Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

Le juge administratif
et
le droit communautaire
de l'environnement

National administrative courts
And
Community
Environmental law

Irlande-Ireland

Réponse au questionnaire
Answer to The questionnaire

SEMINAR OF COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS

QUESTIONNAIRE:
"The administrative judge and the european law about environment"

RESPONSE OF IRELAND

1. Information and public participation in environmental issues

Directive 2003/4/EC (replacing Directive 90/313/EEC) has primarily been implemented into Irish law by the European Communities (Access to Information on the Environment) Regulations 2007.

Directive 85/337/EEC (as amended) has primarily been implemented into Irish law by the Planning and Development Act 2000 and the Environmental Protection Agency Acts 1992 – 2003. The Planning and Development Act 2000 allows local authorities (county and city councils) to grant consent for land use, with an appeal to an independent statutory tribunal known as An Bord Pleanála. The Environmental Protection Agency Acts 1992 – 2003 also confer functions on the Environmental Protection Agency (EPA), whose consent is required for certain forms of pollution control licenses. Ministerial Regulations supplement these rules.

Note on Terminology used: EIA and EIS:
The terms Environmental Impact Assessment (EIA) and Environmental Impact Statement (EIS) are used throughout this questionnaire response. The difference between the two should be noted: (i) the EIA is the process through which the effects on the environment are anticipated; (ii) the EIS is merely a part of that process. It is a statement of the effects, if any which the proposed development, if carried out, would have on the environment, submitted by the developer at the first stage of the EIA assessment process established by the Directive.

A – Application of Regulation

Has the respective application scope of these texts, and the Community directives in particular, led to disputes? How has national case law clarified the concepts contained in these texts

considering, in particular, the case law of the Court of Justice of the European Communities?

The application of these texts has been the subject matter of considerable dispute. The implementation of Council Directive 85/337/EEC (as amended by Council Directive 97/11/EC) has been the subject of a great deal of litigation. Much of the courts' consideration of these matters has centred on the level of scrutiny which the Irish courts will give to the decisions of administrative bodies implementing the Directives (see part B below).

In Ireland, the actions of administrative bodies may be challenged in a procedure known as judicial review. Judicial review tends to focus on the decision-making process, and not on the decision arrived at. However, consideration has also been given to certain substantive aspects of the requirements relating to information and public participation in environmental issues.

The Irish Courts have considered the question whether Directive 85/337/EEC should have direct effect. It is now generally accepted by the Irish courts, despite earlier decisions to the contrary,[1] that certain provisions of Directive 85/337/EEC (in particular Articles 2(1) and 4(2)) may have direct effect. For example, the High Court acted on the basis that the Directive had direct effect in cases such as *Shannon Regional Fisheries Board v. An Bord Pleanála*[2] and *O'Núalláin v. Dublin Corporation*.[3]

In *O'Núalláin v. Dublin Corporation*[4] the High Court considered whether an environmental impact assessment (EIA) was required only where the proposed development would have an "adverse effect" on the environment. Smyth J. referred to the ECJ decision in *Aannemersbedrijf P.K. Kraaijeveld v. Gedeputeerde Staten Van Zuid-Holland*[5] (hereinafter referred to as the *Kraaijeveld* case). He said the *Kraaijeveld* case did not suggest that the scope of the Directive should be limited in any way. He added that there was an obligation on the authorities to require an environmental impact statement (EIS) where the project was likely to

[1] See, for example, *Browne v. An Bord Pleanála* [1991] 2 I.R. 209 and *McBride v. Galway County Council* [1998] I.R. 485.
[2] [1994] 3 I.R. 449.
[3] [1999] 4 I.R. 137.
[4] [1999] 4 I.R. 137.
[5] [1996] E.C.R. I-5403, at para. 15.

have significant effects on the environment, even if this project fell below thresholds laid out in the legislation implementing the Directive.[6]

The precise meaning of "development consent" (Article 1(2) of Directive 85/337/EEC) has been the subject of some dispute. This is because, in Ireland, consent for a project may be required by two or more regulatory bodies acting according to different legislation. The main concern in relation to the Directive, in such an instance, is that the different bodies would not adequately take into account the connection between the different factors to be assessed within an EIA.

The Irish courts have upheld the practice in Ireland whereby permission may be required from two or more bodies, each having regard to different features of the EIA. In *O'Connell v. Environmental Protection Agency*[7] (a case which related to the situation prior to the Planning and Development Act 2000) the legislation expressly separated consideration of "environmental pollution" from other considerations relevant to the EIA. Fennelly J., in the Supreme Court, held that: "Article 2.2 (a) [of the Directive] permits, but does not oblige the member states to lay down a single procedure for planning and pollution matters".[8] This type of situation is no longer a feature of Irish law: Part X of the Planning and Development Act 2000 allows the planning authority to consider all aspects of an EIS, including environmental pollution.

Disputes have also arisen as to whether consents granted after the main development has been granted the required consent will be subject to an EIA. In order to determine this, the Irish courts will look at the type of development which would be carried out according to the subsequent consent. In *O'Connor v. Dublin Corporation ex p. Borg Developments Ltd*.[9] O'Neill J. in the High Court held that the implementation of further conditions relating to a development did not require a separate EIA, as these merely related to the fulfilment of detailed planning conditions.

The threshold under which matters will not be subject to an EIA has been the subject of some dispute, most particularly, in relation to the legislation implementing the Directive in Ireland (which was the subject-matter of Case C-392/96 *Commission v. Ireland*[10]). In *O'Connell v. Environmental Protection Agency*,[11] the Supreme Court held that there

[6] [1999] 4 I.R. 137, at p. 148.
[7] [2003] 1 I.R. 530.
[8] *O'Connell v. Environmental Protection Agency* [2003] 1 I.R. 530, at p. 542.
[9] (Unreported, High Court, 3rd October, 2000).
[10] [1999] E.C.R. I-5901.
[11] [2003] 1 I.R. 530.

must be case-by-case analysis of sub-threshold developments in order to determine whether these would have a "significant impact" on the environment.

Another issue which has been the subject of dispute has been the need for an EIS to cover all parts of a project, where a project is carried out in several stages that may, collectively, have an impact on the environment. Advocate General Gulmann, in an opinion on Case C-396/92 *Bund Naturschutzin Bayren v. Freistaat Bayren*[12] suggested that developers should take any projects within "current plans" into consideration when compiling an EIS. In *O'Connell v. O'Connell*[13] a section of the road which had been part of the proposed development was removed a day before the plan was due for approval. This changed plan had been included as one out of twelve plans which were available for viewing by the public at an earlier stage of the process. Because the change involved the removal of a section or road, the scheme was entirely covered by the EIS. The High Court did accept that modification in this way could constitute a change requiring an additional EIS. Finnegan J. noted that: "It is possible to envisage circumstances where the modification is such that the scheme as modified goes outside the ambit of the Environmental Impact Statement". However, the High Court rejected an argument that an EIS should have included consideration of a possible future extension of the road in question. This decision was followed in *Sloan v. An Bord Pleanála*,[14] where it was held that the cumulative effects of a proposed motorway and another proposed road did not have to be considered as part of the EIS.

There have been far fewer cases concerning Directive 2003/4/EC (which repealed Council Directive 90/313/EEC). According to one commentator, this has been due to "the absence of an independent, accessible and effective review mechanism (beyond informal internal review) where access to information was delayed or denied", which meant that anyone wishing to challenge a decision to refuse information had to go through the process of judicial review, a more difficult route.[15]

However, in the case of *Lowes v. Coillte Teo*[16], the High Court, whilst expressing no opinion as to the merits of the applicant's case, refused to dismiss as being frivolous and vexatious a challenge by the applicant

[12] [1996] E.C.R. I-3717.
[13] (Unreported, High Court, 29th March, 2001).
[14] (Unreported, High Court, 2003).
[15] Á. Ryall, "Access to Information on the Environmental Regulations 2007" (2007) 14(2) I.P.E.L.J. 57.
[16] (Unreported, High Court, 6th March, 2003).

against the refusal of information requested by him. In this instance, the applicant had requested information but had been refused on the grounds that the body was not a "public authority" for the purposes of the regulations implementing Directive 90/313/EEC.

In *Lowes v. Bord na Móna*[17] Mr. Justice Roderick Murphy, in the High Court, stated that the reasons for the applicant bringing proceedings and the purposes for which the information was requested were not relevant to whether the request should be granted or not. However, in the circumstances, he refused the application for the requested information (the existence of which the respondent had denied) on the basis that the information related to a "confidential commercial relationship" thereby taking it within the ambit of the exception regarding information relating to commercial relationships.

It was argued, in the case of *Friends of the Irish Environment Ltd. v. Minister for Environment, Heritage and Local Government,*[18] that s. 33(2)(c) of the Planning and Development Act 2000 is contrary to European law, as it provides that anyone wishing to make a submission in relation to a planning application is charged a fee, including a planning application which contained an environmental impact assessment (EIA). Murphy J. in the High Court allowed for a stay on the plaintiff's claim since the European Commission was also bringing a challenge against Ireland on this basis. However, in its decision on the matter, the ECJ upheld the Irish procedure[19] on the basis that:
(i) Member States have a responsibility to ensure that a Directive is fully effective, but have a "broad discretion" as to the choice of methods[20] (the Commission's argument was that Ireland had not been empowered to levy an administrative fee). The Court noted that Article 6(3) of Directive 85/337/EEC allows Member States to "determine the detailed arrangements for public information and consultation and, in particular, determine the public concerned and specify how that public may be informed and consulted".[21]
(ii) That "the charging of a fee of a reasonable amount is not incompatible with the guarantee of access to information",[22] provided that this was not fixed at such a level as to prevent the Directive from

[17] (Unreported, High Court, 27th March, 2004).
[18] (Unreported, High Court, 15th April, 2005).
[19] Case C-216/05 *Commission v. Ireland* [2006] E.C.R. I-10787.
[20] Case C-216/05 *Commission v. Ireland* [2006] E.C.R. I-10787, para. 26.
[21] Case C-216/05 *Commission v. Ireland* [2006] E.C.R. I-10787, para. 38.
[22] Case C-216/05 *Commission v. Ireland* [2006] E.C.R. I-10787, para. 41.

being fully effective[23]. The ECJ found that the fees charged by Ireland could not "be regarded as such an obstacle"[24].

B – Judge control techniques

How much control does the administrative judge exercise over the administration's compliance with its obligations to inform citizens and facilitate public participation? In other words, how much discretion does it allow the administration in this regard? And what sanctions are issued when the judge observes that one of the obligations not been met?

There is no separate system of administrative courts in Ireland. Instead the Irish High Court may review the decisions of administrative bodies in a process known as judicial review.[25] Judicial review is a form of supervision exercised by the superior courts over the decisions of administrative bodies and lower courts in order to ensure that the functions given to these authorities are carried out correctly and legally. Judicial review focuses on the decision-making process, and not on the decision arrived at.[26] Legislation specifically provides the terms under which decisions of planning authorities and An Bord Pleanála relating to permissions or approvals involving an EIA may be challenged by way of judicial review.[27] The Supreme Court hears appeals from decisions of the High Court, but only on a point of "exceptional public importance".[28]

Due to the focus in judicial review being upon the decision-making process and not the decision made, it is a matter for the competent authority to determine whether the information contained within the EIS is sufficient or not. For example, in *Murphy v. Wicklow County Council*,[29] Kearns J., in the High Court, stated that once a developer purported to comply with the regulations, only the administrative body responsible could determine whether the regulations had been complied with. In addition, in *Kenny v. An Bord Pleanála*[30] McKechnie J., in the High Court, stated that: "Once the statutory requirements have been

[23] Case C-216/05 *Commission v. Ireland* [2006] E.C.R. I-10787, para. 43.
[24] Case C-216/05 *Commission v. Ireland* [2006] E.C.R. I-10787, para. 45.
[25] The procedure for judicial review applications is set out in Order 84 of the Rules of the Superior Courts, 1986.
[26] Per Lord Brightman in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155, at p. 1173.
[27] Planning and Development Act 2000, s. 50.
[28] Planning and Development Act 2000, s. 50(4)(f).
[29] (Unreported, High Court, 19th March, 1999).
[30] [2001] 1 I.R. 565, at p. 578.

satisfied I should not concern myself with the qualitative nature of the Environmental Impact Study or the debate on it had before the inspector". In *Boland v. An Bord Pleanála*[31] it was held, in the Supreme Court, that the court is entitled to assume that the planning authority will act with reasonable competence in approving the plan. Given that the environment impact assessment process involves several stages, including submissions from various interested parties, it would appear that there will be relatively few instances where there is insufficient information before the planning authority for it to have properly taken a decision.

However, the case law evinces a greater willingness on the part of the courts to intervene with respect to the decisions of administrative bodies where the implementation of EC law is at stake. In *Lancefort v. An Bord Pleanála*[32] it was suggested that national law requirements as to standing may have to give way where a point of EC law is at issue. In *Martin v. An Bord Pleanála*[33] O'Sullivan J., in the High Court, was prepared to disregard a procedural rule if it was the "only thing" preventing the application of Community Law. In addition, in cases such as *Shannon Regional Fisheries Board v. An Bord Pleanála*[34] and *Maher v. An Bord Pleanála*,[35] the Irish courts have held that the Directive must be interpreted purposively, thus widening the scope of its application. In *O'Núalláin v. Dublin Corporation* the High Court held that Directive 85/337/EEC must be interpreted as having a "wide scope" and a "broad purpose".[36]

In relation to the more general question of whether an EIA is required for a particular development, the Irish courts have held that this is a question of law, and therefore a matter for the courts to determine. This allows less discretion to the administrative body than a purer form of judicial review. In *Shannon Regional Fisheries Board v. An Bord Pleanála*,[37] Barr J., in the High Court, looked to the definitions of "pig" and "sow" in the Directive in order to establish whether an EIS should have been required for a piggery, thereby preferring his own interpretation of the Directive to that of the planning authority. In *Maher v. An Bord Pleanála*[38] the High Court also looked at the definition of "pig" in the Directive, in order to determine whether or not an EIS should have been required. In *O'Reilly*

[31] [1996] 3 I.R. 435.
[32] [1999] 2 I.R. 270, at p. 315.
[33] [2002] 2 IR 655.
[34] [1994] 3 I.R. 449, at pp. 457, 458.
[35] [1999] 2 I.L.R.M. 198, at pp. 212 – 214.
[36] [1999] 4 I.R. 137, at p. 147.
[37] [1994] 3 I.R. 449, at pp. 457, 458.
[38] [1999] 2 I.L.R.M. 198, at pp. 212-214.

& O'Sullivan v. Dun Laoghaire County Council[39], Laffoy J., in the High Court, held that an EIA was not required for a halting site[40] as it did not come within the definitions of the Directive (again giving an interpretation of the Directive). Against this line of authority, in an earlier case of *Max Developments Ltd. v. An Bord Pleanála*[41] it was held that the interpretation of the Directive was a mixed question of fact and law and, as such, its interpretation by An Bord Pleanála was not subject to consideration by the courts.

The extent to which the courts will be willing to review the decision of the administrative body depends upon the extent to which that decision is deemed to have complied with the Directive. In *McBride v. Galway County Council*,[42] substantial compliance with the Directive was held to be sufficient to prevent the court from interfering with the decision of the administrative body. In *Murphy v. Wicklow County Council*[43] it was held that defects in an EIS were "of a minor nature only". In *Lancefort Ltd. v. An Bord Pleanála*,[44] Keane J., in the Supreme Court, noted that the failure to require an EIS made no difference to the attainment of the overall objectives of the Directive and therefore denied the applicants' *locus standi* to challenge a planning decision. In *McBride v. Galway County Council*[45] the Supreme Court denied that the Minister had an obligation to require that an EIS be submitted in relation to a lease of the foreshore being granted, because the Minister making the decision in relation to the issue in question had already seen an EIS for the area in relation to a different type of permission which had been sought by the same applicant. This would appear to reflect the reasoning of the ECJ's decision in *Commission v. Germany*[46] where the Court found that, despite the absence of provisions implementing the Directive, national law provisions did encompass the essential features of the Directive and so there was compliance.

In *Cosgrave v. An Bord Pleanála*[47] it was held that a simple claim that the Directive had not been properly transposed into Irish law was not

[39] (Unreported, High Court, 25th July, 1996).
[40] The term "halting site" refers to land containing hardstand areas for the permanent location of caravans or mobile homes. They are generally used to accommodate members of the Traveller community, an indigenous minority with a tradition of nomadism.
[41] [1994] 2 I.R. 121.
[42] [1998] 1 I.R. 485 (High Court and Supreme Court).
[43] (Unreported, High Court, 19th March, 1999).
[44] [1999] 2 I.R. 270, at p. 315.
[45] [1998] 1 I.R. 485.
[46] [1995] E.C.R. I-2189.
[47] [2004] 2 I.R. 435.

sufficient to form the basis of a challenge in judicial review, where an order was sought to quash the decision of a planning authority.

The sanctions which are available to the court in relation to a decision by an administrative body that is held to contravene an obligation to inform citizens and facilitate public participation are those which are generally available to a person seeking judicial review of a decision. It should be noted that a court, in judicial review proceedings, can only return the decision to the administrative body to be re-decided, subject to the order made by the court. The court cannot substitute its own decision for that of the administrative body.[48] An applicant who challenges the actions of a public authority on the grounds that they contravene the obligation to inform citizens and to facilitate public participation may petition the court for the following orders:

1) *Certiorari:* an order which has the effect of quashing the illegal decision of a public authority;
2) *Prohibition:* an order which will have the effect of restraining a public body from exercising powers which would be outside its jurisdiction;
3) *Mandamus:* an order compelling a person or a public body to perform a public duty;
4) *Injunction:* an order which may have the same effect as a prohibition;
5) *Damages:* these may be awarded in judicial review proceedings where: (i) the applicant makes a claim for such damages; and (ii) the court is satisfied that the applicant would have been awarded damages in a civil action against the respondent.

2. Pollution law

Directive 75/442/EEC and Directive 96/61/EC have been integrated into Irish law primarily under two pieces of legislation: the Environmental Protection Agency Acts 1992 – 2003 and the Waste Management Acts 1996 – 2003. This legislation is supplemented by Regulations made by the relevant Minister (currently the Minister for Environment, Heritage and Local Government). Directive 2006/12/EC has not yet been transposed into Irish law.

A – Application of regulation

How are the responsibilities distributed under your national legislation in connection with the restoration of polluted sites?

[48] "It is not available [to the court] to correct errors or to review decisions …"; *State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] I.R. 318, at p. 392.

Under national legislation, two types of regulatory authority are given competence to ensure that environmental standards are maintained:

1) Local authorities (authorities such as county councils and city councils whose functions are limited to a certain geographic region): each local authority is responsible for the supervision and enforcement of the relevant provisions of the Waste Management Acts 1996 – 2003 within its own functional area.[49]

2) Environmental Protection Agency (EPA): this is a regulatory agency established to perform licensing, enforcement, monitoring and assessment activities relating to environmental protection. The EPA is responsible for the grant of Integrated Pollution Prevention Control (IPPC) licences.[50] These licences are granted to large-scale industrial and agricultural facilities, aiming to prevent or reduce emissions to air, water and land, reduce waste and use energy and resources efficiently. An IPPC licence is a single integrated licence which covers all emissions from the facility and its environmental management. The EPA is also responsible for the issue of waste licences[51] to facilities including landfills, transfer stations, hazardous waste disposal facilities and other significant waste disposal and recovery activities. All operations related to the facility are considered within the context of the same licence application. It is the responsibility of the EPA to enforce licences issued by it. This work is carried out by the Office of Environmental Enforcement, a section within the EPA. The EPA also exercises a supervisory function over local authorities' performance of their environmental functions.

Section 14 of the Waste Management Act 1996, as amended by the Protection of the Environment Act 2003, grants extensive powers to an "authorised person" who has "reasonable grounds" to suspect that there is environmental pollution or a risk of environmental pollution from a certain premises or vehicle. An authorised person includes: the relevant Minister, the EPA, the local authority, the Commissioner of the Garda Síochána (national police) or another authorised person or Garda (police

[49] Waste Management Act 1996, s. 59(1).
[50] Issued pursuant to the Environmental Protection Agency Act 1992, s. 82(2) as am. by Protection of the Environment Act 2003, s. 15.
[51] Issued pursuant to the Waste Management Act 1996, s. 39(1).

officer).[52] Where an authorised person suspects that there is a risk of pollution, that person may direct the holder of the waste licence to take such measures as are necessary to remove the risk.[53] If the licence-holder fails to comply, the authorised person may take such measures himself, and recover the cost of same from the licence-holder.[54] It is an offence to obstruct in any way the carrying out of such activity.[55]

Any person convicted of an offence under the Waste Management Act 1996 or under the Environmental Protection Act 1992 (as amended) is liable on criminal conviction to a fine or imprisonment. The maximum penalty for an offence under the Waste Management Act 1996 or under the Environmental Protection agency Act 1992 is 10 years imprisonment and/or a fine of €16,000,000. Prosecutions may also be taken in the District Court (a court of limited jurisdiction) where a fine of up to €3,000 and/or imprisonment of up to 12 months may be imposed.[56] Continuing an offence after conviction will render a person liable for a fine of up to €130,000 per day for a conviction on indictment. The holder of an IPPC licence may be subject to prosecution under a number of environmental statutes, depending upon the nature of the pollution, including the Waste Management Act, the Air Pollution Act 1987 and the Local Government (Water Pollution) Acts 1977 – 1990. The EPA has to date taken a number of prosecutions pursuant to these Acts.

Section 12 of the Waste Management Act 1996 provides a concrete example of the "polluter pays" principle: where a person has been convicted of an offence under the Waste Management Act, the court is obliged unless there are "special and substantial reasons for not doing so", to order the person to pay the costs and expenses, measured by the court, incurred by the local authority, the EPA or any other person prescribed by the court in relation to the investigation, detection and prosecution of the offence. The prosecuting body can apply to the court to have any fine paid directly to the prosecutor.[57]

In the case of certain offences (for example: the disposal or recovery of waste in a manner likely to cause environmental pollution or the transfer of waste to a person who does not hold a waste licence) a presumption may arise that the owner of the land upon or in which the waste was

[52] Waste Management Act 1996, s. 5 as am. by Protection of the Environment Act 2003, s. 20.
[53] Waste Management Act 1996, s. 14(5)(a).
[54] Waste Management Act 1996, s. 14(5)(b).
[55] Waste Management Act 1996, s. 14(6).
[56] Waste Management Act 1996, s. 10.
[57] Waste Management Act 1996, s. 13.

discovered consented to that waste disposal or recovery.[58] This presumption may arise due to the nature of the particular activity that was carried on; the period of time over which the activity was carried on; the characteristics of the land and the degree of control exercised over it by the owner; and any other relevant circumstances.[59]

Section 32(3) of the Waste Management Act 1996 provides that the holder of waste must "without delay" inform the relevant local authority if a loss, spillage or accident occurs that causes, or is likely to cause, environmental pollution. If the waste is hazardous, the EPA must also be informed. Anyone who fails to comply with this obligation has committed an offence. Typically, licenses will contain a clause requiring that the local authority and/or the EPA be notified of any such incident.

In addition to the above measures (and perhaps more usefully for the purposes of environmental protection), sections 57 and 58 of the Waste Management Act 1996 allow "any person", regardless of proof of standing or special interest, to seek an order from the courts requiring that a person who has in the past held, recovered or disposed of waste in a way that is causing or has caused environmental pollution to mitigate or remedy any effects of the waste management practice concerned.

Also, under section 99H of the Environmental Protection Agency Act 1992,[60] an application may be made to the Circuit Court (a court of local and limited jurisdiction operating on a regional basis) or the High Court for an order, where a person is concerned that an activity is being carried out in contravention of the requirements of the Act. The court may make an order requiring the person in charge of the activity complained of to do, refrain from, or cease doing any act, or to make such provision (including provision relating to costs) as the court thinks appropriate. The court may make such interim or interlocutory orders as it thinks appropriate. This power applies where an offence is ongoing and is in addition to any power under the Waste Management Acts to seek an order in relation to a contravention of that Act.

Does the selection of the party responsible (operators of sites or holders of waste) raise problems?

[58] Waste Management Act 1996, s. 11A, as inserted by s. 23 of the Protection of the Environment Act 2003.
[59] Waste Management Act 1996, s. 11A, as inserted by s. 23 of the Protection of the Environment Act 2003.
[60] As amended by s. 15 of the Protection of the Environment Act 2003.

From the above, it is clear that both the holder of waste and the owner of land upon which waste is disposed or recovered may, in certain circumstances, be held liable for any unauthorised disposal or recovery of waste.

In *Wicklow County Council v. Fenton*[61] an attempt was made to hold both the landowner and the directors of the waste company which had sent waste to his (unlicenced) landfill responsible for the environmental pollution which had occurred. O'Sullivan J., in the High Court, held both Mr. Fenton and the waste company liable for the remediation of the site, and held the two directors of the company personally responsible in the event that the company would be unable to provide sufficient funds to remediate the site. This was the case even where those held responsible did not know that the waste which had been disposed was hazardous waste. The Court, in this case, did not find the truck driver who had deposited the waste responsible since, according to the Court he was an independent contractor working for the company and it was for the company to ensure that he acted properly. The Court also declined to find the hospitals who had supplied the waste liable as they were not the immediate and real cause of the pollution.

Both waste licences and IPPC licences may only be surrendered if this surrender is accepted by the EPA. The Waste Management Act 1996 and the Environmental Protection Act 1992 set out a series of events which must take place on the surrender of a waste licence, including the inspection of the facility.[62] The surrender of a licence does not in any way affect or diminish the obligations arising out of the licence. The EPA can only accept the surrender of a licence if it is satisfied that the condition of the facility in question is not causing or likely to cause environmental pollution.

However, in *Minister for the Environment v. Irish ISPAT Ltd.*[63] it was held that an IPC (the form of licence which preceded the IPPC licence) could be disclaimed by a liquidator of a company as this would have forced the unsecured creditors of the company in liquidation to pay to remedy the environmental damage caused by the company.

A leading commentator suggests that, because a licence is personal to its holder, where the EPA refuses to accept the surrender of a licence its

[61] [2003] 1 I.L.R.M. 279.
[62] Waste Management Act 1996, s. 48.
[63] [2005] 2 I.R. 338.

continuation could prove impossible in practice where the licence holder dies or a company holding the licence is dissolved.[64]

In *Cork County Council v. O'Regan*[65] the local authority successfully sought an order requiring Mr. O'Regan to commission and pay for a site investigation and report to include a mitigation plan in respect of illegal dumping without a waste licence, where Mr. O'Regan was a director of the company which had carried on the dumping and had also owned the land on which the dumping had taken place.

Moreover, is it possible, in certain cases, to question the responsibilities of the public authorities in charge of applying the regulation in the event that they have not sufficiently exercised their powers to monitor and control industrial manufacturers?

The actions of any public authority may be challenged in judicial review proceedings. An action may, therefore, be taken on the grounds that the EPA or the local authority was acting outside of its powers, acted unreasonably or took irrelevant considerations into account. However, the Waste Management Act 1996 specifically provides that:

> "No action or other proceeding shall lie or be maintainable against the [EPA] 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."[66]

The local authority or the EPA may also indemnify certain persons against such an action where they are satisfied that that person carried out his or her duties in good faith.[67]

There have been no cases relating to these provisions to date. However, in *Cullinane v. Waterford County Council*,[68] a case which involved a similar statutory provision concerning the liability of the fire services, it was held that this provision did not prevent an action at common law being taken against the service.

---

[64] Y. Scannell, *Environmental and Land Use Law* (Thomson Round Hall, 2006), p. 792.
[65] (Unreported, High Court, 17th June, 2005).
[66] Waste Management Act 1996, s. 67(a).
[67] Waste Management Act 1996, s. 67(b).
[68] [2000] *Irish Law Times* 65.

B – Judge control techniques

What is the scope of the powers of a judge ruling on a dispute concerning the application of one or other of these regulations? Are there procedural regulations or rules of evidence before the judge or procedures for establishing specific facts connected with these matters given, in particular, their specific technical nature?

Generally speaking, the correct process by which the application of the regulations may be challenged is by way of judicial review proceedings. As stated above, in judicial review proceedings the court will focus on the decision-making process, rather than the decision made. The court will therefore focus on whether the authority properly exercised the powers conferred upon it, without delving into the subject matter of the decision. There are no specific procedural rules relating to the consideration by a court of the matters mentioned in the Directives.

The Irish courts employ an adversarial system whereby the facts and evidence will be put before the court by the parties to a case. Typically this will include the calling of expert witnesses to give evidence before the court. The court does not have the power to make any special investigation into the matter. An order may not be made under section 58 of the Waste Management Act 1996 unless the person against whom the order is to be made has had an opportunity to be heard.[69]

The appropriate court to which an order will be made under section 57 of the Waste Management Act 1996 will be determined by the estimated cost of complying with the order.[70]

In addition to the two previous questions, has your court issued other decisions on waste law or polluting installations law that should be noted? If yes, please summarise these decisions in a few lines.

In addition to the cases which have been noted above, the case of *Dublin City Council v. Wright*[71] is of interest for its interpretation of the idea of the "polluter pays" principle in the Directive and in the Irish implementing legislation. In that case, an argument was made that the fee charged by the local authority for the collection of household waste contravened the "polluter pays" principle, since it applied a fixed charge for waste with no reference to the weight of the waste collected. This

[69] Waste Management Act 1996, s. 58(3).
[70] Waste Management Act 1996, s. 58(1)(b).
[71] (Unreported, High Court, 21st January, 2004).

argument was rejected, by Quirke J., in the High Court, who held that Directive 91/156/EEC (which amended Directive 75/442/EEC) could not be construed as directly imposing upon local authorities the obligation to calculate waste collection charges with reference to the weight of waste, the quantity of waste or the frequency of collection.

In the recent case of *Laois County Council v. Richard Scully and others*[72] the High Court made an order for the committal of three people who had failed to comply with an order under section 57 of the Waste Management Act 1996 to remedy the environmental damage which had been caused by their dumping waste at an unlicenced illegal landfill site. Peart J., in the High Court, stated that, when the original section 57 order was made, additional time was allowed by the Court to ensure that a clear plan was in place for remediation of the pollution, dismissing an argument on the part of the respondents that they were not clear as to the terms which had to be complied with. Peart J. noted the need for Ireland to fulfil its obligations under the Waste Directive (Directive 75/442/EEC as amended by Directive 91/156/EEC) and the part that the courts had to play in ensuring such fulfilment.

[72] (Unreported, High Court, 23rd January, 2007).