated unequivocally that he considered the principles set down in *CPAG* to be entirely consistent with the overriding objective laid down in the Civil Procedure Rules,⁴⁰⁰ which had recently entered into force.⁴⁰¹ Applying these tests to the facts, however, the order was refused. The first successful application for a PCO was made in 2002 by the Campaign for Nuclear Disarmament (CND) in a judicial review challenge to the legality of the war in Iraq, in which Simon Brown LJ. had no difficulty in finding that the public interest test had been satisfied and, therefore, limited CND's exposure to costs to £25,000.⁴⁰² In 2004, the Refugee Legal Centre obtained a "full PCO", granting immunity from all potential liability, by consent after Brooke LJ. had granted an interim PCO following a contested hearing.⁴⁰³

5.3 Corner House

5.3.1 PCOs affirmed

The issue of protective costs orders, and the judicial requirements for the grant of such orders, was revisited by a "powerfully constituted" Court of Appeal in *R (Corner House Research) v. Secretary of State for Trade and Industry*,⁴⁰⁴ where Lord Phillips MR (presenting a judgment prepared by Brookes LJ.) restated the applicable principles. This judgment is the first detailed exposition by the Court of Appeal of the courts' jurisdiction to grant a PCO and involved an appeal against the refusal of an application for such an order in judicial review proceedings arising from a challenge by a small NGO of the failure to consult over the new anti-corruption policy issued by the Export Credit Guarantee Department of the UK Department of Trade and Industry. Allowing the appeal, the Court confirmed the absolute discretion of the courts of England and Wales under the applicable legislation and rules of

³⁹⁹ CAT, 26 October 1999, (CO/4050/99).

⁴⁰⁰ CPR 1.1 and 1.2 provide, so far as material, that:

- 1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- 1.1(2) dealing with a case justly includes, so far as is practicable
 - (a) ensuring that the parties are on an equal footing;
 - (b) ensuring that [the case] is dealt with ... fairly ...
- 1.2 The court must give effect to the overriding objective when it
 - (a) exercises any power given to it by the Rules; or
 - (b) interprets any rule.

⁴⁰¹ Richards J. stated:

"I accept that in exercising discretion with regard to costs ... I should seek to give effect to the overriding objective and should have particular regard to the need, so far as practicable, to ensure that the parties are on an equal footing and that the case is dealt with in a way which is proportionate to the financial position of each party. Those aspects of the overriding objective seem to me to be embedded in any event in the principles laid down in *ex p CPAG*."

See further, *Corner House Research*, *supra*, n. 389, at para. 48.

⁴⁰² *R (CND) v. The Prime Minister & Ors.* [2002] EWHC 2712 Admin.

⁴⁰³ *R (Refugee Legal Centre) v. SSHD* [2004] EWCA Civ 1296 & 1239.

⁴⁰⁴ [2005] EWCA Civ 192, (22 December 2005). See further, R. Stein and J. Beagent, "*R (Corner House Research) v. The Secretary of State for Trade and Industry*" (2005) 17(3) *Journal of Environmental Law* 413.

court procedure to grant PCOs, stating that “[T]here is nothing ... to preclude the court from making such an order ... as it considers necessary in the interests of justice”,⁴⁰⁵ and granted the application in full, thereby making the first full PCO where an application had been contested. Most importantly, the Court of Appeal significantly relaxed Dyson J.’s requirement in the *CPAG* case that the court have a “sufficient appreciation of the merits”, instead requiring that there is “a real (as opposed to a fanciful) prospect of success” or that the applicant’s case is “properly arguable”. In so doing, it expressed concern that “experience has shown that [the CPAG guidelines] are cumbersome to operate and that the achievement of justice is thwarted because [the guidelines] are so cumbersome”.⁴⁰⁶ The Court also listed the different forms a PCO may take⁴⁰⁷ and gave guidance on capping orders to restrict the respondent’s possible liability for the protected applicant’s legal costs where the challenge ultimately proves successful. It suggested that *pro bono* representation would enhance the merits of any PCO application. Further, the judgment sets down in some detail the procedures for PCO applications which the Court considered most equitable and efficient⁴⁰⁸ and it expresses the hope that “the CPR Committee and the senior costs judge may formalise these principles in an appropriate codified form”.⁴⁰⁹

5.3.2 *Corner House principles*

The Court of Appeal restated the governing principles first set out by Dyson J. as follows:

1. A PCO 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 is 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 doing so.
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.⁴¹⁰

⁴⁰⁵ Judgment, para. 68.

⁴⁰⁶ Judgment, para. 71.

⁴⁰⁷ The Court acknowledged, at para. 75, that PCOs could take many different forms and noted the various types of applications that had already come before the courts, including one where the applicant’s lawyers were acting *pro bono* and it requested that there would be no order as to costs in the substantive proceedings whatever the outcome (*Refugee Legal Centre*), and one where the applicants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost (*CND*).

⁴⁰⁸ Judgment, paras. 64-81.

⁴⁰⁹ Judgment, para. 81.

⁴¹⁰ Judgment, para. 74.

5.4 Merits threshold

First of all, the Court of Appeal lowered the merits threshold by removing Dyson J.'s requirement that the court should have "sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make the order",⁴¹¹ the reason, in the Court's view, why the CPAG guidelines had proven so cumbersome to operate. In order to avoid heavy and time-consuming ancillary litigation, the Court of Appeal substituted this test with the considerably less onerous requirement that the applicant's case is "properly arguable" or "has a real prospect of success".⁴¹² The Court's procedural guidance for making a PCO application, advising that the hearing should be limited to one hour and should be decided contemporaneously with the judicial review permission application, clearly demonstrates its concern to avoid arduous ancillary litigation in relation to PCOs.

5.5 Issues of public importance and public interest in their resolution

Secondly, while the issues in the case must still be ones of "general public importance" under Principle 1(i), the Court of Appeal now also stipulates in Principle 1(ii) that the public interest requires that those issues should be resolved. Interestingly, leading commentators have suggested that this additional requirement

"might be interpreted as being analogous to the costs benefit test in public funding. A case may raise issues of genuine public importance but the resolution of those issues must also produce a degree of public benefit that justifies committing the public funds of the defendant public body."⁴¹³

This interpretation would suggest that the Court of Appeal was concerned to ensure that the public benefits of public interest litigation would be optimised by encouraging the emergence of clear precedent in relation to questions of law of general public importance. Such precedent is of course necessary for the vindication of the rule of law in such areas.

5.6 No private interest

The requirement, newly added by the Court of Appeal in Principle 1(iii), that the applicant should have no private interest in the outcome of the case is somewhat problematic. First of all, the Court did not elaborate on the nature or extent of private interest which might disqualify an applicant and so it is unclear whether the grant of a PCO is restricted to a public-spirited individual with absolutely nothing to gain personally or to an NGO with nothing to gain personally. Stein and Beagent suggest that the Court would have explored the meaning of "private interest" in the judgment "had it intended to do anything as radical as exclude all claimants with an interest of any sort" and prefer to interpret this requirement as "intended to emphasise that claimants with a primarily personal or financial interest in bringing a claim should not be able to shield themselves behind the public interest". It had seemed that this requirement would ultimately be a matter of fact and degree, with the financial benefit to the

⁴¹¹ *Supra*, n. 396, at 358 C-E.

⁴¹² *Corner House judgement*, para. 73.

⁴¹³ Stein and Beagent, *supra*, n. 404.

applicant being the key factor.⁴¹⁴ However, the Court of Appeal has since interpreted this requirement restrictively in *Goodson v. HM Coroner for Bedfordshire & Luton & Another*,⁴¹⁵ where it held that it was the clear intention of the Court in *Corner House* that:

1. the beneficiary of a PCO should have *no private interest whatsoever* in the outcome of the proceedings (whether financial or otherwise); and
2. practically speaking, PCOs would be restricted to NGOs and public interest groups rather than individuals.

5.6.1 *Goodson*

This interpretation suggests that the Court of Appeal is less concerned with encouraging the efficient emergence of publicly beneficial precedent and legal clarity than with avoiding the inequity or perceived inequity of offering protection against an order for costs to a claimant who might benefit in some way from a successful challenge, regardless of the general public importance of the issues at stake or of the public interest in the resolution of those issues. Nor does it take any account of the Court's observation in *Corner House* that "there is a public interest in the elucidation of public law by the higher courts in addition to the interests of the individual parties".⁴¹⁶ Clearly this approach is likely to stifle many important judicial review actions, particularly in the environmental field where Brooke LJ. in Court of Appeal had earlier recognised that potential applicants

"are almost invariably individuals (or groups of individuals such as residents' associations and action groups) who have an interest in preventing the environmental harm that is threatened. They would therefore appear, as a class, to have a private interest in the outcome of the case whether that interest is only one of amenity or is also a financial one (*i.e.* the value of their property may be affected)."⁴¹⁷

The Addendum which Lord Brooke felt it necessary to add to his judgment in *Burkett* clearly expresses concern

"that an unprotected claimant in such a case, if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and that this may be a potent factor in deterring litigation directed towards protecting the environment from harm."⁴¹⁸

The Addendum further recognises⁴¹⁹ that the UK is a party to the 1998 Aarhus Convention⁴²⁰ and notes the concern of many respondents in a recent study of the UK environmental justice system by the

⁴¹⁴ See further, Stein and Beagent, *ibid.*, who cite *Weir & Others v. Secretary of State for Transport* [2005] All ER (D) 274 (Apr.) as suggesting that, where the sole interest in the outcome of the case is financial, then a PCO will not be granted.

⁴¹⁵ [2005] EWCA Civ 1172.

⁴¹⁶ Judgment, para.70.

⁴¹⁷ *R (Burkett) v. LB Hammersmith & Fulham* [2004] EWCA Civ 1342, summarised by Stein and Beagent, *supra*, n. 404.

⁴¹⁸ *Burkett, ibid.*, at para.80.

⁴¹⁹ *Ibid.*, at para.74.

⁴²⁰ Both the UK and the EC ratified the Convention in February 2005.

Environmental Justice Project⁴²¹ that the current costs regime “precludes compliance with the Aarhus Convention”.⁴²² This makes the Court of Appeal’s decision to deny a PCO to an applicant having any private interest “whatsoever” in the outcome of the proceedings all the more surprising, though Stein and Beagent point out that *Goodson* was not an environmental case and that “there is still scope for litigating the effect of the Aarhus Convention upon the jurisdiction to grant PCOs in environmental cases”.⁴²³ It was common ground that Corner House had no private interest, and this issue was not addressed in submissions to the Court or in the judgment. The private interest “requirement” is arguably an *obiter* comment, not a binding rule.

5.6.2 *Restricting PCOs to groups*

There is a further concern with restricting the availability of PCOs to NGOs and public interest groups rather than individuals, as the Court of Appeal has sought to do in *Goodson*. There is every likelihood that this approach would further concentrate or monopolise the ability to bring environmental challenges in the hands of a few environmental interest groups. This has already occurred to some extent in English law by virtue of the approach to standing adopted by the English court since the late 1980s, which emphasises the “status” of the applicant as a factor in granting standing.⁴²⁴ In relation to the question of standing, some academic commentators had suggested that

“one might question the wisdom of allocating *locus standi* by means which could tend to monopolise standing in the hands of a few large established environmental interest groups . . . [as] . . . [I]t was difficult to envisage many areas of environmental concern in which the larger environmental groups could not always be said to possess a long history, a constituency and considerable expertise.”⁴²⁵

Restricting judicial protection on costs to such organisations raises identical questions. Another concern relates to the capacity of the “favoured” environmental NGOs to take the number of environmental challenges that might be warranted at any particular time. Stein and Bageant caution that

“An organisation such as Friends of the Earth might be willing to act as claimant in some instances but practical capacity issues would prevent it doing so as a general rule. Hence, countless public interest environmental challenges would be stifled at the outset.”⁴²⁶

⁴²¹ Environmental Justice Project, *A Report by the Environmental Justice Project* (2004). See further, C. Hatton, P. Castle and M. Day, “The environment and the law – does our legal system deliver access to justice? A review” (2004) 6(4) *Environmental Law Review* 240.

⁴²² *Burkett*, *supra*, n. 417, para.75.

⁴²³ *Supra*, n. 404.

⁴²⁴ See, for example, *R. v. Inspectorate of Pollution and another, ex parte Greenpeace Ltd. (No. 2)* [1994] 4 All ER 329, where Otton J. acknowledged Greenpeace as

“an entirely responsible and respected body with a genuine concern for the environment . . . who, with its particular expertise in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law) is able to mount a carefully selected, focused and well argued challenge”.

Ottion J. was further impressed by the extend of the organisation’s membership and stated in relation to Greenpeace’s 2,500 local supporters

“if I were to deny standing to Greenpeace those they represent might not have an effective way to bring these issues before the court.”

See also, *R. v. Environment Secretary, ex parte Friends of the Earth (The Times, 4 April 1994)*, where the Court emphasised FOE’s expertise in environmental matters, describing FOE as

“a company of high repute limited by guarantee, founded in 1971, and accepted as having the relevant expertise”.

⁴²⁵ O. McIntyre and T. Mosedale, “The Rise of Environmental Judicial Review” (1997) 6(4) *Environmental Policy and Law* 147, at 153.

⁴²⁶ *Supra*, n. 404.

The *Goodson* decision was followed in *Campbell v. Secretary of State for Work and Pensions*⁴²⁷ by the Court of Appeal. The applicant stood to gain financially from the outcome of the appeal and therefore had a financial interest in it. He lost the appeal, and his application that no costs be awarded against him was refused. Chadwick LJ. said that “it would be a strange result if, in circumstances in which no protective costs order was or could have been made, nevertheless the Court of Appeal would on the same facts and arguments make no order as to costs following the hearing”.

5.6.3 *Goodson restrictiveness relaxed*

However, in *Wilkinson v. Kitzinger*,⁴²⁸ the parties agreed that the proceedings were quasi public and that the court should apply the *Corner House* principles. The petitioner was seeking a declaration that her marriage contracted in Canada to her same-sex partner should be recognised in English law as a marriage rather than a civil partnership, or alternatively that the Matrimonial Causes Act 1973, s. 11(c) should be declared incompatible with the European Convention on Human Rights. The judge, Sir Mark Potter P, described the *Corner House* requirement of no personal interest as “a somewhat elusive concept to apply in any case in which the applicant, either in private or public law proceedings is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest”. He could not see why the applicant’s personal interest should disqualify her from getting a protective costs order if it would otherwise be appropriate. He considered that any personal interest should be considered in the overall context. Although he doubted if the first two *Corner House* criteria were met (that the issue was of general public importance, and required to be resolved in the public interest) and that the fourth and fifth criteria were not met, (financial resources and likely discontinuance of the proceedings), he nonetheless capped the petitioner’s liability for the Lord Chancellor’s costs at £25,000 including vat. The petitioner’s lawyers were acting *pro bono*.

5.6.4 *Private interest – Liberty report*

A study of litigation in the public interest including the issue of protective costs orders commissioned by Liberty under the chairmanship of Sir Maurice Kay (Kay LJ.) published its findings in June 2006.⁴²⁹ In relation to the requirement in the *Corner House* decision that an applicant should have no private interest in the application, some members of the group suggested that a factor which might be *relevant* developed into a *requirement*, due to the fact that the earlier cases had all been taken by NGOs (CPAG, Amnesty International, PORE, CND, the Refugee Legal Centre and Corner House Research). However, while recognising the benefits of NGO involvement in public interest litigation, the Liberty group did not see any justification for effectively limiting the availability of protective costs orders to NGOs and campaigning groups with no private interest in the outcome of the cases they brought. The group noted that under the Human Rights Act 1998, only persons directly affected by a violation of the European Convention on Human Rights are eligible to bring proceedings. It also discerned a lack of

⁴²⁷ [2005] EWCA Civ 1400

⁴²⁸ [2006] EWHC 835 (Fam)

⁴²⁹ *Litigating in the Public Interest*, Liberty, 2006

clarity as to what constitutes a private interest. It distinguished between cases like *Goodson* where the benefit is moral or intangible, and others where there is a potential financial benefit. Even among these, it observed the wide range possible between a potential substantial financial benefit being the reason for taking the case, and a modest financial benefit possibly incidental to the motivation for litigation.

While the group unanimously believed that the lack of a private interest should not be a condition for obtaining a protective costs order, they also recommended that the nature and extent of an applicant's private interest should be a relevant factor relevant in deciding whether to grant such an order.

5.7 Financial resources

Principle 1(iv) would appear to require that an equitable balance be struck as between the applicant and respondent when considering the grant of a PCO, and when fixing the degree of protection, and Stein and Beagent suggest, by way of illustration, that

“it may be fair and just to grant a full PCO where the defendant has the resources of Central Government at its disposal, but only to grant a limited PCO where the public authority is a small one with extremely limited resources.”⁴³⁰

However, they also point out that it is clear from a reading of Principle 1(v) that “the starting point will always be the resources available to the applicant”.⁴³¹

In *R (British Union for the Abolition of Vivisection) v. the Secretary of State for the Home Department*⁴³² the applicants sought an order limiting their costs liability on a challenge to the grant of licences to experiment on animals. With reserves of around £1,035,000, an adverse costs order anticipated at £100,000 - £120,000 would not have put BUAV out of business. However, it would have left it financially embarrassed, with possible redundancies among its staff, and significant restrictions on its future activities. BUAV argued that with its limited resources, insecure income base and the other demands on its income, it could not responsibly run the risk of the costs exposure. This was accepted by Bean J., who concluded that this met the criteria set out in *Corner House*, namely that if no protective costs order were made, BUAV would probably discontinue proceedings and would be reasonable in doing so. He raised the proposed cap from £20,000 to £40,000, which he considered a fairer level.

In a Scottish case, *The Petitions of McArthur and others v. The Lord Advocate and the Scottish Ministers*,⁴³³ the petitioners sought an enquiry into the deaths of their relatives, due to Hepatitis C allegedly contracted from blood transfusions. They sought no compensation. Lord Glennie accepted that Scottish courts can make protective costs orders, applied the *Corner House* principles. He decided that the first two criteria were met for two of the three petitioners, and that none had a private interest

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² [2006] EWHC 250 (Admin)

⁴³³ [2005] CSOH 165, [2006] SLT 170

in the outcome. However, they failed on criteria (iv) and (v), financial resources and discontinuance. He concluded that as Parliament had established a system of legal aid and set eligibility criteria, it was not for the courts to step in and grant the costs protection which would follow from legal aid to those who were not eligible under the scheme. The applicants had assets, and did not meet the fourth and fifth criteria.

5.8 Pro bono representation

The express inclusion in Principle 2 of *pro bono* legal representation as a factor in deciding whether an applicant might be eligible for a PCO is altogether confusing having regard to the apparent twin objectives of the PCO jurisdiction of securing access to justice for the applicant and of clarifying questions of law of genuine public importance in the public interest. In relation to the former, the PCO could hardly be expected to ensure some measure of “equality of arms” where the applicant may have great difficulty in instructing the lawyers of its choice with the most appropriate experience in claimant judicial review. Though the capping of applicants’ possible liability for respondents’ legal costs could function to discourage excessive spending by respondents, the Court of Appeal nowhere suggests that, where a PCO is granted with applicant *pro bono* representation, the respondents’ lawyers should also act *pro bono* or for a reduced fee. As claimant-focussed public lawyers, Stein and Bageant reasonably complain that “it is of great concern that in order to be able to conduct what the court considers to be litigation of public importance, they should be expected to work for free”,⁴³⁴ especially in light of Lord Brooke’s and the Court of Appeal’s earlier recognition of “the importance of maintaining the viability of the few legal practices which operate in the field of publicly funded environmental litigation”.⁴³⁵ Of course, this factor might also operate to hinder attainment of the latter objective as there is no reason to assume that *pro bono* legal representation would be available for all cases involving issues of public interest, the resolution of which would be in the public benefit. Clearly, the strict time limits within which an application for judicial review must be brought might exacerbate the difficulty in securing *pro bono* representation. As Stein and Bageant point out

“it is conceivable that there may be occasions where a PCO is refused, and an issue of great public importance is stifled at the outset simply because the claimant was unable to secure *pro bono* representation within the very tight timescale in which to bring a judicial review.”⁴³⁶

5.8.1 Pro bono representation – Liberty report

The Liberty group on public interest litigation⁴³⁷ considered the suggestion made in the *Corner House* judgment that “if those acting for the applicant are acting *pro bono* this will be likely to enhance the merits of an application for a PCO”. The group was concerned that there could be too much emphasis laid on this, and that it would unduly restrict the pool of lawyers who might be willing to act for someone wishing to bring a public interest case. They recommended that in deciding whether to grant

⁴³⁴ *Supra*, n. 404.

⁴³⁵ Addendum to the *Burkett* judgment, *supra*, n. 417, at para.76.

⁴³⁶ *Supra*, n. 404.

⁴³⁷ *Litigating in the Public Interest*, Liberty, 2006

a PCO the courts should place little emphasis on the fact that the lawyers for the applicant are acting or are prepared to act *pro bono*.

5.9 Cost capping

The purported introduction of capping arrangements in relation to the applicant's legal costs may also result in the stifling of important public interest issues.⁴³⁸ Though intended to reduce the respondent's exposure to excessive costs incurred by a protected applicant, it would appear that sufficient safeguards already exist in the PCO application procedure proposed by the Court. Also, where this is a real danger, the courts always have the option of granting a PCO stipulating that there would be no order for costs whatever the outcome.⁴³⁹ Generally, the potential inequity of capping an applicant's costs is apparent:

“The effect of introducing the costs-capping procedure, besides making it more difficult for a potential claimant to secure the services of a legal team, will be to create an artificial inequality of arms. The claimant will be limited to finding solicitors who are prepared to act for an as yet undefined “moderate” level of pay and will be restricted to employing the services of a junior counsel. The defendant public body is of course bound by no such constraints and may deploy city solicitors and leading and junior counsel, all paid at commercial rates and at public expense.”⁴⁴⁰

5.9.1 Cost capping – Liberty report

The Liberty group was unable to agree on the issue of costs capping. On the one hand, some felt that it would be reasonable for a court granting a PCO to limit the costs recoverable by the party to whom the PCO is granted, and that the equality of arms principle did not require that the parties have legal representation of equal seniority or status. Others in the group held a strongly contrary view. They argued that if a case is considered significant enough to meet the public interest test then it is important that the claimant's ability to present the case should not be restricted, and that it is in the public interest, not just the claimant's, that both parties have equal levels of representation.

5.9.2 Other considerations

However, it should be noted that the introduction of restrictions on the applicant's legal costs is probably intended to mitigate the increased costs associated with “success fees” under Conditional Fee Arrangements (CFAs) in the UK. Indeed, the whole discussion of PCOs in England and Wales takes place against a different background to that obtaining in Ireland in relation to legal aid. Briefly, in England and Wales if a person is legally aided, he or she is generally not exposed to the other party's costs even if not successful in the action. The CFA is a mechanism to allow persons, who could otherwise not afford it, to litigate where legal aid is not available. A CFA means that a claimant will

⁴³⁸ Para.76 of the judgment in *Corner House* provides that

“It is likely that a cost-capping order for the claimant's costs will be required in all cases other than [where the PCO provides that there would be no order as to costs] ... The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation ... accordingly”.

Para.76 elsewhere provides that

“The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest”.

⁴³⁹ As occurred in *Refugee Legal Centre*. See *Corner House* judgment, para.75.

⁴⁴⁰ Stein and Beagent, *supra*, n. 404.

not have to bear the cost of his or her own lawyers. A PCO is sought to remove the other potential barrier to justice, being liability for the costs of the other party. In *Corner House*, costs protection was allowed even though a CFA was in place.

In Ireland, the unenumerated right to legal representation identified under Article 40.3.1 of the Constitution⁴⁴¹ would have to be considered in this context.

5.10 Inability to proceed without PCO

The fifth principle stated as a condition for granting a PCO in *Corner House* was that if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so. The Liberty group, in its study *Litigating in the Public Interest*,⁴⁴² questioned whether a court could properly take into account whether an applicant could or would continue with the application if a PCO were not awarded, and suggested that the applicant's inability to proceed with a meritorious public interest challenge without a PCO should be a strong factor weighing in favour of granting one, and that "It was hard to see why a factor suggesting that a PCO should be granted had become one whose absence excluded the possibility of a PCO." It agreed with the approach taken by Bean J. in the *BUAV* case,⁴⁴³ where the applicant could have proceeded with the application without the protection of a PCO, but where the public interest in the case and the disparity of resources between the parties justified one being granted.

5.11 Costs and procedure of PCO application

The detailed procedures outlined by the Court of Appeal in *Corner House*⁴⁴⁴ reflect the practical steps required to give effect to the principles outlined therein and require that the application for a PCO be dealt with in conjunction with the normal application for permission to take a judicial review and be supported by the requisite evidence as to, *inter alia*, the financial means of the applicant, the motives for bringing the claim, the degree of public importance of the issues and the public benefit to be derived from their resolution, along with a schedule of the applicant's estimated legal costs. The Court stated that the application would be dealt with by a judge on the papers and at that stage should give rise to exposure to costs of up to £1,000 (£2,000 if multiple defendants). On refusal, the applicant would have the right to an oral hearing limited to one hour, with potential costs of up to £2,500 (£5,000 if multiple defendants). To prevent a flood of applications, the judgment establishes a "financial disincentive for those who believe they can apply for a PCO as a matter of course", as the unsuccessful applicant would be liable for the costs of the defendant (and one interested party) if they choose to resist the application, which costs the Court limited to a total of £7,000. This disincentive to "have-a-go" applications was intended to address concerns about the potential inequity of PCOs for

⁴⁴¹ See, for example, *Re Commission to Inquire into Child Abuse* [2002] 3 IR 459 and *O'Brien v. Personal Injuries Assessment Board and Others* [2005] IEHC 100.

⁴⁴² *Litigating in the Public Interest*, Liberty, 2006

⁴⁴³ *R (British Union for the Abolition of Vivisection) v. the Secretary of State for the Home Department* [2006] EWHC 250 (Admin)

⁴⁴⁴ Judgment, paras. 64-81.

respondents. On the other hand, the Court stated that an unmeritorious application to have a PCO set aside should be met with an order for indemnity costs, to which any cap imposed by the PCO should not apply.

5.11.1 Costs and procedure of PCO application – Liberty report

The Liberty group was of the view that exposure to costs of up to £7,000 was unduly harsh and likely to result in meritorious applicants being deterred.⁴⁴⁵ Their view was that the normal rule on a PCO application should be that there should be no order as to costs, this rule only to be departed from where a party acts unreasonably. In the *Corner House* case, the claimant could not afford any costs risk, and certainly not a risk in the order of £5,000. Accordingly the High Court and the Court of Appeal both made interim protective costs orders, ensuring that Corner House would have no liability in the event that its PCO application failed.

Commenting on this issue in *R (England, on the application of) v. London Borough of Tower Hamlets & Ors*,⁴⁴⁶ a case concerning Suttons Wharf, the Court of Appeal held that while it would be wrong to grant a PCO without an opportunity for the affected parties to comment, it was important that means should be found to do this without that process itself becoming a source of additional cost. It referred to the Liberty report (above) and the Aarhus Convention⁴⁴⁷ and expressed hope that the Civil Procedure Rules Committee would soon review these questions in the light of the Liberty report. In that case the local authority had appeared because it feared that a PCO might be made against it. Stating that the court would not make a PCO without giving it an opportunity to make representations, it declined to award costs to the authority for its appearance.

5.12 Aarhus certificate

The Environmental Law Foundation (ELF) proposed an “Aarhus Certificate”⁴⁴⁸ as the best way to address the barrier of prohibitively expensive costs in environmental cases. Such a certificate could be awarded by the court where the court considers that an action falls within the remit of the Aarhus Convention, namely that it is related to the environment, that the case is in the public interest and that the applicant has an arguable case. Although an Aarhus Certificate would be similar in effect to a protective costs order, it could be more useful in practice in that there would be a presumption in favour of granting the certificate once the facts met the required criteria and that this would be clearly laid down in the Superior Court Rules.

⁴⁴⁵ *Litigating in the Public Interest*, Liberty, 2006 at 33

⁴⁴⁶ [200] EWCA Civ 1742

⁴⁴⁷ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, (1999) 38 *ILM* 517. (Aarhus, 25 June 1998). In force 30 October, 2001. Article 9 sets out the core requirements of the access to justice pillar of the Convention.

⁴⁴⁸ Coalition for Access to Justice for the Environment – Briefing (ELF, June 2004, at www.elflaw.org).

6. OTHER COMMON LAW JURISDICTIONS

6.1 Ontario

Protective costs orders, of one form or another, have been proposed in a variety of common law jurisdictions. For example, in 1989 the Ontario Law Reform Commission suggested that the following criteria might be adopted by a court considering whether to make a PCO:

- The litigation must raise issues of importance beyond the immediate interests of the parties;
- The plaintiff must have no personal, proprietary or pecuniary interest in the outcome, or if such an interest does exist, it clearly does not justify the litigation economically;
- The litigation does not present issues which have been previously judicially determined against the same defendant;
- The defendant must have a clearly superior capacity to bear the costs of the proceedings.⁴⁴⁹

6.2 Canada

In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, the Supreme Court of Canada, by a 6-3 majority, granted a quite radical version of such an interim order, directing the respondents to pay the costs of the appellant, on a strictly controlled basis, as the proceedings went on.⁴⁵⁰ LeBel J. cited concerns about access to justice and the desirability of mitigating severe inequality between litigants and identified the following principles:

1. The party seeking the order must be impecunious to the extent that without such an order that party would have been deprived of the opportunity to proceed with the case;
2. The claimant must establish a *prima facie* of sufficient merit to warrant its pursuit;
3. ... the case must fall into a subcategory where the special circumstances that justified an award of interim costs were related to the public importance of the questions at issue in the case;
4. It was for the judge at first instance to determine whether a particular case, which might be classified as special by its very nature as a public interest case, was special enough to rise to the level where the unusual measure of ordering costs would be appropriate.⁴⁵¹

6.3 Australia

Similarly, in 1995 the Australian Law Reform Commission observed that the generally applicable “costs indemnity rule”, which corresponds to the “costs follow the event” principle, had a deterrent effect on public interest litigation, which plays an important role in clarifying legal issues to the benefit of the general community.⁴⁵² The Commission recommended that courts should have the power to make a “public interest costs order” at any stage of the proceedings and suggested criteria that might be taken into account in determining what type of order to make. In relation to such orders, it suggested that the court might direct that

“the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall – not be liable for the other party’s costs – only be liable to pay a specified

⁴⁴⁹ Cited in *Corner House* judgment, para. 42.

⁴⁵⁰ (2003) 114 CCR 2d 108. See *Corner House* judgment, paras.55-56.

⁴⁵¹ At paras.36 and 38.

⁴⁵² Australian Law Reform Commission, Report No. 75: *Costs shifting – who pays for litigation?* (1995), at paras.13.1 and 13.8. See further, *R (Corner House Research) v. The Secretary of State for Trade and Industry*, *ibid.*, at para.43.

proportion of the other party's costs – be able to recover all or part of his or her costs from the other party.”

In 1998, the High Court of Australia upheld, by a 3-2 majority, the refusal of a judge at first instance to order costs in favour of a respondent public authority in relation to an unsuccessful challenge to a planning consent on grounds that the development would impact on the habitat of the endangered koala bear.⁴⁵³ The trial judge had considered that there were “sufficient special circumstances to justify a departure from the ordinary rule as to costs”, based on the following considerations:

- the appellant had nothing to gain from the litigation “other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna”;
- a significant number of members of the public shared the appellant's stance, so that in that sense there was a public interest in the outcome of the litigation;
- the challenge had raised and resolved significant issues about the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and the present and future administration of the development consent in question, which had implications for the council, the developer and the public.

In 1994 the Privy Council had adopted a similar approach in relation to the costs of an unsuccessful application by the New Zealand Maori Council.⁴⁵⁴ It refused to award costs to the respondents because the Maori Council had not been pursuing the proceedings for private gain but in the interests of an important part of the heritage of New Zealand, and the New Zealand Court of Appeal had failed to clarify the law in question. In a case from Belize in 1985, the Privy Council dismissed an application for an interim injunction made by an alliance of Conservation NGOs from Belize, on the grounds that it was a public interest case, and refused to award costs against them.⁴⁵⁵

7. IRELAND

7.1 *Village Residents*

In the *Village Residents Association (No. 2)* case,⁴⁵⁶ the Irish High Court confirmed that it has jurisdiction to make a “pre-emptive costs order”, directing that the applicant should not be liable for the costs of any other party to those proceedings as may arise, or for the reserved costs of any such party as might have arisen in those proceedings to date, on the basis of section 14 of the Courts (Supplemental Provisions) Act, 1961 and Order 99, Rules 1(1) and 5 of the Rules of the Superior Courts 1986.⁴⁵⁷

⁴⁵³ *Oshlack v. Richmond River Council* [1998] HCA 11. See *Corner House* judgment, paras.59-63.

⁴⁵⁴ *New Zealand Maori Council v. AG of New Zealand* [1994] 1 AC 466

⁴⁵⁵ *Belize Alliance of Conservation Non-Governmental Organisations v. Dept. of the Environment & Anor. (Belize)* [203] UKPC

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⁴⁵⁶ *Village Residents Association Ltd. v. An Bord Pleanála* [2000] IEHC 34; [2000] 2 IR 321; [2001] 2 ILRM 22 (23rd March, 2000).

⁴⁵⁷ *Ibid.*, at para.24. Laffoy J. goes on to explain that s.14 of the 1961 Act

“provides that the jurisdiction vested in and exercisable by this Court is to be exercised so far as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by the rules of court in force ...”. She also explains that Rule 1(1) of Order 99 “provides that the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively” and that Rule 5 “provides that costs may be dealt with by the Court at any stage of the proceedings ... notwithstanding that the proceedings have not been concluded”.

Though finding that the application in that particular case met none of the relevant requirements, Laffoy J. approved the position adopted by the English High Court in the *CPAG* case in relation to the grant of PCOs. She stated that “as a broad proposition the principles enunciated by Dyson J. ... would seem to meet the fundamental rubric that the interests of justice should require that the order be made.”⁴⁵⁸ Indeed, Laffoy J. might be regarded as having taken a more flexible approach to PCOs than that of Dyson J. by expressly anticipating that “it maybe that in a particular type of case other factors may come into play”.⁴⁵⁹ Tellingly, by way of an example, she cites policy considerations set out in environmental or heritage protection legislation:

“For instance, in judicial review proceedings challenging the validity of a decision of the Board [An Bord Pleanála] or of a planning authority which has no private, as opposed to public, ramifications and, therefore, where what is at issue is a true public interest issue of general importance, perhaps a heritage protection issue or an environmental issue, it might well be that there would exist policy considerations reflected in legislation which the Courts would have to have regard to.”⁴⁶⁰

7.2 Friends of the Curragh Environment

An application for a PCO arose again in *Friends of the Curragh Environment Ltd. v. An Bord Pleanála*,⁴⁶¹ prior to a hearing for leave for judicial review. Kelly J. referred to Laffoy J.’s decision in the *Village Residents* case and the more recent *Corner House* decision of the Court of Appeal in England and Wales, citing the conditions listed there as appropriate principles to be applied. He concluded that the first issue raised, relating to delegation by the Board to the planning authority of the negotiation of certain matters, did not raise an issue of public importance as the applicable principles had already been decided in other cases.⁴⁶² The second ground concerned “project splitting”, and Kelly J. held that would involve an assessment of the facts by reference to well-established jurisprudence, and therefore it raised no issue of general public importance either. The third ground on the inadequacy of the EIS, Kelly J. likewise held, did not raise any issue of general public importance, nor did a fourth point on delay.

Kelly J. went on to consider the effect of article 10(a) of Directive 85/337/EEC as inserted by article 3 of Directive 2003/35/EEC. This article provides as follows:

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

- (a) Having a sufficient interest, or alternatively,
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

⁴⁵⁸ *Ibid.*, para. 25.

⁴⁵⁹ *Ibid.* Laffoy J. further stated, *ibid.*,

“While I am satisfied that the Court has jurisdiction to in an appropriate case to deal with costs at an interlocutory stage in a manner which ensures that a particular party will not be faced with an order for costs against him at the conclusion the proceedings, it is difficult in the abstract to identify the type or types of cases in which the interests of justice would require the Court to deal with the costs issue in such a manner and it would be unwise to attempt to do so.”

⁴⁶⁰ *Ibid.*

⁴⁶¹ [2006] IEHC 243

⁴⁶² *Boland v. An Bord Pleanála* [1996] 3 IR 435, *Kenny v. An Bord Pleanála* [2001] 1 IR 565 and *Arklow Homes Ltd. v. An Bord Pleanála* [2006] IEHC 15

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 the Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirement referred to in Article 1(2), shall be deemed sufficient for the purpose of sub-paragraph (a) of this article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of sub-paragraph (b) of this Article.

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

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

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

Kelly J. also noted that the “public” was defined under the Directive as
“One or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or group”,

and that “public concerned” was defined as
“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.”

The applicant argued that Ireland had failed to implement the directive by the set date, which was 25 June 2005, and that therefore the directive should have direct effect. It argued that the provisions of the directive should entitle it to a PCO, aside from the public interest ground.

Kelly J. concluded that the directive did not meet the all criteria for direct effectiveness, and that in particular the provisions of the directive concerned were not sufficiently clear, precise and unconditional. Further, the directive could not have horizontal effect, and so a PCO could not be ordered against the Turf Club, a notice party. He dismissed the application, and awarded costs against the applicant in respect of the respondent and the first notice party. The case is under appeal to the Supreme Court.

7.2.1 Costs of PCO application in Friends of the Curragh Environment

In contrast to the procedures set down in the English *Corner House* decision to limit ancillary litigation in relation to PCOs (specifying a maximum exposure of £7,000), the *Friends of the Curragh Environment* case involved at least five motions, two days’ hearing in the High Court and attendance for the judgment, the costs of which are likely to be in six figures. Further costs were incurred because leave was not granted to stay the application for leave for judicial review, pending a decision on the

PCO issue. The level of costs incurred and still being incurred is such that the applicant company, representing 10 years' work by its members, will face liquidation in the event that the final decision goes against it. If PCO applications in the public interest are to be viable, it will be necessary to develop procedures to curtail the time and expense involved in applying for them.

8. GIVING EFFECT TO THE PUBLIC PARTICIPATION DIRECTIVE

8.1 Action by the EU Commission

The Commission announced in March 2007 that it proposed to refer Ireland to the ECJ for failing to adopt and provide correct information on measures to give effect to the Public Participation Directive, (Directive 2003/35/EEC). It noted that the deadline for implementation of the Directive was June 2005 and that the Irish Government had argued that the Irish courts already upheld the provisions through a system of judicial review, and that additional legislation was not necessary. It stated that it had learned, not from the Irish Government, that the High Court had expressly refused to apply the Directive in the *Friends of the Curragh Environment* case (in relation to the 'reasonable costs' provision). It appears therefore that the Commission is seeking to have the Directive more explicitly implemented than by interpretation by the Courts, a course of action which would fit with Kelly J.'s interpretation of the Directive, which still however remains to be confirmed by the Supreme Court when his judgment is appealed.

8.2 Sweetman

In April 2007, the issue of the necessity to transpose the Public Participation Directive was considered by Clarke J. in *Sweetman v. An Bord Pleanála and Others*,⁴⁶³ a leave application for judicial review. In this case the decision to grant planning permission was made in the first instance by the defendant Board, and the only appeal possible was by means of judicial review. Two issues arose: whether judicial review provided a remedy as required by the directive, and whether the aspect of the directive which entitles a person to a review before a court or other independent body is sufficiently clear to be given direct effect. Clarke J. also considered the question of prohibitive costs under article 10a of the directive.

Clarke J. referred to *Friends of the Curragh Environment*, and the comments by Kelly J. in relation to the directive and its interaction with the Irish judicial review process, which he noted were mainly concerned with whether the directive was sufficiently clear to mandate the making of a PCO under the principle of direct effect. He then considered a number of points.

8.1.1 Substantial interest for legal standing

The first was that the requirement that an applicant has to establish a "substantial interest" under section 50 of the 2000 Act is in breach of article 10(a). Clarke J. accepted that it might be necessary to

⁴⁶³ [2007] IEHC 153

construe the term “substantial interest” in a manner that does not infringe the directive. He held that if it should prove to be necessary on the facts of any case to give a more generous interpretation of the requirement of “substantial interest” so as to meet the “wide access to justice” criteria set out in article 10a, then there would be no difficulty in construing the term “substantial interest” in an appropriate manner. He failed to find any failure to transpose properly on those grounds.⁴⁶⁴

8.1.2 Adequacy of JR

The second point considered by Clarke J. was that Irish judicial review does not adequately give to persons an ability “to challenge the substantial or procedural legality of decisions”. Clarke J. held that the requirement for leave was not a barrier to the entitlement to the judicial review mandated in the directive, as the leave application could be wide-ranging and lengthy.⁴⁶⁵ In relation to the judicial review hearing proper, he held that there was sufficient potential for a greater than usual level of scrutiny if that was mandated by the directive, and that it is possible to accommodate any requirements which may be found to exist within article 10a in the existing judicial review regime. He accepted that Irish judicial review might not accommodate a complete appeal on the merits, but that he did not believe that such a review is required by the directive, and that the review required under the directive could be accommodated within the existing system.⁴⁶⁶ He found that “substantive legality” of a decision did not mean a review of the substance of the decision itself, and that the directive does not require a complete appeal on the merits. Referring to the EU law doctrine of “manifest error”, he concluded that it was unlikely that the directive intended to impose a higher level of scrutiny on the courts of member states than the ECJ itself would apply to decisions of EU institutions. He concluded:

“I am, however, satisfied that to the extent that it may emerge that it may be necessary to allow, in certain circumstances, for a review so as to meet that test which goes beyond the existing parameters of Irish judicial review law, that law is more than capable of being adapted by the courts to accommodate such a requirement. In those circumstances I am not satisfied that it has been established that there is any failure to transpose.”⁴⁶⁷

8.1.3 Prohibitive cost

Finally, Clarke J. considered whether the exposure of parties such as the applicant to the costs not only of the respondent but also of notice parties amounts to a “prohibitive cost” in breach of the directive. He noted that this was the aspect of the directive which Kelly J. determined could not be of direct effect on the grounds of lack of clarity, and he saw no reason to depart from this view. He referred to the provisions of the Aarhus Convention, article 3.8.⁴⁶⁸ “. . . This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings”. He found that the “absence of excessive cost” requirement in the directive is not intended to cover the exposure of a party to reasonable costs in judicial proceedings.⁴⁶⁹ Further, as courts have a discretion in relation to costs, and may award costs in favour of an unsuccessful applicant in public interest cases, he did not believe that

⁴⁶⁴ Para.6.7

⁴⁶⁵ Para.6.10

⁴⁶⁶ Para.6.17

⁴⁶⁷ Para.6.21

⁴⁶⁸ The report mistakenly refers to art.9 para.3.

⁴⁶⁹ Para.7.8

the level of exposure to costs in judicial review cases was “unreasonable” within the terms of the Aarhus Convention, article 3.8.⁴⁷⁰ Lastly, the two-stage process of judicial review likewise did not generally give rise to unreasonable costs. He concluded that he could not find a failure to properly transpose the directive under this heading, nor that the directive required there to be immunity from exposure to the sort of costs which arise in Irish judicial review proceedings.⁴⁷¹

8.3 Alternative interpretation

This judgment, firmly placing environmental law challenges within the framework of judicial review as to the degree of review and the costs, will be a disappointment to many who had other expectations based on a different interpretation of article 9 of the Aarhus Convention and article 10a of the Public Participation Directive.

Before the *Sweetman* decision, in relation to the possible normative significance of the requirement that any procedure not be prohibitively expensive and to ongoing concerns about the deterrent effect of costs at national level, Ryall recalled “the principle of effectiveness developed by the ECJ which dictates that national procedural rules must not make it ‘impossible in practice’ or ‘excessively difficult’ to enforce Community law rights”.⁴⁷² Indeed, she further observed that

“In Member States where the substantive or procedural legality of a decision may only be challenged before a court, the financial resources of the parties seeking to mount judicial review proceedings and the availability of civil legal aid and advice will be critical.”⁴⁷³

Ryall also noted with disappointment that the text of article 10a of the 2003 Directive does not reflect the requirement set out in article 9(5) of the Aarhus Convention⁴⁷⁴ that

“In order to further the effectiveness of the provisions of this article, each Party ... shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”

The interpretation of the provisions of the Public Participation Directive (2003/35/EEC) in the *Sweetman* case must undermine the hope held by many environmentalists that a way of reducing costs in environmental cases in accordance with the spirit and intent of the Aarhus Convention would be found when the Directive was implemented in Irish law. The public discourse on this issue reflected the problems of the current costs barrier and the perceived need for their reduction. We recommend that the implementation of the Directive be considered as an opportunity to make provision for assisting greater access to justice through the provision of legal aid in environmental cases of public interest as recommended in chapter 2, and a statutory framework for protective costs orders including provision for a so-called “Aarhus certificate”.

⁴⁷⁰ The report again mistakenly refers to art.9 para.3.

⁴⁷¹ Para.7.11

⁴⁷² See, Ryall, *supra*, n. 386, at (14). See further, in relation to liability for costs, Case C-63/01 *Evans* [2003] ECR I-14447, at paras.74-75, cited in Ryall, *ibid.*, at (15).

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

9. OTHER VIEWS ON COSTS AS A BARRIER TO JUSTICE

9.1 Law Reform Commissions

A 1994 Law Commission (England and Wales) report proposed the introduction of a “two track system of standing” which would include a new “discretionary track” where the High Court considers that it is in the public interest for the applicant to make the application.⁴⁷⁵ If the Irish courts were to take a similar view of the centrality and significance of the vindication of the rule of law for the advancement of the public interest, they might more easily justify the grant of PCOs, including where an applicant had a private interest in the decision in question.

The Law Commission decided not to recommend any form of costs protection order at the outset of litigation, feeling that traditions of costs following the event and judicial discretion were too deeply entrenched. Further, the most recent Legal Aid Act was only six years old at the time. It did however recommend that when a framework for public law litigation brought in the public interest was finally decided, the court should have power to order a party’s costs to be paid out of central funds instead of by the other side. This recommendation was not acted upon.

The Law Reform Commission has examined the issue of protective costs orders and describes this as an “an area of developing law at present”.⁴⁷⁶ The Commission highlighted the extent of the protection that might be conferred on a successful applicant for a PCO, pointing out, for example, that

“The pre-emptive costs order will be sought at a preliminary stage and if the applicant succeeds in obtaining such order, it will apply regardless of the fact that intermediate stages may be dealt with by other judges than the final full hearing.”⁴⁷⁷

However, the Commission would appear to promote a cautious approach and agrees with the view that the making of a PCO is a “high-risk strategy”, stating that

“There would appear to be a considerable element of risk in making such an order, in that the pre-emptive costs order is made in advance of the full hearing ... There is thus a danger that such order might be made prematurely, in advance of a full exposition of the facts, where it might subsequently be clear that making such an order was inappropriate.”⁴⁷⁸

In the light of this risk, the Commission recommended, not alone that the courts exercise their jurisdiction in relation to PCOs only in exceptional circumstances, but also that “where any doubt

⁴⁷⁵ Law Commission Report No. 226, *Administrative Law: Judicial Review and Statutory Appeals* (London, 1994).

⁴⁷⁶ Law Reform Commission, *Consultation Paper on Judicial Review Procedure* (January 2003), at 96.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*, at 98. The Commission agrees with the view expressed by Costello that

“The risk in exercising such a power prematurely is that facts will emerge after the order which show that its exercise was inappropriate. But as a final decree of the court a pre-emptive costs order cannot be revised – even if the circumstances show that it has been improperly made.”

See K. Costello, “Costs Principles and Environmental Judicial Review” (2000) 35 *Irish Jurist* 121, at 136. The Commission points out that this risk has also been recognised by the *Review of the Crown Office List* (A Report to the Lord Chancellor, March 2000).

exists, the court should instead simply indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings⁴⁷⁹. The Commission pointed out that the court would be able, under its inherent jurisdiction as to costs, merely to give an indication as to the likely outcome in relation to costs and explains that

“This approach would have the advantage of flexibility: the court would be free to vary its approach to the question of costs at the conclusion of the full hearing if it felt that such approach is warranted having heard the full case, while providing the applicant with some comfort in that, excluding any adverse facts coming to light at the full hearing, such applicant will be entitled to recover their costs.”⁴⁸⁰

10. RECOMMENDATIONS

10.1 A legislative framework for PCOs

We propose a legislative framework to allow for the possibility of legal aid as set out in chapter 2 and the making of protective costs orders in appropriate public interest cases. We recognise that under court rules and their inherent jurisdiction under the Constitution, the courts retain discretion in relation to costs. Nevertheless we believe it would be helpful to set out the principles to be considered in legislation, as guidance for the courts in the exercise of that discretion.

We recommend

- The development of a statutory framework for the award of costs and protective costs orders in public interest litigation.
- The development of a definition of public interest litigation. The criteria identified by the Court of Appeal in the *Corner House* case provide a good starting point: a public interest case is one where (i) the issues raised are one of general public importance, and (ii) the public interest requires that those issues should be resolved.
- The identification of different forms of PCO, ranging from orders directing that an applicant’s liability for the respondent’s costs be capped at a reasonable level, thereby discouraging excessive spending by well resourced public bodies, through orders directing that there be no order as to costs whatever the outcome of the substantive proceedings, to orders requiring that the respondent pay the applicant’s reasonable costs as the proceedings progress.
- That it should not be a requirement for the making of a PCO that the applicant has no private or personal interest in the outcome of the case. However, the nature and extent of a private interest is a matter which the court may take into account, weighing the private interest against the public interest in the case. Where some element of private interest is involved, it would be open to the courts to vary the terms of any PCO in order to mitigate any inequity.
- That there should be no requirement that the applicant’s legal representatives act *pro bono*, as such a requirement could unduly limit the pool of lawyers willing to act in such cases, and could make it unnecessarily difficult to find lawyers willing to take a case on a *pro bono* basis within the short timeframes which often must be met.
- That any capping of an applicant’s costs should be reasonable and not disproportionate to the costs incurred by the respondent, and should avoid a significant inequality of arms. The unenumerated right to legal representation identified under article 40.3.1 of the Constitution⁴⁸¹ would have to be considered in this context.

⁴⁷⁹ *Ibid.*, at 98-99. The Commission included this recommendation in its 2004 *Report on Judicial Review Procedure* (LRC 71-2004) (February 2004).

⁴⁸⁰ *Ibid.*, at 98.

⁴⁸¹ See, for example, *Re Commission to Inquire into Child Abuse* [2002] 3 IR 459 and *O'Brien v. Personal Injuries Assessment Board and Others* [2005] IEHC 100.

- That it should not be necessary for an applicant for a PCO to be completely financially unable to proceed with a case. In appropriate cases, the public interest in a case and the disparity of resources between the parties might justify a PCO being granted.
- That the application procedure for a PCO be streamlined and kept brief, so that unnecessary costs are not incurred. We recommend that consideration be given to interim PCOs to enable such applications to be made. [Sections 5 and 7]

10.2 Other considerations in granting PCOs

In considering the desirability of equitable access to justice for concerned groups or individuals, the Irish courts might consider, among the additional factors alluded to by Laffoy J. in *Village Residents*, the virtual absence of civil legal aid in Ireland having regard to the objectives underlying the Aarhus Convention. Also, in determining whether a PCO is warranted, the Irish courts might consider the likely benefit to the public broadly, in terms of the efficient production of timely precedent in order to ensure the application of rules of general public importance. In the absence of availability of civil legal aid in environmental matters, the judicious use of PCOs could represent an efficient allocation and use of public funds. [Section 2]

10.3 Other approaches to reducing costs

The costs barrier to access to justice is real and can have grave consequences, particularly in environmental cases where the effects of decisions can impact on large numbers of people. We also recognise that the problem of costs is as real for respondents as it is for applicants. To reduce recourse to litigation, we recommend the development of mechanisms to achieve agreement and to promote negotiation and compromise. A commitment to this on the part of public bodies and those charged with environmental matters could make a contribution to the problem of the costs barrier. The Ombudsman has no jurisdiction in planning matters where recourse may be had to An Bord Pleanála, but a properly resourced role for the Ombudsman to examine procedures, mediate and encourage the achievement of compromises could be a valuable one. [Section 3.1]

10.4 Achieving non-prohibitive costs under the Aarhus Convention

We recommend that the implementation of the Public Participation Directive (2003/35/EEC) be considered as an opportunity to make provision for assisting greater access to justice through the provision of legal aid in environmental cases of public interest as recommended in chapter 2, and a statutory framework for protective costs orders including provision for a so-called “Aarhus certificate”. [Section 8.2]

Appendix

ENVIRONMENTAL ENFORCEMENT AND PENALTY PROVISIONS

Legend:

Waste Management Act 1996 = WMA

Waste Management Amendment Act 2001 = WMAA

The Local Government (Water Pollution) Act 1977 = 1977 Act

The Local Government (Water Pollution) (Amendment) Act 1990 = 1990 Act

Air Pollution Act 1987 = APA

Litter Pollution Act 1997 = LPA

Environmental Protection Agency Act, 1992 = EPA 1992

Protection of the Environment Act 2003 = PoEA

Sea Pollution (Amendment) Act 1999 = SPAA

Dumping at Sea Act 1996 = DSA

Dumping at Sea (Amendment) Act 2004 = DSAA

Fisheries (Consolidation) Act 1959-2003 (excluding any Fisheries (Management and Conservation) Orders and Sea Fisheries Orders) = FA

	Waste	Water	Air	Litter	Noise	Fisheries	Odour
Offence	<p>Range of offences (all from WMA unless stated to be otherwise), including the following:</p> <p>S.9(1) – Offences by corporate bodies, individuals can be personally liable.</p> <p>S.14(6) – An offence to obstruct/impede etc. an <i>authorised person</i>.</p> <p>S.15(3)(a) – An offence</p>	<p>S.3(1) 1977 Act</p> <p>Prohibition on the entry of polluting matter to waters.</p> <p>S.4(8) 1977 Act</p> <p>It is an offence to contravene the terms of a licence in relation to trade and sewage effluents.</p> <p>S.6 1977 Act</p>	<p>S.11(1) APA</p> <p>Any person who contravenes any provision of this Act or of any regulation made under this Act or of any notice served under this Act shall be guilty of an offence.</p>	<p>S.3(6) LPA</p> <p>Any person who breaches this condition which prohibits the depositing of any substance or object so as to create litter in a public place shall be guilty of an offence.</p> <p>S.4(3) LPA</p> <p>It is an offence to breach obligations to</p>	<p>S.107 EPA 1992</p> <p>Failing to comply with Local Authority Notice to prevent or limit noise from premises, processes or works.</p> <p>S.108 EPA 1992</p> <p>Failing to comply with a District Court Order (made on complaint from local authority, EPA or affected</p>	<p>S.10 SPA</p> <p>Prohibition on discharge of oil and other substances.</p> <p>S.171 FA</p> <p>Steeping flax or hemp in waters or throwing deleterious matter into waters.</p>	<p>S.11 APA</p> <p>Contravention of any provision of APA is an offence. An offence committed by a body corporate or by a director, manager, secretary, or other official acting on behalf</p>

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>not to comply with terms as to monitoring and inspection.</p> <p>S.16(5) – An offence to remove, damage or deface a notice under this section.</p> <p>S.28(6) – An offence to breach terms as to waste prevention and minimisation.</p> <p>S.29(6) – An offence to breach terms as to measures related to the recovery of waste.</p> <p>S.32(6) – An offence generally to breach one’s duties as a holder of waste.</p> <p>S.(33)(8)(c) – An offence to breach terms as to the collection of waste.</p> <p>S.34(1)(c) – An offence to collect waste for reward without a waste collection permit.</p> <p>S.36(3) – An offence to breach regulations in relation to the movement of waste.</p> <p>S.38(7)(b) – An offence to breach regulations as</p>	<p>It is an offence to make a false or knowingly misleading statement when applying for a licence for trade and sewage effluents.</p> <p>S.12 1977 Act</p> <p>A person who does not comply with a notice of the local authority re measures required to be taken to prevent water pollution shall be guilty of an offence.</p> <p>S.14 1977 Act</p> <p>It is an offence to fail to notify the local authority re any accidental discharge, spillage or deposit of any polluting matter which enters or is likely to enter any waters or a sewer.</p> <p>S.16(8) 1977 Act</p> <p>It is an offence to breach this section re licensing of discharges to sewers.</p> <p>S.16(13)(a) 1977 Act as inserted by s.12 1990 Act</p> <p>Where a notice of the</p>	<p>S.11(2) APA</p> <p>Where an offence under this Act is committed by a body corporate or by a person acting on behalf of a body corporate and is proved to have been committed with the consent, connivance or approval of, or to have been facilitated by any neglect on the part of, any director, manager, secretary or other official of such body, such person shall be guilty of an offence.</p> <p>S.14(5) APA</p> <p>Any person who obstructs an authorised person in the exercise of his powers under this section or who fails to comply with a requisition of an authorised person or who wilfully withholds any information which the authorised person requires shall be</p>	<p>prevent litter such as that which may escape from a vehicle or skip.</p> <p>S.6(6) LPA</p> <p>It is an offence to breach the duty owed by occupiers etc. regarding littering.</p> <p>S.9(7) LPA</p> <p>It is an offence to fail to comply with notice of local authorities requiring the removal of litter.</p> <p>S.15 LPA</p> <p>It is an offence for owners, occupiers or persons in charge of mobile outlets that dispense food or drink not to provide adequate litter receptacles.</p> <p>S.16(6) LPA</p> <p>An occupier who fails to fulfil their obligations under this section (re special measures required of certain operations) shall be guilty of an offence.</p> <p>S.17 LPA</p> <p>A person on whom a</p>	<p>person) to prevent or limit noise giving reasonable cause for annoyance to a person in any premises or public place.</p> <p>Noise Regulations 1994 Regulation 4</p> <p>An offence in relation to a notice, or to a notice as amended, served by a local authority under s.107 of the Act may be prosecuted summarily by that local authority.</p>	<p>S.172 FA</p> <p>Allowing deleterious liquid to enter waters.</p> <p>S.2 DSA</p> <p>Restrictions on dumping at sea of vessels, aircrafts, substances and material.</p> <p>S.3 DSA</p> <p>Prohibition on incineration of substances or material in maritime area.</p> <p>S.4 DSA</p> <p>Prohibition of disposal of offshore installations and certain substances or material.</p>	<p>of the body corporate shall be guilty of an offence.</p> <p>S.24(1) APA</p> <p>Occupier of premises other than private dwelling shall use best practicable means to limit and prevent emissions.</p> <p>S.24(2) APA</p> <p>Occupier of any premises shall not cause an emission so as to cause a nuisance.</p> <p>S.29 APA</p> <p>Requirement on occupiers (other than private dwellings) to notify the relevant local authority as soon as practicable after the occurrence of any incidence.</p>

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>to waste management facilities.</p> <p>S.39(9) – An offence to contravene requirement to hold a waste licence.</p> <p>S.40(13)(b) – An offence to fail to give notice in writing to the EPA within 1 month after the cesser of the activity the subject of the licence.</p> <p>S.45(4) – An offence to make false or misleading submissions in an application for a waste licence.</p> <p>S.51(5) – An offence to breach conditions as to the recovery of sludges and agricultural waste.</p> <p>S.53(2) – An offence to furnish to the EPA any evidence or particulars which one knows to be false or misleading re financial provisions regarding waste recovery and disposal.</p> <p>S.53A(7) as inserted by s.43 PoEA</p> <p>An offence to fail to furnish statement in relation to landfill</p>	<p>sanitary authority under this section (re licensing of discharges to sewers) is not complied with, the person on whom it was served shall be guilty of an offence.</p> <p>S.19(3)(a) 1977 Act</p> <p>A person who, in relation to a licence to discharge into sewers, when furnishing information under the relevant ss. 16 and 20, makes a statement in writing which is false or to his knowledge misleading in a material respect shall be guilty of an offence.</p> <p>S.23(4) 1977 Act as inserted by 1990 Act</p> <p>A person who fails to comply with this section (re providing information on request to a local authority or a sanitary authority) shall be guilty of an offence.</p> <p>S.27(3) 1977 Act</p> <p>A person who contravenes the provisions re restricting</p>	<p>guilty of an offence.</p> <p>S.16(3) APA</p> <p>Any person who has been served with a notice under section 16 (re obligation to give information) and who furnishes any information which he knows to be false or misleading in a material particular shall be guilty of an offence.</p> <p>S.31(3)(a) APA</p> <p>A person who, in relation to an application for a licence, or a review of a licence, under this Act, or in relation to an appeal arising from such an application, makes a statement in writing which to his knowledge is false or misleading in a material respect, shall be guilty of an offence.</p> <p>S.40(4) APA</p> <p>Any person who contravenes any provision of a special</p>	<p>notice has been served under section 17 (re major events) who fails to comply with the notice or who has not made the necessary financial contribution shall be guilty of an offence.</p> <p>S.20(7) LPA</p> <p>A person who contravenes s.20 (re the prohibition of articles and advertisements on and defacement of certain structures, etc.) or who impedes a local authority in the exercising of its functions under this section shall be guilty of an offence.</p> <p>S.22 LPA</p> <p>A person who contravenes S.22 (re depositing of dog faeces) shall be guilty of an offence.</p> <p>S.23(3) LPA</p> <p>A person who obstructs or impedes a litter warden or a member of the Garda Síochána who is exercising</p>			

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>charges for disposals within one month after year-end.</p> <p>S.53C(4) as inserted by s.44 PoEA</p> <p>It is an offence to breach regulations re producer responsibility for free treatment and recovery of end-of-life vehicles.</p> <p>S.53F PoEA</p> <p>It is an offence to breach regulations as to the requirement to deposit mechanically propelled vehicles for recovery etc.</p> <p>S.57(4) – An offence to fail to comply with an order of the High Court in relation to the holding, recovery or disposal of waste.</p> <p>S.66(3)(a) – An offence to breach amendments made to the Local Government (Water Pollution) Act, 1977.</p> <p>S.66(11) – An offence to breach notice requirements of this section.</p>	<p>use of certain vessels in specified waters shall be guilty of an offence.</p> <p>S.28(3)(b) 1977 Act as inserted by s.19 1990 Act</p> <p>A person who fails to comply with a request to furnish name, address, description of occupation, functions and responsibilities to an authorised person re inspection of a premises or vessel in accordance with this section shall be guilty of an offence.</p> <p>S.28(4) 1977 Act</p> <p>A person who obstructs an authorised person in the performance of his duties under this section(re powers of entry and inspection) shall be guilty of an offence.</p> <p>S.21(3)(a) 1990 Act</p> <p>A person who contravenes or fails to comply with bye-laws under this section (re prohibition of certain agricultural activities)</p>	<p>control area shall be guilty of an offence.</p>	<p>functions under the LPA, or a person who gives a false or misleading name or address when reasonably suspected to have contravened the LPA, shall be guilty of an offence.</p> <p>S.25(3) LPA</p> <p>Regarding offences by corporate bodies, individuals can be personally liable.</p> <p>S.27 LPA</p> <p>Where a mechanically propelled vehicle is used in the commission of an offence under the LPA, the registered owner/ hirer/ person using the vehicle at that time can be severally guilty of an offence.</p> <p>S.32(4) LPA</p> <p>It shall be an offence to deface, damage or remove a notice served under the LPA within 3 months of its posting without lawful authority.</p>			

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>S.71(1) – An offence to abandon a vehicle in certain circumstances.</p> <p>S.71(9) – An offence to knowingly make a false or misleading statement re abandoned vehicle.</p> <p>S.9(9) WMAA – An offence to breach the terms re levy on plastic bags.</p> <p>S.73(10) WMA as inserted by s.11 WMAA – An offence to fail to pay the landfill levy.</p>	<p>shall be guilty of an offence.</p> <p>S.23 1990 Act</p> <p>Where an offence is committed under this or the 1977 Act by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a person being an officer of that body corporate, or a person who was purporting to act in any such capacity, that person shall also be guilty of an offence and be liable to be proceeded against and punished as if he were guilty of the first mentioned offence.</p>					
Fine - Summary Conviction	<p>S.22 PoEA</p> <p>Fine not exceeding €3,000.</p> <p>S.66 WMA</p> <p>Fine in relation to water pollution or nutrient management plans not exceeding €1,000.</p>	<p>S.24 1990 Act</p> <p>Fine not exceeding €1,000 for offences under ss. 3, 4, 16, 6, 19, 27, 28(4), 10 or 14 of the 1977 Act.</p>	<p>S.12 APA</p> <p>Fine not exceeding €1,000.</p>	<p>S.24 LPA as substituted by s.58 PoEA</p> <p>Fine not exceeding €3,000</p> <p>S.28 LPA as amended by s.14 WMAA</p> <p>Provision is made for an on the spot fine of €125</p>	<p>S.9 EPA 1992</p> <p>Fine not exceeding €3,000</p>	<p>S.29 SPA as amended by s.15 SPAA</p> <p>Fine not exceeding €1,500 or euro equivalent</p> <p>S.171 FA</p> <p>Fine not exceeding €25 or</p>	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
				<p>S.28 LPA</p> <p>Re the deposit of dog faeces, a person may during the 21 days beginning on the day on which he/she was served with notice by a litter warden or a member of the Garda Siochana, make to the local authority a payment of £25. This will mean that no prosecution in respect of the alleged offence will be instituted.</p>		<p>euro equivalent</p> <p>S.10(2) DSA as amended by s.7(a) DSAA</p> <p>Fine not exceeding €3,000</p>	
Fine – Conviction on Indictment	<p>S.22 PoEA</p> <p>Maximum of €15m.</p> <p>S.66 WMA</p> <p>Fine in relation to water pollution not exceeding €25,000.</p>	<p>S.24 1990 Act</p> <p>Fine not exceeding £ 25,000 for an offence under ss.3, 4 or 16 of the 1977 Act or S.21(3) of the 1990 Act.</p>	<p>S.12 APA</p> <p>Fine not exceeding £10,000.</p>	<p>S.24 LPA as substituted by S.58 of PoEA</p> <p>Fine not exceeding €130,000.</p>	<p>S.9 EPA 1992</p> <p>Fine not exceeding €15 m.</p>	<p>S.29 SPA as amended by s.16 SPAA (ref. S.19 SPAA)</p> <p>£10m or euro equivalent</p> <p>FA</p> <p>Not applicable under FA.</p> <p>S.8 DSA</p> <p>Fine to such an amount as the court feels is appropriate.</p>	No provision
Incarceration – Summary	<p>S.10 WMA 1996 (not amended by PoEA)</p>	<p>S.24 1990 Act</p> <p>Term not exceeding six</p>	<p>S.12 APA</p> <p>Term not exceeding</p>	No provision	<p>S.9 EPA 1992:</p> <p>Term not exceeding 12</p>	<p>S.29 SPA as amended by s.16</p>	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
Conviction	Term not exceeding 12 months. S.66 WMA Re water pollution, term not exceeding 6 months.	months on summary conviction for offences under ss.3, 4,16, 6, 12, 19, 27 or 28(4) of the 1977 Act.	six months, or at the discretion of the court, to both fine and imprisonment.		months (and/or fine not exceeding €3,000).	SPAA (ref. S.19) Term not exceeding 12 months or, at the discretion of the court, to both fine and imprisonment. S.171 FA Term not exceeding six months or, at the discretion of the court, to both fine and imprisonment. S.172 FA n/a S.10(4) DSA Term not exceeding twelve months or, at the discretion of the court, to both fine and imprisonment.	
Incarceration-Conviction on Indictment	S.10 WMA Term not exceeding 10 years. S.66 WMA Re water pollution, term	S.24 1990 Act Term not exceeding 5 years on conviction on indictment for offences under ss.3, 4 or 16 of 1977 Act.	S.12 APA Term not exceeding two years, or at the discretion of the court, to both such fine and such	No provision	S.9 EPA 1992 Term not exceeding 10 years (and/or fine not exceeding €1.5m)	S.29 SPA as amended by s.16 SPAA Term not exceeding five years or, at the	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	not exceeding 5 years.		imprisonment.			discretion of the court, to both such fine and imprisonment FA n/a S.10(1) DSA Term not exceeding 5 years or, at the discretion of the court, to both fine and imprisonment.	
Ongoing Offences – Summary Conviction	S.22 PoEA Penalties of up to €1,000 per day on summary conviction.	Ss.3, 4, 10, 12, 16 and 27 1977 Act as amended by s.24 1990 Act A fine not exceeding £100 for every day on which the contravention is continued.	S.12 APA A fine not exceeding £100 for every day on which the contravention is continued	S.24 LPA as substituted by S.58 PoEA On summary conviction to a fine not exceeding €600 for every day on which the contravention is continued.	S.9(3) EPA 1992 as amended by S.10(d) PoEA Liable for fine of €1,000 for every day offence continued after conviction	S.172 FA Fine not exceeding £5 for each day offence continues.	No provision
Ongoing Offences – Conviction on Indictment	S.22 PoEA Up to €130,000 for each day an indicted offence continues after conviction.	Ss.3, 4 and 16 1977 Act as amended by s.24 1990 Act A fine not exceeding £500 for every day on which the contravention is continued.	S.12 APA A fine not exceeding £1,000 for every day on which the contravention is continued.	S.24 LPA as amended by s.58 PoEA A fine not exceeding €10,000 for every day on which the contravention is continued.	S.9(3) EPA 1992 as amended by s.10(d) PoEA Liable for fine of €130,000 for every day offence continued after conviction.	No provision	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
Who the Fines are Paid to	<p>S.12 WMAA</p> <p>Establishment of the Environment Fund, a fund that will be used to assist, support or promote programmes, equipment, research etc. for the prevention or reduction of waste.</p> <p>S.13 WMA</p> <p>Payment of certain fines to local authority, EPA or other persons.</p>	<p>S.26 1990 Act</p> <p>Where a court imposes a fine for an offence under this Act or the 1977 Act, prosecuted by a local authority, a sanitary authority or a regional board, it shall, on the application of the body or board concerned, provide by order for the payment of the amount of the fine to the authority or board, as the case may be, as if it were due to it in foot of a decree or order made by the court in civil proceedings.</p>	<p>S.22(1) APA</p> <p>A local authority may, in accordance with regulations made by the Minister under this section, make charges in relation to such emissions as may be specified in the regulations.</p> <p>S.22(3) APA</p> <p>A local authority may recover the amount of any charges made by them under section 22 from the person by whom they are payable as a simple contract debt in any court of competent jurisdiction.</p>	<p>S.25 LPA</p> <p>Fines are paid to the local authority in proceedings brought by the local authority.</p> <p>S.34 LPA</p> <p>Moneys received by a local authority under the LPA shall be lodged, (a) in the corporation of a county borough or other borough or the council of an urban district, to the credit of the municipal fund of the county borough, borough or urban district, or (b) the council of a county, to the credit of the county fund, and may be expended for the same purposes as other moneys credited to that fund.</p>	No provision	No provision	No provision
Remediation	<p>S.22 PoEA</p> <p>Fine must reflect extent of damage to environment and any remediation required.</p> <p>S.41(5) WMA</p> <p>The EPA may recover</p>	<p>S.10 1977 Act as inserted by s.7 1990 Act</p> <p>A party responsible is required to mitigate or remedy any effects of the contravention of the Act.</p>	<p>S.26(7) APA</p> <p>If a person on whom a notice under this section has been served does not, within the period specified in the notice, comply with the requirements of</p>	<p>S.9(5) LPA</p> <p>A person who fails to comply with a notice served on them by the local authority requiring the removal of litter shall be liable to pay the expenditure reasonably incurred by</p>	<p>S.107(5) EPA 1992</p> <p>Local Authority (and EPA in relation to IPC licensable facility) may take such steps as they consider necessary to secure compliance with a s.107 Notice (specifying measures</p>	<p>S.23 SPA</p> <p>Minister/Harbour Master may refuse entry of ships into harbour or state if it would cause a threat to the environment.</p>	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>the amount of any payment due to it arising from a condition attached to a waste licence as a simple contract debt in any court of competent jurisdiction.</p> <p>S.55(2)(c) WMA as amended by s.46 PoEA</p> <p>A local authority or the EPA can require the mitigation or remedying of any acts that cause or are likely to cause environmental pollution in relation to the holding, recovery or disposal of waste.</p> <p>S.56 WMA as amended by s.47 PoEA</p> <p>Where the local authority or EPA takes steps to prevent or limit environmental pollution caused by waste, they may recover the costs of such steps as a simple contract debt in a court of competent jurisdiction from such person as they satisfy the court is a person whose act or omission necessitated such</p>	<p>Local Authority may take any steps it considers necessary to mitigate or remedy any effects of the contravention and may recover the cost of such steps as a simple contract debt in court from the person named in the Order.</p> <p>S.11 1977 Act as amended by s.8 1990 Act</p> <p>The High Court can order any person causing or permitting or continuing to cause or permit the entry of polluting matter to waters or the discharge of trade effluent or sewage effluent to waters to carry out specified measures to prevent an entry or discharge or the continuance or recurrence of such entry or discharge.</p> <p>S.13 1977 Act as inserted by s.10 1990 Act</p> <p>Local authorities and sanitary authorities</p>	<p>the notice, the local authority may take such steps as they consider reasonable and necessary to secure compliance with the notice and may recover any expense thereby incurred from the person on whom the notice was served as a simple contract debt in any court of competent jurisdiction.</p> <p>S.27 APA</p> <p>Where it appears to a local authority that urgent measures are necessary to prevent or to limit air pollution affecting any part of their functional area or any adjoining area, the local authority may take such steps, carry out such operations or give such assistance as they consider necessary to prevent or to limit such pollution or to remedy the effects of such pollution, and the local authority can</p>	<p>the local authority.</p> <p>S.16(2)(c) LPA</p> <p>An occupier may, at their own discretion and in lieu of complying with the requirement of certain operations to take special measures, make a financial contribution to the local authority in an amount estimated to be the cost to the local authority of removing the litter.</p> <p>S.16(8) LPA</p> <p>Any financial contribution made to a local authority under s.16 shall be used by the local authority solely for the prevention and limitation of the creation of litter and the removal of litter in respect of the premises or land, or both, in relation to which the financial contribution is made.</p> <p>S.17(2)(c) LPA</p> <p>A person to whom notice is given may, at</p>	<p>to prevent or limit noise) and can recover any costs and expenses of so doing from the person on whom the Notice was served.</p>	<p>S.24 SPA</p> <p>Inspector/Harbour Master may detain ships if they have a reasonable believe that the ship has caused or may cause pollution.</p> <p>S.42 SPA</p> <p>The costs of the investigation, detection and prosecution are to be born by the person convicted of an offence under this Act.</p> <p>S.171 FA</p> <p>Minister may grant a licence, if such a licence is granted no offence is being committed.</p> <p>S.172 FA</p> <p>Minister may issue a certificate and if such I issued no offence is committed under the Act.</p>	

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>measures.</p> <p>S.57 WMA as amended by s.48 PoEA</p> <p>Power of the High Court in relation to the holding recovery or disposal of waste includes a power to order the payment of costs, including the costs of the EPA.</p> <p>S.58 WMA</p> <p>The remedies for unauthorised holding, recovery or disposal of waste include an order requiring the party responsible to mitigate or remedy any effects of the said holding, recovery or disposal of waste.</p> <p>Where a person does not comply with such an order, the local authority may take any steps specified in order to mitigate or remedy any effects of the activity concerned and can recover the cost of same as a simple contract debt in any court of competent</p>	<p>have the power to take such measures as they consider necessary to prevent and abate pollution and they may dispose of any such polluting matter in such manner as they see fit. The expenditure incurred by the authority in relation to the measures may be recovered by the authority from the person responsible as a simple contract debt in any court of competent jurisdiction.</p> <p>S.16(13) 1977 Act</p> <p>A sanitary authority may serve on any person making, causing or permitting an unlicensed discharge or entry into sewers a notice in writing requiring the ceasing of the contravention and requiring mitigation or remedying of any effects of the contravention.</p> <p>S.16(14) 1977 Act</p> <p>Where a person fails to comply with section 16</p>	<p>recover the costs of such operations from any person whose act or omission necessitated such steps.</p>	<p>their own discretion and in lieu of complying with the requirement to take special measures re major events, make a financial contribution to the local authority in an amount estimated to be the cost to the local authority of removing the litter.</p> <p>S.17 LPA</p> <p>Any financial contribution made to a local authority under section 17 shall be used by the local authority solely for the prevention and limitation of the creation of litter and the removal of litter in respect of the event or events in relation to which the financial contribution is made.</p> <p>S.18 LPA</p> <p>Local authorities can take measures to prevent or limit litter creation by major events and they can recover the reasonable costs of such steps as a</p>		<p>S.5 DSA</p> <p>A permit may be granted and this renders the dumping legal.</p>	

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>jurisdiction.</p> <p>S.74 WMA as inserted by s.51 PoEA</p> <p>Subject to, and in accordance with, regulations under S.53C (re producer responsibility for free treatment and recovery of end-of-life vehicles), S.72 (as inserted by s.9 of WMA 2001, re plastic bags) or S.74, there shall be paid into the Environment Fund the amounts specified in those regulations of financial resources or levy collected or recovered thereunder.</p>	<p>(13) above, the sanitary authority may take any steps it considers necessary to prevent the discharge or entry or to mitigate or remedy any effects of the contravention and may recover the cost of same from the person on whom the notice was served as a simple contract debt.</p>		<p>simple contract debt in a court of competent jurisdiction.</p> <p>S.25(2), (4) and (5) LPA</p> <p>Fines paid under this Act, the cost of actions brought by local authorities, and the costs incurred by the local authorities in the collection and disposal of any litter to which any prosecution relates are all recoverable by the relevant local authorities.</p>			
Prevention and Minimisation	<p>S.28 WMA</p> <p>Any Minister or local authority may provide support, including financial, to any person concerned with the prevention and minimisation of waste.</p> <p>Parties carrying on any activity of an agricultural, commercial or industrial nature shall have due regard to the need to prevent or</p>	<p>S.11 1977 Act as amended by s.8 1990 Act</p> <p>High Court's power to prohibit the continuance of the contravention of s.3(1) (re not causing or permitting any polluting matters to enter waters) or s.4(1) (re licensing of trade and sewage effluents).</p> <p>S.12 1977 Act as amended by s.9 1990</p>	<p>S.18(1) APA</p> <p>A local authority may organise and conduct research, surveys or investigations into the nature and extent, the cause and effect, and the prevention or limitation, of air pollution and may establish and maintain educational programmes relating to such matters and may publish any</p>	<p>S.6(1) LPA</p> <p>The occupier of a public place (not being a public road or building or other structure) shall keep the place free of litter.</p> <p>S.6(2) LPA</p> <p>The occupier of any land (other than land consisting of a building or other structure) that is not a public place shall keep the land free</p>	No provision		

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>minimise the production of waste. Minister can specify by regulation the steps to be taken. Steps may include conducting a waste audit, implementing a waste reduction programme, the keeping of records and furnishing of specified information to specified persons, requiring the use of the best available technology, the carrying out of a life cycle assessment, the prohibiting and limiting of specified uses or productions, and the production of plans and reports generally.</p> <p>S.29 WMA</p> <p>Assistance, including financial, available for the purpose of promoting, supporting or facilitating the recovery of waste. The list of actions the regulations can require is substantial, including requirements as to labelling, packaging, the disposal of such packaging, the charging of a fee for certain</p>	<p>Act</p> <p>Local authorities have the power to require measures to be taken to prevent water pollution.</p> <p>S.14 1977 Act</p> <p>A person responsible for an accidental discharge, spillage or deposit of any polluting matter which enters or is likely to enter any waters or sewer shall notify their local authority or sanitary authority as soon as practicable after the occurrence of the accident.</p> <p>S.15 1977 Act as amended by s.11 1990 Act</p> <p>Re local authority making a water quality management plan, either independently or jointly with another local authority, and either as part of their own initiative or as directed to so do by the Minister.</p> <p>S.25 1977 Act</p> <p>The Minister may by</p>	<p>information derived from any such research, surveys, investigations or educational programmes.</p> <p>S.18(2) APA</p> <p>A local authority may support or assist, by means of financial contribution or otherwise, any person, or body of persons, engaged, or proposing to engage, in any research, survey or investigation into the nature and extent, the cause and effect, and the prevention or limitation, of air pollution or in any educational programmes relating to such matters.</p> <p>S.18(4) APA</p> <p>The Minister, with the consent of the Minister for Finance, may make a financial contribution to any person, or body of persons, engaged, or proposing to engage, in research, surveys or</p>	<p>of litter that is to any extent visible from a public place.</p> <p>S.8 LPA</p> <p>A local authority will take all practicable measures for the prevention of the creation of litter.</p> <p>Ss.10 and 11 LPA</p> <p>Local authorities will implement a litter management plan which will include, <i>inter alia</i>, prevention and control measures adopted, public awareness measures, etc.</p> <p>S.16 LPA</p> <p>Local authorities can require the taking of special measures regarding litter created by certain operations.</p> <p>S.17 LPA</p> <p>Local authorities can take measures to prevent or limit litter creation by major events.</p>			

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>packaging, the provision of waste separation services free of charge, the provision of waste collection receptacles, financial assistance for persons engaged in the collection of household waste, that local authorities facilitate the composting of municipal, organic waste, and other general provisions as to reporting, planning and recording.</p> <p>S.30 WMA</p> <p>The Minister was to promulgate a programme and also to publish guidelines and criteria with regard to the prevention, minimisation and recovery of waste arising from the performance by public authorities of their functions. Minister can also require the conducting of waste audits, implementation of waste reduction programmes, and the making of plans and recordings and their</p>	<p>order establish a water quality control authority in respect of a specified area.</p> <p>S.26 1977 Act</p> <p>The Minister may prescribe, for the purposes of this Act, quality standards for waters, trade effluents and sewage effluents and standards in relation to the treatment of such effluents.</p> <p>S.27(1) of 1977 Act</p> <p>The Minister may make regulations restricting the use of certain vessels in specified waters.</p> <p>S.29 1977 Act</p> <p>A local authority may contribute to the funds of a person engaged in or proposing to engage in research, surveys or investigations in relation to water pollution.</p>	<p>investigations into the nature and extent, the cause and effect, and the prevention or limitation, of air pollution or in any educational programme relating to such matters.</p> <p>S.23 APA</p> <p>For the purpose of preventing or limiting air pollution, the Minister may, by regulations, prohibit either absolutely, or subject to such exceptions as may be specified in the regulations, such emissions as may be specified, and the production, treatment, use, import, placing on the market, distribution, or sale of any substance (other than a fuel) which may cause air pollution.</p> <p>S.24(1) APA</p> <p>The occupier of any premises, other than a private dwelling, shall use the best</p>	<p>S.18 LPA</p> <p>The local authority may take such steps or carry out such operations as it considers necessary to prevent or limit the creation of litter.</p> <p>S.19 LPA</p> <p>This section creates a prohibition on articles and advertisements on and defacement of certain structures.</p> <p>S.20 LPA</p> <p>This section states the powers of local authorities regarding articles and advertisements on, and defacement of, certain structures.</p> <p>S.21 LPA as amended by s.57 PoEA</p> <p>This section provides for a local authority making bye-laws in particular areas for the regulation of litter in their functional area.</p> <p>S.22 LPA</p> <p>A person in charge of a dog will immediately</p>			

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>publishing.</p> <p>S.40(4)(e) WMA as amended by s.35(g) PoEA</p> <p>Waste licenses will not be granted unless certain minimum standards are maintained in relation to the protection of the environment.</p> <p>S.41 WMA</p> <p>Conditions that can be attached to a waste licence.</p> <p>S.32 WMA</p> <p>A holder of waste shall, without delay, inform the local authority of any development that is likely to cause environmental pollution.</p> <p>The Minister can require the holders of specified classes of waste to maintain a policy of insurance.</p> <p>S.34 WMA</p> <p>Strict requirements in relation to waste collection permits.</p>		<p>practicable means to limit and, if possible, to prevent an emission from such premises.</p> <p>S.24(2) APA</p> <p>The occupier of any premises shall not cause or permit an emission from such premises in such quantity, or in such a manner, as to be a nuisance.</p> <p>S.25(1) APA</p> <p>For the purpose of preventing or limiting air pollution, the Minister may, by regulations, prohibit or restrict the emission into the atmosphere of smoke from any premises.</p> <p>S.26 APA</p> <p>Where it appears to a local authority that it is necessary so to do in order to prevent or limit air pollution, the local authority may serve a notice under this section on the occupier of any premises from which</p>	<p>remove any faeces deposited by that dog in specified areas.</p>			

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>S.35 WMA Local authorities can make byelaws to facilitate proper presentation of waste for collection.</p> <p>S.36 WMA Minister can by regulations provide for the supervision and control of the movement of waste (substantial list included).</p> <p>S.39 WMA (as amended by s.33 PoEA) Minister can impose conditions and requirements re holding of a waste licence.</p> <p>S.40 WMA EPA to grant waste licenses subject to a consideration of matters related to the prevention, limitation, elimination, abatement or reduction of environmental pollution.</p> <p>S.51 WMA Conditions may be</p>		<p>there is an emission, specifying <i>inter alia</i> the measures which appear necessary in order to prevent or to limit the air pollution, directing that certain measures be taken and specifying a period within which such measures are to be taken.</p> <p>S.28(2) APA An order made by the High Court on an application under section 28 may require, <i>inter alia</i>, that specific measures be taken to eliminate or reduce the risk of air pollution, that any person do, or not do, or cease from doing, anything which the Court considers necessary and specifies in the order to ensure that the emission concerned is terminated or restricted or complies with any relevant licence under the Act, and provisions in relation to the</p>				

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>imposed in relation to the recovery of sludges and agricultural waste.</p> <p>Ss.55(1) and 56 WMA as amended by Ss.46 and 47 PoEA</p> <p>Power of the local authority and EPA to require measures to be taken in relation to the holding, recovery or disposal of waste.</p> <p>S.66 WMA</p> <p>For the purpose of preventing or limiting water pollution, the Minister may, by regulations, prohibit or control the production, treatment, use, importation, distribution, storage, transport, supply or sale of any specified substance or of any article containing any specified substance.</p>		<p>payment of costs.</p> <p>S.29 APA</p> <p>The occupier of any premises, other than a private dwelling, shall as soon as is practicable after the occurrence of any incident which may cause air pollution notify the relevant local authority of the incident.</p> <p>S.32 APA</p> <p>There is an extensive list of conditions (a to k) that a local authority can attach to the granting of a licence under this section.</p> <p>S.39(1) APA</p> <p>Where it appears to a local authority that the whole or any part of their functional area should, in order to prevent or limit air pollution, be declared to be a special control area, they may make an order under this section. S.40 elaborates on the</p>				

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
			<p>particular orders that may be made in relation to a special control area.</p> <p>S.39(4) APA</p> <p>The Minister may direct a local authority to declare an area a special control area and he may further direct particular measures to be taken and that particular requirements shall have effect in such area.</p> <p>S.46(1) APA</p> <p>A local authority may make a plan for the preservation or improvement of the air quality in any part of their functional area. Under s.47, the Minister may direct that an air quality management plan be made.</p> <p>S.50(1) APA</p> <p>The Minister may by regulations specify different air quality standards for different areas, different</p>				

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
			<p>circumstances or for different periods of time.</p> <p>S.51(1) APA</p> <p>The Minister may by regulations specify different emission limit values for different areas, different circumstances or for different periods of time.</p> <p>S.52 APA</p> <p>The Minister shall, from time to time as occasion demands, issue such general directions as to policy in relation to the prevention and limitation of air pollution as he considers necessary.</p> <p>S.53 APA</p> <p>The Minister may, for the purpose of preventing or limiting air pollution, make various regulations in relation to fuel.</p>				
Competent Body Powers	S.55A WMA as inserted by s.46 PoEA	S.27 1990 Act This section sets out in	S.13(1) APA A local authority may	Local Authority	Service of Notices	S.26 SPA The Minister has	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>re service of notices</p> <p>S.56A WMA as inserted by s.47 PoEA re remedial works</p> <p>Extension, to the EPA, of certain powers available to local authorities in relation to the serving of notices and carrying out of remedial works (recovering the costs from the relevant parties).</p> <p>S.13(6) PoEA</p> <p>EPA is given supervisory powers over local authorities, to ensure local authorities perform their functions in relation to environmental protection.</p> <p>S.21 WMA</p> <p>Transfer of functions from local authorities to EPA, corporations or councils, where Minister believes functions can be more effectively performed by other body.</p> <p>Local Authority Powers</p>	<p>tables the persons entitled to prosecute the various offences provided for in the 1977 and 1990 Acts.</p> <p>S.27 1990 Act referring to S.3 1977 Act</p> <p>A local authority in or adjoining whose functional area any of the waters concerned are situated, a regional board in whose functional area any of the waters concerned are situated or any other person affected.</p> <p>S.27 1990 Act referring to S.6 1977 Act</p> <p>The local authority concerned.</p> <p>S.27 1990 Act referring to S.12 1977 Act</p> <p>The local authority concerned.</p> <p>S.27 1990 Act referring to S.14 1977 Act</p> <p>A local authority in or adjoining whose functional area any of the waters concerned are situated or a sanitary authority in</p>	<p>prosecute an offence under this Act summarily.</p> <p>S.13(2) APA</p> <p>The Minister may, by regulations under this section, prescribe that offences under this Act as may be specified in the regulations may be prosecuted summarily by such person as may be so specified in addition to, or in lieu of, the relevant local authority.</p> <p>S.21(1) APA</p> <p>The Minister may, by regulations, provide that any function conferred on a local authority under this Act shall, in addition to, or in lieu of, being performed by a local authority, be performed by such other person (including the Minister or another local authority) or body of persons as may be specified.</p>	<p>S.16 LPA</p> <p>Local authorities have the power to require the taking of special measures regarding litter by certain operations.</p> <p>S.21 LPA as amended by s.57 PoEA</p> <p>A local authority may make bye-laws to prevent litter, including in particular in relation to the distribution of advertising material to the public, the regulation of mobile outlets, the occupiers of specified premises including the washing down of the area outside of their premises, the promoters or organisers of large events, and the regulation of the provision and use of supermarket trolleys.</p> <p>S.23 LPA</p> <p>A litter warden or a member of the Garda Síochána who has reasonable grounds for believing that a person is committing or has</p>	<p>S.107 EPA 1992</p> <p>(Notice to prevent or limit noise): Local authority is a competent body to serve in notice in respect of "any premises, process or works".</p> <p>S.107 EPA 1992</p> <p>(Notice to prevent or limit noise): Environmental Protection Agency is a competent body to serve notice respect of an IPC/IPPC licensable facility.</p> <p>S.107(2) EPA</p> <p>Notice should set out the measures to be taken, direct the person to take these measures and specify the time period in which this is to be done.</p> <p>Prosecution</p> <p>EPA Act 1992 (Noise) Regulations 1994</p> <p>Local Authority may prosecute a failure to comply with a Section 107 Notice served by</p>	<p>power to prevent, mitigate or eliminate pollution. This power extends to directing for the movement, restraint, boarding, unloading of a ship, etc.</p> <p>S.21 SPA</p> <p>Inspectors can inspect ships to ensure they comply with the SPA.</p>	

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>Summary proceedings may be brought by a local authority or by the Agency (subject to s.69 which concerns summary proceedings in respect of a failure to comply with a condition attached to a waste licence – summary proceedings can therein only be brought by the EPA).</p> <p>S.28(4) of WMA</p> <p>Minister or Local Authority can require a person to conduct a waste audit, operate a waste reduction programme, keep certain records for the purpose of furnishing specified information, use specified standards of technology, limit the production or use of any product, specify requirements in relation to packaging, publish plans and reports re minimising of production of waste.</p> <p>S.29(4)(x)</p> <p>Conferring on public authorities and other</p>	<p>which the sewer concerned is vested or by which it is controlled.</p> <p>S.27 1990 Act referring to S.16 1977 Act</p> <p>A sanitary authority in which the sewer concerned is vested or by which it is controlled or in whose functional area it is situated.</p> <p>S.27 1990 Act referring to S.19 1977 Act</p> <p>The sanitary authority concerned.</p> <p>S.20(2) 1977 Act as inserted by s.15 1990 Act</p> <p>An Bord Pleanála may allow or refuse an appeal re s.16 (re licensing of discharges to sewers) and may give any direction consequent on its decision that it considers appropriate to the sanitary authority concerned.</p> <p>S.23 1977 Act as inserted by s.17 1990</p>	<p>S.44(1) APA</p> <p>A local authority may require the owner or occupier of a premises within a special control area to carry out such alterations to the premises as may be specified in the notice.</p> <p>S.45(1) APA</p> <p>The Minister may make schemes for the granting of financial assistance in relation to costs incurred by the owner or occupier of a premises situate within a special control area in order to enable the premises to comply with the requirements of a special control area order.</p>	<p>committed an offence under the LPA can request that the person give his details and may request that the information be verified. If dissatisfied with the response, the person may be requested to accompany the warden or member to a local authority office or Garda station.</p> <p>S.23 LPA</p> <p>A litter warden can request assistance from a member of the Garda Síochána to prevent the obstruction of the litter warden.</p> <p>S.23 LPA</p> <p>A member of the Garda Síochána who is of the opinion that a person is committing or has committed an offence under s.23 may arrest the person without warrant.</p> <p>S.25 LPA</p> <p>A local authority can prosecute an offence under the LPA.</p>	<p>it.</p> <p>EPA may prosecute a failure to comply with a s.107 Notice served by it.</p> <p>S.63 EPA Act 1992 as substituted by s.13 PoEA</p> <p>EPA has supervisory role, in respect of local authorities' powers and functions in relation to environmental noise.</p>		

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	specified persons specific additional functions for the purpose of measures related to the recovery of waste.	<p>Act</p> <p>A local authority can require polluters to provide them with specified information in certain circumstances and such other information as may be necessary for the purposes of their functions.</p> <p>S.25(3) 1977 Act</p> <p>The authority of specified functions granted under the 1977 Act to local authorities may be transferred to a water quality control authority as created under s.25.</p> <p>S.27 1990 Act referring to S.27 1977 Act</p> <p>A local authority in or adjoining whose functional area any of the waters concerned are situated.</p>					
Authorised Persons	S.24 PoEA Strengthening of the powers of "authorised persons" in relation to stopping, inspection and detention of vehicles.	S.28(9) 1977 Act In this section re powers of entry and inspection, an "authorised person" means a person who is	S.14 APA An authorised person shall for any purpose connected with this Act, be entitled, at all reasonable times, to	No provision	S.13 EPA 1992 as amended by s.11 PoEA Authorised persons (defined) have wide powers of entry ["at all reasonable times" (in	See Competent Body Powers section. S.6 DSA An authorised officer may enter	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>S.28 WMA</p> <p>Re waste prevention and minimisation, powers conferred on public authorities and other specified persons by s.28(4)(o).</p>	<p>appointed by a local authority, a sanitary authority, the Minister, the Minister for Fisheries or a board of conservators or the Minister.</p>	<p>enter into any premises and to bring therein such other persons or equipment as he may consider necessary.</p>		<p>respect of a private dwelling, only on 24 hours notice, except with the consent of the occupier)], inspection, data recording, testing etc.</p>	<p>any vehicle, place, vessel etc. and carry out an inspection and demand information.</p> <p>A Garda is an authorised officer.</p>	
Powers to police	<p>S.20 PoEA</p> <p>Garda Commissioner can appoint members of An Garda Siochana to be "authorised persons", ensuring that the powers under the Acts can be made available, speedily, to individual Gardaí, where necessary.</p> <p>S.14 WMA</p> <p>Power of Authorised Persons to request Garda assistance in relation to power of entry and inspection.</p>	<p>S.26(4)(a) 1977 Act as inserted by s.18 1990 Act</p> <p>Regulations authorise specified persons to require the taking of steps to comply with water quality standards.</p>	<p>S.16(1)(a) APA</p> <p>A local authority may, for any purpose relating to its functions under this Act, by notice in writing, require the occupier of any premises in its functional area to furnish in writing to the authority such particulars as to any activity or process being carried out on the premises, any fireplaces on the premises, and any fuels or other materials being burned on the premises, as may be so specified.</p> <p>S.54(3) APA</p> <p>A local authority may require the occupier of any premises, other</p>	<p>S.9 LPA</p> <p>Power of local authority to require removal of litter, by notice.</p> <p>S.15(2) LPA</p> <p>Power of local authority to impose conditions on location and operation of mobile outlet to prevent litter, by notice.</p> <p>S.16 LPA</p> <p>Powers of local authority to require taking of special measures regarding litter by certain operations, by notice.</p> <p>S.17 LPA</p> <p>Powers of local authority to require precautions against litter by major events,</p>	No provision	No provision	No provision

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			than a private dwelling, from which there is an emission to carry out such monitoring of the nature, extent and effect of the emission and of the air quality as the local authority considers necessary and to supply to the local authority such records of monitoring.	by notice. S.19 LPA Power of local authority to remove articles, advertisements and graffiti and to enter land to do so. S.20 LPA Power of local authority to require occupier to remove article, advertisement or defacement, by notice, and to enter land by its agents to do so in the event of non-compliance. S.23 LPA Powers of litter wardens and Gardai. S.28 LPA Powers of litter wardens and Gardai to impose fines.			
Powers of Entry and Inspection	S.14 WMA (as amended by s.24 PoEA) Power of an authorised person to enter any premises (or halt and board vehicle) where there is a reasonable belief of a risk of	S.23(1) and (2) 1977 Act as inserted by 1990 Act A local authority or a sanitary authority (re discharges to a sewer) may by notice require certain persons to	S.14 APA An authorised person shall for any purpose connected with this Act, be entitled, at all reasonable times, to enter into any premises and to bring	S.9(6) LPA A local authority may, upon such terms and conditions as may be agreed by it and the person concerned, in the case of any litter in respect of which this	S.13(1) EPA 1992 as amended by s.11 PoEA In relation to noise a local authority (and, in relation to IPC licensable facilities, the EPA) can use the general "Authorised	S.25 SPA Harbourmaster may go on board a ship to inspect it and require the production of documents.	No provision

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	<p>environmental pollution.</p> <p>Cannot enter a private dwelling without (a) a warrant from the District Court or (b) 24 hours notice being given to the occupier of the dwelling.</p> <p>S.14(4) WMA as amended by s.24 PoEA and S.14(11) WMA.</p> <p>Extensive powers of inspection.</p> <p>An offence not to permit entry onto premises or boarding of vehicle (s.14(6)).</p> <p>Authorised person can request Garda Síochána assistance where obstruction is anticipated.</p> <p>S.15 WMA</p> <p>Periodic monitoring and inspection by the local authority and EPA.</p>	<p>provide particulars in relation to specified activities as may be so specified and such other information as it may consider necessary.</p> <p>S.28 1977 Act</p> <p>An authorised person may at any reasonable time enter premises or vessels for the purposes of performance of a function under this Act of a local authority, a sanitary authority, the Minister, the Minister for Fisheries or a board of conservators, ascertaining whether such a function should be performed, ascertaining whether there is or has been a contravention of any provision of this Act or any regulations under this Act, or carrying out such inspections and taking such samples of waters, effluents or other matter as may be necessary for the performance of such a function under this Act. The 'at any reasonable time' provision can be</p>	<p>therein such other persons or equipment as he may consider necessary.</p> <p>S.14(4) APA</p> <p>Whenever an authorised person enters into any premises pursuant to s.14, he may therein make such plans and carry out such inspections, make such tests and take such samples, require from the owner or occupier of the premises or from any other person on the premises such information, or inspect such records or such documents as he, having regard to all the circumstances, considers necessary for the purposes of this Act.</p> <p>S.42(3)(a) APA</p> <p>A person conducting an oral hearing in relation to a special control area order may visit and inspect premises for any</p>	<p>section applies, by its employees or agents remove the litter or, as may be appropriate, take other steps in relation to it, and for those purposes, by its employees or agents, enter into the place or on the land concerned.</p> <p>S.19 LPA</p> <p>Powers of local authority to remove articles, advertisements and graffiti and to enter land to do so.</p> <p>S.20 LPA</p> <p>Power of local authority to require occupier to remove article, advertisement or defacement, by notice, and enter land by its agents to do so in the event of non-compliance.</p>	<p>Person" provision in s.13 of the EPA 1992 as amended by PoE Act 2003 ["An authorised person shall, for any purpose connected with this Act, be entitled, at all reasonable times, to enter any premises and therein carry out such inspections"]</p>		

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
		<p>dispensed with in s.13 circumstances, i.e. where it appears that urgent measures are required.</p> <p>S.28(5) 1977 Act</p> <p>The Minister can make regulations to provide for the taking of samples and the carrying out of tests, examinations and analyses of samples taken under this section, prescribe the classes of persons to be responsible for the above, or prescribe the certificate or other evidence to be given of the result of any such test, examination or analysis and the classes.</p>	<p>purpose he considers necessary.</p>				
Evidence	<p>S.14(4) and (11) WMA</p> <p>Provides for the taking of samples, recordings etc. and for the carrying out of examinations as considered necessary by the authorised person.</p> <p>S.18 WMA</p> <p>The Minister, local authority or EPA can</p>	<p>S.28 1977 Act</p> <p>Authorised persons are empowered to enter premises or vessels to inspect or take any samples which they require.</p>	<p>S.24(3) APA</p> <p>In any prosecution for a contravention of the obligation to prevent air pollution, it shall be a good defence to establish that the best practicable means have been used to prevent or limit the emission concerned,</p>	<p>S.26 LPA</p> <p>Where the contents of litter that has been deposited in contravention of this Act . . . gives rise to a reasonable suspicion as to the identity of the person from whom the litter or waste emanated, the contents</p>	<p>S.13(4) EPA</p> <p>Whenever an authorised person enters any premises pursuant to this section, he may therein</p> <p>(a) make such plans, take such photographs and carry out such inspections,</p>	No provision	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>order relevant parties to furnish them in writing with specified waste-related information. It is an offence to fail to comply with such a notice.</p> <p>S.19 WMA</p> <p>Register to be maintained by local authority and EPA. Can be viewed by members of the public.</p>		<p>or the emission concerned was in accordance with a licence under this Act, or the emission was in accordance with an emission limit value, or the emission concerned was in accordance with a special control area order in operation in relation to the area concerned, or in the case of an emission of smoke, the emission concerned was in accordance with regulations under s.25, or the emission did not cause air pollution.</p> <p>S.25(3) APA</p> <p>The ‘best practicable means, in accordance with a licence, in accordance with an emission limit value and in accordance with a special control area order’ defence, similar to that above for s.24, shall apply re the prohibition on emissions of smoke.</p>	<p>shall, in a prosecution of the person for an offence under this Act, constitute evidence, in the absence of evidence to the contrary, that the litter or waste emanated from the person before the deposit or placement and that the person made the contravening deposit or placement.</p>	<p>(b) make such tests and take such samples,</p> <p>(c) require from the occupier of the premises or any person employed on the premises or from any other person on the premises such information, or</p> <p>(d) inspect such plant, vehicles, records and documents,</p> <p>as he, having regard to all the circumstances, considers necessary for the purposes of, and exercising any power conferred on him by or under, this Act.</p>		

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
			<p>S.42(5)(a) APA</p> <p>A person conducting an oral hearing may, by giving notice, require any person who made an objection to attend at such time and place as is specified (subject to the conditions in s.42(5)(b)) to give evidence in relation to any matter in question at the hearing or to produce any books, deeds, contracts, maps, plans or other documents in his possession, custody or control which relate to any such matter.</p>				
Reversal of the burden of proof in certain cases	<p>Defendant has to prove that an activity did not cause environmental pollution. Evidenced by the fact that many of the specific offences state that it shall be a defence to a charge of committing an offence under a specific section to prove that all reasonable care was taken to prevent the pollution.</p> <p>S.11A of WMA as</p>	<p>S.5(2) 1977 Act</p> <p>In a prosecution for an offence re licensing of trade and sewage effluents, it shall be presumed until the contrary is shown by the person charged, that the discharge concerned is not an existing discharge of trade effluent or sewage effluent.</p> <p>S.18(2) 1977 Act</p>	<p>S.24 3(f) APA</p> <p>It shall be a good defence to any prosecution for an offence under this section (re obligation to prevent air pollution) to establish that the emission did not cause air pollution.</p> <p>This would suggest that the burden of proof has shifted onto</p>	<p>S.19 LPA</p> <p>In relation to the prohibition of articles and advertisements on and defacement of certain structures etc., it shall not be necessary for the prosecution to show that the person was not the owner, occupier or person in charge of the structure etc.</p> <p>S.26 LPA</p>	<p>S 108(2) EPA</p> <p>Defence for the accused to prove that he took all reasonable care to prevent /limit the noise.</p>	No provision	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>inserted by s.23(6) of PoEA</p> <p>A Legal presumption can arise that unauthorised waste disposal has occurred with the consent of the landowner.</p>	<p>In a prosecution of an offence under s.16 (re licensing of discharges to sewers) it shall be presumed, until the contrary is shown by the person charged, that the discharge concerned is not an existing discharge of trade effluent.</p> <p>S.19(2)(c) 1977 Act</p> <p>The Minister may make regulations requiring the production of evidence to verify any information given by an applicant in relation to s.16 (re licensing of discharges to sewers) and s.20 (re appeals re ss.16 and 17).</p> <p>S.28 1977 Act</p> <p>It shall be presumed in any legal proceedings until the contrary is shown that any sample of effluent taken by an authorised person at an inspection is a sample of what was passing from the premises, works, apparatus, plant or drainage pipe concerned to waters or</p>	<p>the Defendant.</p>	<p>Where the contents of litter that has been deposited in contravention of the LPA gives rise to a reasonable suspicion as to the identity of the person from whom the litter or waste emanated, the contents shall, in a prosecution of the person for an offence under the LPA, constitute evidence, in the absence of evidence to the contrary, that the litter or waste emanated from the person before the deposit or placement and that the person made the contravening deposit or placement.</p> <p>S.28(3) LPA</p> <p>The onus of showing that a payment has been made in respect of a fine for the deposit of dog faeces (£25) shall lie on the accused.</p>			

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
		<p>a sewer at the time the sample was taken.</p> <p>S.28(5)(d) 1977 Act</p> <p>The Minister may provide by regulation that any certificate or other evidence prescribed under this section (re powers of entry and inspection) and given in respect of the test, examination or analysis of a sample shall in relation to that sample be sufficient evidence of the result of the test, examination or analysis until the contrary is shown.</p>					
Third Party Enforcement	<p>S.42 (3) WMA</p> <p>Any person can make an objection to the EPA in relation to an application to grant or review of waste licence.</p> <p>Art. 4 of the Waste Management (Miscellaneous Provisions) Regulations 1998 (S.I. No. 164 of 1998)</p> <p>Summary proceedings for an offence under the Act may be brought by</p>	<p>S.27 1990 Act referring to S.3 1977 Act</p> <p>Any person affected can take a prosecution (previously ‘any . . . person’)</p> <p>S.27 1990 referring to S.4 1977 Act</p> <p>Any person affected can take a prosecution (previously ‘any . . . person’)</p> <p>S.10 1977 Act as inserted by s.7 1990</p>	<p>S.28 APA</p> <p>The High Court may, on the application of a local authority or any other person, by order, prohibit or restrict an emission from any premises where the Court is satisfied that certain conditions are met.</p>	<p>S.14 LPA</p> <p>No action or other proceeding shall be maintainable against a local authority, a litter warden or a member of the Garda Siochana for damage alleged to have been caused by a failure to exercise any function conferred on the local authority by the LPA.</p>	No provision	<p>S.309 FA</p> <p>Any person can summarily prosecute an offence under the Act.</p>	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	any person.	<p>Act</p> <p>A person without an interest in the waters concerned can apply to the appropriate court and if the court is satisfied that another person is causing or permitting or has caused or permitted polluting matter to enter waters or that they are discharging trade or sewage effluent in breach of the 1977 Act, the court may make one or more of a list of orders.</p> <p>S.15(11) 1977 Act as amended by s.11 1990 Act</p> <p>Re making of water management plan by a local authority, any person may make representations to the local authority in relation to the plan to be made and every such representation shall be considered.</p>					
Orders of the District Court	S.34 WMA Judge can make orders on appeals re granting or revoking of waste	S.10 1977 Act as inserted by s.7 of 1990 Act Court can make an	S.14(6) APA Where an authorised person in the exercise of his powers under	S.16 LPA The District Court may confirm, annul or vary any notice directed to	S 108(1) EPA The Court may order the person/body to	No provision	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>collection permits.</p> <p>S.58 WMA</p> <p>Court can order to mitigate or remedy any effects of unauthorised holding, recovery or disposal of waste up to £5,000. If the Court is of the opinion that the estimated cost > £5,000, it can transfer the application to a higher court.</p> <p>S.61 WMA</p> <p>Court can order the detention or forfeiture of certain vehicles and equipment, or it can order the defendant to enter into a bond of an amount equal to the amount which the judge estimates to be the value of any vehicle or equipment owned by the defendant.</p>	<p>order directing that the person responsible mitigate or remedy any effects of an entry or discharge of polluting matters into waters.</p> <p>Court can also order that the person responsible pay to the applicant or other such person as may be specified in the order a specified amount to defray all or part of any of the costs incurred by the applicant or that other person in investigating, mitigating or remedying the effects of the entry or discharge concerned.</p> <p>Jurisdiction is limited to where the estimated cost of complying with the order does not exceed £2,500.</p> <p>S.28(7) 1977 Act</p> <p>A District Court may by warrant authorise a person to enter any premises or vessel in accordance with this Act where such entry has been refused or where refusal is apprehended and that</p>	<p>s.14 is prevented from entering any premises, the authorised person or person by whom he was appointed may apply to the District Court for a warrant authorising such entry.</p> <p>S.55(1) APA</p> <p>If the occupier of any premises is unable, without the consent of some other person, to carry out works which he is required to carry out in order to comply with the provisions of this Act, and such other person withholds his consent to the carrying out of the works, the occupier may apply to the District Court for an order under this section.</p>	<p>an occupier who is required to take special measures.</p>	<p>prevent /reduce/limit the noise.</p>		

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
		there is reasonable ground for the entry.					
Orders of the Circuit Court	S.58 WMA Court can order to mitigate or remedy any effects of unauthorised holding, recovery or disposal of waste up to £30,000. If the Court is of the opinion that the estimated cost > £30,000, it can transfer the application to the High Court.	S.10 1977 Act as inserted by s.7 1990 Act Court can make an order directing that the person responsible mitigate or remedy any effects of an entry or discharge of polluting matters into waters. Court can also order that the person responsible pay to the applicant or other such person as may be specified in the order a specified amount to defray all or part of any of the costs incurred by the applicant or that other person in investigating, mitigating or remedying the effects of the entry or discharge concerned. Jurisdiction is limited to where the estimated cost of complying with the order does not exceed £15,000.	No provision	No provision	No provision	No provision	No provision
Orders of the High Court	S.57 WMA 1996 as amended by s.47 PoEA	S.11 1977 Act as amended by s.8 1990	S.28 APA The High Court may	No provision	No provision	No provision	No provision

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	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	<p>Orders for costs, provision for the recoupment of the costs incurred by the EPA in carrying out inspections, undertaking analyses, etc.</p> <p>S.58 WMA</p> <p>Court can order to mitigate or remedy any effects of unauthorised holding, recovery or disposal of waste in any case.</p>	<p>Act</p> <p>The High Court can order any person causing or permitting or continuing to cause or permit the entry of polluting matter to the waters or the discharge of trade effluent or sewage effluent to waters to cease causing or permitting same, to carry out specified measures to prevent an entry or discharge or the continuance or recurrence of such entry or discharge.</p>	<p>order, prohibit or restrict an emission from any premises where there is air pollution.</p>				
Licences	<p>S.48A WMA as inserted by s.41 PoEA</p> <p>The EPA has the power to revoke or suspend the waste licence if</p> <p>(a) the holder of the licence no longer satisfies the requirements specified in s.40(7) for his or her being regarded as a fit and proper person, and</p> <p>(b) the circumstances occasioning his or her no longer satisfying those requirements are, in the opinion of the</p>	<p>S.6(3)(b) 1977 Act</p> <p>A licence shall stand revoked from the date of conviction of an offence under s.6(3) (making a false or knowingly misleading statement when applying for a licence for trade and sewage effluents or on an appeal).</p> <p>S.19(3)(b) 1977 Act</p> <p>A licence shall stand revoked from the date of conviction of an offence under s.19(3)</p>	<p>S.26 APA</p> <p>If a person does not comply with the requirements of a notice, the local authority/ Agency may take such steps as they consider reasonable and necessary to secure compliance with the notice.</p> <p>S.28(2) APA</p> <p>High Court can make an order containing such provisions as to the Court seem</p>	No provision	<p>S.107 EPA 1992</p> <p>If person doesn't comply with notice relating to excessive noise, EPA or local authority may take such measures as considers reasonable and necessary to secure compliance with the notice.</p> <p>Failure to comply with a notice relating to noise may constitute an offence. Conviction of an offence under the EPA will lead to a</p>	<p>S.171 FA</p> <p>The Minister for Lands, after consultation with the Minister for Industry and Commerce or (in the case of a licence to be granted to a sanitary authority in relation to a sewerage scheme) with the Minister for Local Government, may revoke any licence granted</p>	No provision

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	<p>Agency, of such seriousness as to warrant the revocation of the licence or the suspension of its operation.</p> <p>If the holder is convicted of an offence under the Act, the EPA 1992, the Local Government (Water Pollution) Acts 1977 and 1990 or the APA it is no longer a fit and proper person as defined by s.40(7) EPA as amended.</p> <p>S.46 WMA as amended by s.40 PoEA</p> <p>The Agency may review a licence in certain circumstances e.g. if it believes there has been a material change in the nature of the activity to which the waste licence relates, or in the nature or extent of an emission concerned.</p> <p>S.55 WMA</p> <p>Where the holding, recovery or disposal of waste is not in accordance with a</p>	<p>(making a false or knowingly misleading statement when applying for a licence to discharge into sewers or on an appeal).</p> <p>S.7(3) 1977 Act</p> <p>Permits review of the licence for trade and sewage effluents at any time where the authority has reasonable grounds for believing the discharge authorised by the licence to be a significant threat to public health.</p> <p>S.10(1) as amended by s.7 1990 Act</p> <p>District Court may make order for person to terminate the entry of polluting matter or discharge of trade effluent or sewage effluent into waters.</p> <p>S.10(5) as amended by s.7 1990 Act</p> <p>Local Authority may serve notice requiring the cesser of the entry of polluting matter or discharge of trade or</p>	<p>appropriate.</p> <p>S.28A as inserted by s.18 and the Third Schedule EPA</p> <p>The District Court, Circuit Court or High Court, as appropriate, may make an Order requiring an occupier to terminate an emission within a specified period.</p> <p>S.31(3) APA</p> <p>A licence shall stand revoked from the date of conviction of an offence under s.31(3) (making a false or knowingly misleading statement when applying for a licence or for review of a licence).</p> <p>S.33 APA</p> <p>Provides for the review of the licence where the local authority have reasonable grounds for believing an emission constitutes a serious risk of air pollution.</p>		<p>person no longer being a “fit and proper person” as defined by s.40(7) WMA and may result in the loss of their waste licence by virtue of s.48A WMA as inserted by s.41 PoEA.</p> <p>S.108(1) EPA 1992</p> <p>Where any noise which is so loud, so continuous, so repeated, of such duration or pitch or occurring at such times as to give reasonable cause for annoyance to a person in any premises in the neighbourhood or to a person lawfully using any public place, the District Court may order the person or body making, causing or responsible for the noise to take specified measures for the prevention or limitation of the noise.</p> <p>Conviction of an offence under this Act will lead to a person no longer being a “fit and proper person” as</p>	<p>under that section.</p>	

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	<p>licence, the local authority may serve a notice requiring measures to be taken to prevent or limit the recovery or disposal of waste</p> <p>S.57 WMA</p> <p>Where application is made to the High Court, and Court satisfied that the waste is being held, recovered or disposed of in a manner that causes or is likely to cause environmental pollution or ss.34 or 39(1) to be contravened, it may make such Order as it considers appropriate (which could include the revocation of a licence).</p> <p>S.58 WMA</p> <p>Where the District Court, Circuit Court or High Court, as appropriate, is satisfied that waste is being held, recovered or disposed of in a manner that is causing or has caused environmental pollution or ss.34 or 39(1) to be contravened, it may</p>	<p>sewage effluent in to waters</p> <p>S.11 1977 Act as amended by s.8 1990 Act</p> <p>The High Court can order any person causing or permitting or continuing to cause or permit the entry of polluting matter to waters or the discharge of trade effluent or sewage effluent to waters to carry out specified measures to prevent an entry or discharge or the continuance or recurrence of such entry or discharge.</p> <p>S.12 1977 Act</p> <p>Local authority has the power to require measures to be taken to prevent water pollution, including regulating or restricting the carrying on of any activity, practice or use of premises that could result in the entry of polluting matter to waters</p>	<p>S.44(5) APA</p> <p>If a special control notice is not complied with, a local authority can take such steps as they consider reasonable and necessary to secure compliance – presumably this could mean revocation of a licence</p> <p>Conviction of an offence under the APA will lead to a person no longer being a “fit and proper person” as defined by s.40(7) WMA and may result in the loss of their waste licence by virtue of s 48A as inserted by the PoEA</p> <p><u>IPPC Licence</u></p> <p>S.97(1) EPA as inserted by s.15 PoEA</p> <p>The Agency may revoke or suspend (a) if the licensee no longer satisfies the requirements specified in s.84(4) for his being a fit and</p>		<p>defined by s.40(7) EPA and may result in the loss of their waste licence by virtue of s.48A EPA as inserted by s.41 PoEA</p> <p><u>IPPC Licence</u></p> <p>S.97(1) EPA as inserted by S.15 PoEA</p> <p>The Agency may revoke or suspend (a) if the licensee no longer satisfies the requirements specified in s.84(4) for his being a fit and proper person and (b) the circumstances occasioning his no longer satisfying these are, in the opinion of the Agency, of such seriousness as to warrant the revocation or suspension of the licence.</p> <p>Under s.84(4), a person is no longer a fit and proper person were he to be convicted of an offence under s.107 or 108.</p> <p>S.99H EPA as inserted by s.15 PoEA</p>		

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	<p>make an order requiring that a person discontinue the said holding, recovery or disposal of waste.</p> <p><u>IPPC Licence</u></p> <p>S.97(1) EPA as inserted by s.15 PoEA</p> <p>The Agency may revoke or suspend (a) if the licensee no longer satisfies the requirements specified in s.84(4) for his being a fit and proper person and (b) the circumstances occasioning his no longer satisfying these are, in the opinion of the Agency, of such seriousness as to warrant the revocation or suspension of the licence.</p> <p>Under s.84(4), a person is no longer a fit and proper person if convicted of an offence under the APA</p> <p>S.99H EPA as inserted by s.15 PoEA</p> <p>The High Court or Circuit Court may order</p>	<p>S.17(3)</p> <p>Permits review of the licence to discharge to a sewer at any time where the authority has reasonable grounds for believing the discharge authorised by the licence to be a significant threat to public health.</p> <p>S.48A WMA as inserted S.41 PoEA</p> <p>Conviction of an offence under the 1977 or 1990 Act will lead to a person no longer being a “fit and proper person” as defined by s.40(7) WMA and may result in the revocation or suspension of their waste licence</p> <p><u>IPPC Licence</u></p> <p>S.97(1) EPA as inserted by s.15 PoEA</p> <p>The Agency may revoke or suspend (a) if the licensee no longer satisfies the requirements specified in s.84(4) for his being a fit and proper person and (b) the</p>	<p>proper person and (b) the circumstances occasioning his no longer satisfying these are, in the opinion of the Agency, of such seriousness as to warrant the revocation or suspension of the licence.</p> <p>Under s.84(4), a person is no longer a fit and proper person if convicted of an offence under the APA</p> <p>S.99H EPA as inserted S.15 PoEA</p> <p>The High Court or Circuit Court may order that the Person in charge refrain from or cease doing any specified act.</p>		<p>The High Court or Circuit Court may order that the Person in charge refrain from or cease doing any specified act.</p>		

Enforcement of Environmental Law: The case for reform

	Waste	Water	Air	Litter	Noise	Fisheries	Odour
	that the Person in charge refrain from or cease doing any specified act	<p>circumstances occasioning his no longer satisfying these are, in the opinion of the Agency, of such seriousness as to warrant the revocation or suspension of the licence.</p> <p>Under s.84(4), a person is no longer a fit and proper person if convicted of an offence under the APA</p> <p>S99H EPA as inserted by s.15 PoEA</p> <p>The High Court or Circuit Court may order that the person in charge refrain from or cease doing any specified act.</p>					