Coming down the tracks: Anticipated Changes to the Environmental Impact Assessment Regime as a result of the Directive 2014/52/EU & and the Aarhus Convention.[1]

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Abstract:

This paper outlines the main changes introduced by the amending Environmental Impact Assessment Directive 2014/52/EU, and considers what these changes will mean for operators on the ground in Ireland and England when the Directive is implemented in 2017. It then goes on to consider what further changes to the European Environmental Impact Assessment regime are likely in order to fully comply with the obligations of the Aarhus Convention UNECE 1998.

1. Introduction

The amending Directive 2014/ 52/EU[2] represent a substantial revision of the original Environmental Impact Assessment (EIA) Directive 85/337/EC[3], perhaps the most significant re-definition of EIA since the 2003/35/EC Directive[4] inserted public participation requirements to implement parts of the Aarhus Convention 1998 UNECE[5].

In this paper I will focus on the changes to the Environmental Impact Assessment (hereinafter "EIA") Procedure which will be brought about by the latest radical revision of the amending EIA Directive 2014/52/EU, attempting to predict what these changes will mean for the conduct of EIA in Ireland and the UK. I will then go on to consider some future changes that are likely to be made to the EIA regime in order to fully implement the provisions of the Aarhus Convention, which as highlighted by the Aarhus Convention Compliance Committee (hereinafter the ACCC) among others, have not yet been fully implemented by the parties, particularly in the area of EIA.

1. Revision of the EIA Directive

The 1985 EIA Directive[6] 85/337/EC on the assessment of the effects of certain public and private projects on the environment required an environmental impact assessment before planning consent could be given. Annex 1 projects required mandatory EIA because of their nature (e.g. oil refineries,

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[1] A partial version of this paper was delivered at the UCC Law & Environment Conference 2016, University College Cork, 21st April 2016, under the title 'Business but not as Usual: Implications of the Aarhus Convention for Private Sector Operators.' This paper incorporates comments and feedback gratefully received at that Conference.

[2] Directive 2014/52/EU, [2014] OJ No. L124/1, of the 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, hereinafter "Directive 2014/52/EU" or "the 2014 Directive".

[3] Council Directive 85/337/EC, [1985] OJ No. L175/40, hereinafter the "1985 EIA Directive" or "Directive 85/337/EC".

[4] Council Directive 2003/35/EC [2003] OJ No. L 156/17 (hereinafter "Directive 2003/35/EC").

[5] (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter referred to as the Aarhus Convention) was adopted on 25 June 1998.

nuclear power stations). Annex II projects, EIA only required where thresholds were triggered, based on size, nature or location. Member States were free to set thresholds for Annex II projects.

The 1997 EIA Directive[7] expanded the list of Annex I projects from 9 to 21, resulting in many previously Annex II projects being brought within mandatory EIA. It also provided guidance on setting the thresholds for Annex II projects. They could be decided on a case by case basis based on whether they were likely to have a significant effect on the environment, or subject to thresholds. Criteria for selection were posited as (i) the characteristics of the project, (ii) the locations of the projects, and (iii) the characteristics of the potential impact.

Directive 2003/35/EC amended the EIA Directive to introduce enhanced public participation.

Directive 2009/31/EC[8] amended the Annexes I and II of the EIA Directive, by adding projects related to the transport, capture and storage of carbon dioxide.

The 2011 Consolidating Directive, 2011/92/EU[9] made no substantive changes to the Directive 1985/337/EC, but repealed it, consolidating and tidying up numbering of its existing provisions.

In 2012, an extensive review of the 2011 Consolidated Directive was undertaken as part of the Better Regulation program[10] series of Impact Assessments. This resulted in a proposal for a revision of the 2011 Directive[11], which eventually became Directive 2014/52/EU. This has resulted in substantial changes to the area.

The EIA Directive is 2014/52/ EU of the European Parliament and of the Council of April 16, 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, (the "EIA Directive") was published on the 25th April 2014 and was effective from 16th May 2014. Member States must have all measures in place by 16th May 2017 (except for so-called "pipeline projects" – those initiated before the 16th May 2017, which means those submitted for screening or scoping by that date, or those who have submitted an EIS by that date).

The main structural changes introduced by the 2014 Directive were

- Revised Articles 1, 2, 4, 5, 6, 7, 9, 10, 12
- Replaced Articles 3,8
- Added 8a, 9a, 10a.
- Revised Annexes III, IV.
- Added Annex IIA

The broad themes evident from the text of Directive 2014/52/EU seem to be integrated decision making, smarter regulation, better quality assessment of impacts, enhanced public participation, and increased prescriptiveness in a variety of areas, from time limits for consultation and decision making phases, to the information required to be submitted by the developer for screening applications.

The main changes introduced by the 2014 Directive are dealt with below in order of Article number.

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[7] Council Directive 97/11/EC [1997] OJ No. L73/5
[8] Council Directive 2009/31/EC [2009] OJ No. L 140/114
[9] Council Directive 2011/92/EU [2011] OJ No. L 26, 28.1.2012, p. 1
[10] See "Better Regulation" http://ec.europa.eu/smart-regulation/impact/index_en.htm for more information.
[11] Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, COM/2012/0628 final - 2012/0297 (COD) available at http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012PC0628

2. The Changes introduced by the new EIA Directive 2014/52/EU:

Article 1 - Definitions

Article 1 is amended by the insertion of a definition of Environmental Impact Assessment at Art 1 (2)(g), the replacement of Art 1(3) which has the effect of adding "civil emergency" to the old national defence exemption.

Art 1(4) is deleted in its entirety (the exemption of measures introduced by National Legislation from the provisions of the Directive). The National Legislation exception, in amended form is now contained in Art 2(5).

This provides a definition of Environmental Impact Assessment for the first time as:

'(g) "*environmental impact assessment" means a process consisting of:*

> *(i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);*
>
> *(ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;*
>
> *(iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7; (iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and*
>
> *(v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a*.';

This is interesting to note that this is a process based definition, which sets out a clearly structured four part procedure:

1. The Report Phase - EIS prepared by the Developer.
2. The Consultation Phase – Consulting with the public, relevant national authorities, and transboundary consultation.
3. The Assessment Phase – assessment of the above by the planning authority.
4. The Decision Phase - issuing of reasoned decision that must include the mitigation and monitoring measures and a description of how the results of public consultation were taken into account.

This clearly distinguishes between the EIS preparation stage and the Consultation stage. The issue of whether this definition aligns with the spirit and text of the Aarhus Convention is dealt with in the penultimate section of this paper, below. However, it is interesting to note the positioning of the Consultation phase after preparation of the Environmental Impact Statement by the developer.

This definition is broader than the Irish definition at 171(A)(1) of the Planning and Development Act 2000 as amended by the s. 53 of the Planning and Development (Amendment) Act 2010, which described EIA as an examination carried out by the deciding authority, that identifies, describes and assesses the impacts under the headings of : (a) human beings, flora and fauna, (b) soil, water, air, climate and the landscape, (c) material assets and the cultural heritage, and (d) the interaction between the factors mentioned in paragraphs (a), (b) and (c).

The definition in the new Directive appears to place Consultation centre stage as a distinct phase of the process.

The equivalent UK legislation has no definition of EIA. The relevant provisions are contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (S.I. 2011/1824) as amended which were created under the Town and Country Planning Act 1990 (1990, c.8) as amended. This will mark a new element to the UK framework, but not a substantive change, bearing in mind the elements of the process described in the new definition were already present in the UK framework.

Article 2 – Integrated Decision-Making

The old Article 2(3) referred to an option to provide a single procedure for EIA and IPC assessments (Integrated Pollution Control). It is replaced with mandatory joint procedure for assessment of effects on the environment under Habitats (92/43/EC) or Birds (2009/147/EC) Directives, unless this is not appropriate, in that it would fundamentally undermine the objectives of the project.

It also sets out an optional joint procedure on assessments under other directives requiring assessment of effects on the environment.

Member States to designate an authority for such joint procedures and to issue guidelines on the carrying out of them.

Article 2(4) is amended. It refers to the freedom to exempt specific individual projects from the Directive. This can only be invoked now where an "adverse effect" on the project could be demonstrated if the project were subjected to the requirements of the Directive. The objectives of the Directive must still be met in relation to such a project. The prior consent of the Commission is still required to invoke this exception.

Article 2(5) now contains the national legislation exception, and a requirement to notify such exemptions to the Commission every two years, and that the objectives of the Directive be met.

This marks a departure from the Irish and English positions at present.

Arabadjieva points out that the lack of a definition of 'appropriate assessment' and other matters mean that this amendment may lead to greater uncertainty about the boundarie s of EIA, Appropriate Assessment under the Habitats Directive and SEA[12].

Article 3 – Factors on which EIA is based

The factors on which the assessment must be based have been replaced with:

- **(a) Population and human health**
- (b) **Biodiversity** with particular attention to species and habitats protected under Directive 92/43/EEC and 2009/147/EC,
- (c) **Land,** soil, water, air and climate,
- (d) Material assets, cultural heritage and the landscape,
- (e) The interaction between the factors referred to in points (a) to (d).

A new part Art. 3(2) includes reference to also **addressing vulnerability to major accidents/disasters.**

[12] Arabadjieva, K., 'Better Regulation in Environmental Impact Assessment: The Amended EIA Directive', JEL, 2016, 28, 159 – 168.

This implements the Major Accident/Hazards Directive[13], and for the first time explicitly links human health and the environment, as well as linking EIA explicitly to the Habitats and Birds Directive, and placing biodiversity as a central concern.

This section will lead to substantial changes to the matters considered during the EIA process and the content of Environmental Impact Statements in the UK and Ireland.

Article 4 - Screening

Article 4 concerns screening determinations as to whether a project requires an EIA or not, with Annex I projects requiring an EIA and Annex II to be determined by Member States on a case-by-case or threshold basis.

Article 4(3) is amended to provide an addition that Member States may provide criteria or thresholds for when a projects need not undergo EIA, or when the project shall always be subject to EIA.

Article 4(4) is changed completely. Instead of referring to determinations being made available to the public, it sets out that where an Annex II project is subject to a case-by-case determination, the developer shall provide certain information set out in a new Annex IIA, and also provides that mitigation measures may be disclosed.

This appears to suggest a formal screening procedure for case-by-case determinations. There is no provision for public consultation in this screening procedure.

Where Member States decide to require a determination for projects listed in Annex II, the developer shall provide information on the characteristics of the project and its likely significant effects on the environment. The detailed list of information to be provided is specified in Annex IIA.

This Annex IIA information includes a description of the project, its characteristics, location and potential impacts under a variety of headings.

New Articles 4(5) and 4(6) are added.

Article 4(5) now contains the provision regarding making determinations available to the public (formerly Article 4(4)), and contains an obligation to give reasons for the decision to require or not to require an EIA, with reference to Annex III criteria.

This new reason giving approach is designed to increase the accountability of the decision maker and has the effect of providing less discretion. It is consistent with previous interpretation of the Art 4(4) by the ECJ[14]. Also reason giving is seen as a fundamental aspect of the procedural rights of participation and review under Aarhus.

Art 4(6) provides a maximum time-frame of 90 days for the making of a determination from the date on which a developer has submitted all information. Extension is only permitted in exceptional cases.

There is no requirement for public consultation at the screening determination but a requirement is made for a reasoned decision to be made public.

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[13] Council Directive 96/82/EC of 9 December 1996 as amended by Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003.

[14] Commission v Italian Republic Case C-87/02 [2004] ECR I -5975 where it was held determinations not to require an EIA must be accompanied by grounding information.

Article 5 - Scoping

The wording of Art 5(1) through 5(3) has changed, with Article 5(3) minimum data requirements being moved to Art 5(1), but the Article 5(2) still concerns the issuing of an opinion by the Competent Authority on Scoping.

Art 5(1) sets out the minimum data to be submitted including things like the description of the size and scope of the project. These have been shuffled and tweaked.

Change at 5(1)(b) instead of the old requirement set out mitigation measures required to **"avoid, reduce" and "remedy**" any adverse effect on the environment, there is a requirement to provide:

> "*the data required to identify and assess the main effects which the project is likely to have on the environment*;".

Art 5(1)(c) that in place of the old requirement to provide "*the data required to identify and assess the main effects which the project is likely to have on the environment*", the requirement is now to provide:

> "a description of the features of the project and/or measures envisaged in order to **avoid, prevent or reduce and, if possible, offset** likely significant adverse effects on the environment"

(*Emphasis added*)

It could be argued there is a more proactive approach required here to prevent environmental damage, rather than just to limit it.

Art 5(3)(a) contains a fairly significant addition. It mandates that the developer must ensure that the environmental impact assessment report be prepared by **competent experts**.

This creates potential for the establishment or development of a standard qualification for professionals considered to be "competent experts" and developers will likely only be able to justify an expert as "competent" when they hold a certain level of academic qualification.

This was likely to address concerns raised regarding the variation in quality of the environmental reports being produced across the Member States and in particular inconsistent screening.[15]

Article 5(3)(b) imposes a duty on the competent authority to ensure that it has access to sufficient expertise to examine the EIS.

In a situation where public bodies are frequently under-resourced one can but wonder how the competent authority is supposed to deal with a scenario where they find they do not have such expertise, and if they proceed to determine consent in the absence of such expertise could a development consent or license be challenged on grounds that the granting authority lacked access to sufficient expertise to scrutinise the EIS?

Lee in her text (pg. 168)[16] posits that Art 5(3)(a) could lead to the establishment of some sort of National Accreditation Scheme for Environmental Consultants who prepare EIS's.

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[15] Brussels, 23.7.2009 COM(2009) 378 final, "*Report From the Commission To the Council, the European Parliament, the European Economic and Social Committee and the Committee of The Regions on the application and effectiveness of the EIA Directive (Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC)*", para 3.2.1 & 3.2.2

She also speculates that Art 5(3)(a) implies or invites the establishment of a National Public Body tasked with evaluating the quality of information in the EIS. However such a proposal was already rejected in the UK[17]. This is the approach taken in the US where the assessment is carried out by the regulatory authority[18].

Article 5(4) is unchanged.

Article 6 – Public Participation Provisions and Timeframes

Art 6(1) Provides opportunities for participation and consultation with competent environmental authorities.

The addition in the revised Directive 2014 of one phrase in the middle of Art 6(1): '*taking into account, where appropriate, the cases referred to in Article 8a(3)*.' – refers to the scenario provided for further on at Article 8a(3) where Member States choose not to utilise the EIA procedure on a particular project but must still demonstrate compliance with the Directive in the manner in which they authorise projects.

Art. 6(2) concerns information being made available to the public regarding the process

Addition at the beginning '*In order to ensure the effective participation of the public concerned in the decision-making procedures*'.

This emphasises that the main purpose of providing information to the public is to ensure participation and not just to achieve a kind of transparency. This ties in with a broader move in debate on the revised Directive to achieve a more genuine level of participation, to move up the scale from placation to genuine participation[19] [20].

The section is also amended to make the provision of electronic information appear mandatory:

> '*the public shall be informed electronically and by public notices*'

As opposed to the original wording '*the public shall be informed, whether by public notices or by other appropriate means such as electronic media where available*,'.

Art 6(5) Members States are required to set down the Public Participation arrangements.

There is an addition at the end '*Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level.*'

Again this appears to suggest that Member States must switch to primarily electronic means of information provision to satisfy the public participation requirements. There is already a requirement for developers to submit electronically under Irish Law[21]. In the UK provision is made

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[16] Lee, M., *EU Environmental Law, Governance and Decision Making*, 2nd Ed. 2014, Vol 43, Modern Studies in European Law, Hart Publishing, Oxford and Portland Oregon, pg. 168.

[17] "*The Governments Response to the Royal Commissions Twenty-Third Report on Environmental Planning*" (2003) CM 5887, 12.

[18] Glasson, J.,"*Introduction to Environmental Impact Assessment*", 4th Ed., Routledge Taylor Francis Group, London & New York, 2012, Ch. 4.

[19] Arnstein, Sherry R., "*A Ladder of Citizen Participation*," JAIP, Vol. 35, No. 4, July 1969, pp. 216-224.

[20] Tromans, "*EIA, SEA and energy projects: better decision-making or a game of snakes and ladders*?" Environmental Law and Management, Volume 26 Issues 3–4 2014, ISSN 1067 6058.

[21] Article 97, Planning and Development Regulations 2001, as amended by Article 13 of S.I. No. 476/2011 – Planning and Development (Amendment) (No. 3) Regulations 2011.

for electronic application but it is not mandatory and usage is inconsistent across planning authorities[22].

Art 6(6) is divided into an (a) and (b) part regarding information and participation and insertion of reference to the authorities in para 1 'informing the authorities referred to in paragraph 1'.

This refers to consultation with other competent authorities and the emphasis on joined-up decision making is evident throughout the revised Directive.

Art 6(7) contains the addition of a minimum consultation period of 30 days.

This is interesting, as commentators[23] had previously questioned whether the 5 week consultation period in Irish Law[24] would comply with the requirement of "reasonable timeframe" under the old Directive. It appears that it may require to be extended to 6 weeks (30 working days). However the question will still remain as to whether 30 days would satisfy the Aarhus Convention provision on public participation.

It seems clear the timeframe under the relevant provisions of English law providing for a 21 day time period will have to be amended on the implementation of the Directive.[25]

The Compliance Committee case law indicates that periods of 10 – 20[26] days are not but has approved periods of 45[27] – 90[28] days. They have not laid down a specific timeframe but indicate this depends on the complexity and nature of the project.[29]

Article 7 – Consultations on Transboundary Effects.

Art 7(4) Line added "Such consultations may be conducted through an appropriate joint body.';"

It remains to be seen in what manner the Member States will seek to fulfil the requirement of establishing an 'appropriate joint body' but it seems practical that it would be done by adding this as a layer of responsibility to the existing decision makers at the various level, such as local authorities or the Planning Boards.

Article 8 – Taking into Account Public Consultation

Results of consultations and information gathered under Art 5, 6 and 7 should be taken '*into account*' instead of '*into consideration'* in the development consent procedure. It is unclear if this represents a greater degree of taking on board of the submissions and observations collected. It is clear that the requirement is an attempt to enhance the quality of public participation under Articles 5, 6 and 7, as is evident from the ACCC's comments on the area in their Guide to Implementation.[30]

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[22] E.g. Article 7 Town and Country Planning (Development Procedure) Order 2015.
[23] Simons, G., '*Planning and Development Law'*, 2nd Ed. 2007, Thomson Roundhall, Dublin, Pg.726 Para 13-18
[24] Planning and Development Regulations 2001, article 29 (as substituted by article 10 of S.I. No. 135/2007 – Planning and Development (No. 2) Regulations 2007)
[25] Article 15, Town and Country Planning (Development Procedure) Order 2015
[26] ACCC/C/2006/16 (Lithuania) Findings and recommendations of 07.03.2008 ECE/MP.PP/2008/5/Add.6, para 69 and 70 and ACCC/C/2008/24 (Spain) Findings and recommendations of 08.02.2011, ECE/MP.PP/C.1/2009/8/Add.1 para 92.
[27] ACCC/C/2007/22 (France) Findings and recommendations of 03.07.2009 ECE/MP.PP/C.1/2009/4/Add.1 para 44.
[28] ACCC/C/2004/4 (Hungary) Findings and recommendations of 18.02.2005 ECE/MP.PP/C.1/2005/2/Add.4 para 12.
[29] ACCC/C/2006/16 (Lithuania) Findings and recommendations of 07.03.2008 ECE/MP.PP/2008/5/Add.6, para 69 and 70
[30] United Nations, "The Aarhus Convention: An Implementation Guide", Second edition, 2014. Pg.156.

Article 8(a) – Reasoned Decisions, Mitigation, Monitoring

Article 8(a) is an entirely new section addressing the obligation to give a reasoned decision setting out minimum information the decision should contain, including: reasons, conditions and mitigation measures.

There are extensive and detailed references to monitoring measures (art.8 (1)(b) & art 8(4)) to be put in place as a condition of consent being granted. This appears to be directed at making sure that mitigation measures proposed function as planned, and are real and effective. Previously this type of obligation had only been included in Strategic Environmental Assessments of plans and programmes. Arabadjieva has hailed this as transforming the EIA process from a linear one to a learning process with a feedback loop leading to continued improvement[31].

It also provides for giving reasons for refusal, and an obligation to make a decision within a reasonable period of time (although it is not prescriptive of the timeframe).

It also introduces an obligation to give reasoned decisions.

These provisions form an important foundation for the right to appeal and review decision. The obligation to give reasoned decisions has long been a fundamental principle of administrative decision making in the UK and Irish legal systems, and so this reason-giving provision is unlikely to mark a drastic change in these jurisdictions. However, the provision may have more profound effect in legal systems less accustomed to such administrative rights.

Article 9 – Reasoned Decisions and Responses to Consultation

Art 9 (1) replaced to include references to the competent authorities and how the competent authority should give reasons for decisions and address the results of public consultation and information gathering in 5 -7.

> '*1.When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall promptly inform the public and the authorities referred to in Article 6(1) thereof, in accordance with the national procedures, and shall ensure that the following information is available to the public and to the authorities referred to in Article 6(1), taking into account, where appropriate, the cases referred to in Article 8a(3):*
>
> *(a) the content of the decision and any conditions attached thereto as referred to in Article 8a(1) and (2);*
>
> *(b) the main reasons and considerations on which the decision is based, including information about the public participation process.*
>
> *This also includes the summary of the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how those results have been incorporated or otherwise addressed, in particular the comments received from the affected Member State referred to in Article* 7.';

This does seem to represent a greater obligation to consider the submissions and observations gathered in public consultation when reaching a decision, particularly the obligation to summarise how these submissions have been incorporated or otherwise addressed.

This is in line with the Aarhus Convention Compliance Committee Guidance on the subject[32].

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[31] Arabadjieva, K., 'Better Regulation in Environmental Impact Assessment: The Amended EIA Directive', JEL, 2016, 28, 159 – 168.

[32] Ibid. 24. The ACCC comments at Pg. 156: '*A good practice used in some countries in handling comments received is to require the relevant authority to respond directly to the substance of the comments. For this purpose, comments that are substantially identical may be grouped together. Some countries require the*

Article 9(a) – Conflict of Interest Provision

This is a new article, instructing the competent authority to be objective and to avoid conflict of interests. It also obliges Member States to organise their administrative competencies to avoid the same.

This will mean taking appropriate measures particularly in the case of State and Local Authority Development.

Article 10

Reference inserted at beginning to '*Without prejudice to Directive 2003/4/EC*,' re-emphasising the importance of the public participation measures.

Article 10a - Penalties

This is a new article obliging Member States to set down rules on penalties applicable to infringements of the national provisions which are effective, proportionate and dissuasive.

This has the potential to introduce for the first time a criminal dimension to failure to comply with the appropriate provisions of the implementing legislation, which, overlaid on top of the existing administrative remedies in both jurisdictions, has the potential to provide real "teeth" to the EIA regulations and perhaps enable them to be taken more seriously.

Arabadjieva[33] is of the opinion that provision will be significant in encouraging consistent and proper implementation of the EIA Directive.

Article 12 – Information Gathering

New Art 12(2) inserted containing detailed obligations on Member States to gather information about the number of projects in either Annex I or II subjected to EIA with a breakdown into project categories as listed in the annexes. Also the number of projects which are subject to a screening procedure. Finally they must gather information on the cost of EIA to small – medium enterprises. All this information must be reported every six years to the Commission.

This is to be welcomed as informed debate on how EIA actually functions is difficult in a vacuum of information regarding same. In the long term, this is likely to be the provision with the most significant effect on the practice of EIA in the EU, as with accurate information from all Member States it will be possible to identify inconsistencies as well as good practices in the implementation of the Directive and the practice of EIA across the EU, and take measures to ensure the harmonisation of the system.

5. The Current Irish EIA Regime:

substance of all comments to be addressed in a written document justifying the final decision, which may be called a "response document". This written document may also be used to satisfy the requirements of paragraph 9, which requires decisions to be given in writing along with the reasons and considerations on which they are based.'

[33] Arabadjieva, K., '*Better Regulation in Environmental Impact Assessment: The Amended EIA Directive*', JEL, 2016, 28, 159 – 168, at pg. 162.

The EIA Directive was first transposed into Irish law by the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349 of 1989) which amended the Local Government (Planning and Development) Act, 1963 (and other legislation) to provide for environmental impact assessment.

These Regulations, together with the Local Government (Planning and Development) Regulations, 1990, (S.I. No. 25 of 1990), which made more detailed provision in relation to planning consents, came into effect on 1 February 1990.

EIA provisions in relation to planning consents are currently contained in the Planning and Development Act, 2000, as amended, (Part X) and in Part 10 of the Planning and Development Regulations, 2001, as amended.

These provisions have been significantly amended by the Planning and Development Act 2006, the Planning and Development (Amendment) Act 2010 (number 30 of 2010), the Regulations of 2011, S.I. No. 473 of 2011, the European Union (Environmental Impact Assessment and Habitats) (No. 2) Regulations 2011, S.I. No. 584 of 2011, the European Union (Environmental Impact Assessment) (Planning and Development Act, 2000) Regulations 2012 (S.I. No. 419 of 2012), and the S.I. No. 582/2015 – Planning and Development (Amendment)(No. 4) Regulations 2015, to name but a few.

Together the Planning and Development Act 2000 as amended and the Planning and Development Regulations 2001 – 2015 provide for the conduct of, among other matters, development consent.

There is no requirement for pre-planning consultation, although the applicant may engage with the planning authority prior to application. There is no requirement for application for screening or scoping decisions, but the applicant can voluntarily seek such determinations from the planning authority[34].

Public participation in the planning process is covered by the Planning and Development Regulations 2001 – 2015. The applicant must put up a site notice and take out a newspaper notice two weeks prior to application[35]. The information must be provided that the application can be viewed and copied at the offices of the relevant planning offices during office hours, for a copying fee, and that submissions and observations can be made in writing to the relevant planning authority, within 5 weeks of the date of application[36]. Anyone who submits an observation may appeal.

Similar provisions can be found in relation to the submission of an Environmental Impact Statement[37]. Submissions and observations can be made on the EIS within 5 weeks.

The content of the EIS reflects that required in the EIA Directive 2011/92/EU.

Irish planning legislation provides a maximum timeframe for making a final determination on the application of 8 weeks[38] which may be increased to 16 weeks on request for further information where the development is an EIA development[39].

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[34] Section 173(2)(a) Planning and Development Act 2000 as amended (Screening) & Section 173(3)(a) Planning and Development Act 2000 (Scoping).
[35] Art 17 Planning & Development Regulations 2001 as amended.
[36] Art 18 Planning & Development Regulations 2001 as amended.
[37] Art 98 & 107 Planning & Development Regulations 2001 as amended.
[38] Planning and Development Act 2000, s.34(8)(b) as amended.
[39] Planning and Development Act 2000, s.34(8)(c) & (ca) as amended.

6. The Current EIA framework in England for Planning Decisions:

The equivalent UK Environmental Impact Assessment provisions are contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (S.I. 2011/1824) as amended which were created under the Town and Country Planning Act 1990 (1990, c.8) as amended. These cover England only, and encompass the majority of EIA developments[40] in the UK.

This legislation specifically designed for EIA development runs alongside the usual development consent procedure with the provisions overlaid, similar to the Irish implementation. The development consent procedure is contained in the Town and Country Planning (Development Procedure) Order 2015 (S.I. 2015/595)and the relevant portions are founded on the Town and Country Planning Act 1990 (1990, c.8).

The legislation prescribes a broadly similar system to the Irish Planning regime, and can be briefly summarised as follows:

Pre-planning public consultation is not mandatory (except in the case of Wind Farms). Screening[41] and scoping[42] decisions may be sought in advance with no public consultation but these are not mandatory. The results of screening determinations must be made public and reasons must be given[43]. The provisions and Annexes of the Directive 85/337/EC as amended up to 2011/92/EU are given effect to in the schedules setting out the thresholds for determining when a project is subject to an EIA, and the contents of same.

A planning application is submitted. The local authority then posts site notices and newspaper notices[44]. The developer must post site notices and newspaper notices seven days before submission of the planning application, and a 21 day consultation period applies in which concerned members of the public can make submissions and observations[45]. There is also a statutory consultation with prescribed bodies[46].

The Local Planning Authority will then determine whether the application is valid and determine whether it is an EIA development, if no EIA has been submitted. If an EIA is submitted it is treated as an EIA development[47].

A consultation period of between 14 and 21 days applies and the decision must be finalised within 8 to 16 weeks depending on the type of development. The 16 week period applies to EIA developments[48].

This has been observed by Glasson as being an implementation of the minimal requirements of the EIA directive rather than a "gold plating" of the public participation requirements[49].

[40] Glasson, J., "*Introduction to Environmental Impact Assessment*", 4th Ed., Routledge Taylor Francis Group, London & New York, 2012, Ch. 3, pg. 64 & Ch.8, fig.8.2, indicating that 60% – 70% of all EIAs in the UK fall under these regulations.
[41] Article 5, Town and Country Planning (Environmental Impact Assessment) Regulations 2011 as amended.
[42] Article 12, Town and Country Planning (Environmental Impact Assessment) Regulations 2011 as amended.
[43] R (Mellor) v Secretary of State for Communities and Local Government [2010] Env LR 18, para 57 – 60.
[44] Article 15, Town and Country Planning (Development Procedure) Order 2015 (S.I. 2015/595).
[45] Article 15, Town and Country Planning (Development Procedure) Order 2015.
[46] Articles 20 & 21, & Sch.4, Town and Country Planning (Development Procedure) Order 2015.
[47] Article 4, Town and Country Planning (Environmental Impact Assessment) Regulations 2011 as amended.
[48] Article 61, Town and Country Planning (Environmental Impact Assessment) Regulations 2011 as amended.
[49] Glasson, J., "*Introduction to Environmental Impact Assessment*", 4th Ed., Routledge Taylor Francis Group, London & New York, 2012, Ch. 3, pg. 152 para 6.2.

7. Changes to the UK and Irish Regimes Likely:

This procedures will have to be altered in the following ways:

a) The scope of matters to be considered will expand to include impacts on biodiversity, land, and population.
b) One-stop shop approaches will have to be developed by both jurisdictions for joint assessment in relation to EIA and Habitats/Birds where appropriate.
c) Both jurisdictions may choose to simplify procedures for assessment of impacts under other legal measures where they coincide with EIA.
d) The addition of biodiversity in relation to the Habitats and Birds Directives, effects on Human Health and vulnerability to major accident/hazards to the range of factors to be assessed in the EIA.
e) Annex II projects (or Schedule 5 (2) of the Planning and Development Regulations 2001) requiring assessment on a case by case basis now require a specific information set to be submitted for screening determinations, as prescribed in the new Annex IIA of the Directive including a description of the characteristics, location and likely impacts of the project.
f) Annexes III and IV changes will lead to the relevant Schedules being updated in both jurisdictions to reflect the additional information now required by these.
g) There will possibly be a more pro-active obligation on the developer to consider ways to completely avoid any adverse environmental effects caused by the project or offset them.
h) Both jurisdictions may attempt to define what a "competent experts" should be by mandating specific, most likely third level Bachelors standard qualifications and/or minimum levels of practical experience required to prepare a valid EIS. This could involve a national accreditation system or professional regulatory body for those who wish to work on the preparation of environmental statements.
i) The decision making authorities may have to hire in outside expertise through external consultants to carry out their EIA of the project, if they do not have the necessary expertise themselves, or risk having their decisions later overturned in Court.
j) Information regarding the development consent application and the EIS will have to be made available electronically, and presumably the site notices and newspaper notices will have to refer to this in addition to the old provisions regarding the information being available at the offices of the planning authority during business hours. In the UK, the relevant provisions provide in a non-mandatory way for electronic application[50], and some local authorities have moved to electronic methods of storage and access but this is not consistent across authorities. In Ireland under relevant statutory provisions, [51]developers already have to submit a copy of the EIS in electronic form so there will be no impact from their perspective. The largest impact will be felt by the planning authorities who will have to develop new systems for storage and retrieval by the public of online information in this area. It is likely that information being more easily available will result in much wider participation and a greater level of objection to applications. It would be wise for developers to address this in advance, perhaps through earlier engagement with local communities particularly in the case of significant, high profile or large scale projects.
k) Irish time-frames of 5 weeks, and UK timeframes of 21 days, for public consultation will both have to be increased to 6 weeks to reflect the new 30 day mandatory minimum specified in

[50] E.g. Article 7 Town and Country Planning (Development Procedure) Order 2015.
[51] Article 97, Planning and Development Regulations 2001, as amended by Article 13 of S.I. No. 476/2011 – Planning and Development (Amendment) (No. 3) Regulations 2011.

the directive, depending on interpretation. Where timeframes for public consultation are 4 weeks, they may have to be increased.

l) Timeframes for public consultations in the case of projects having transboundary effects will still be up to the discretion of the National legislature, but will likely have to be at least equal to or greater than that allowed for domestic consultation, and possibly will have to be increased from 4 weeks to at least 6 weeks.
m) The establishment of joint bodies for transboundary cases, instead of the current situation set out in the Irish Legislation of a notification and consultation procedure between the Planning Authority, the Minister and the affected State[52].
n) A greater emphasis on giving reasoned decisions for both grant and refusal of permission. In particular a greater degree of detail regarding how submissions and observations were used in arriving the decision will be required.
   The new emphasis on reasoned decision-giving is something that is second nature to planning decision makers in this jurisdiction, although it may mark a departure in some other jurisdictions.
   However the Art 9 prescriptive provisions on the content of the reasoned decision are clearly going to impact on the importance of public consultation in the planning process here. Art 31 of the Regulations clearly required the decision maker to issue a reasoned decision which "*had regard*" to the outcomes of public consultation.
   The new obligation to "Includes the summary of the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how those results have been incorporated or otherwise addressed." This represents a significant raising of the bar and will take the public consultation process one step closer to genuine Aarhus "participation", rather than an exercise in placation/channelling that it can sometimes amount to at present. In combination with the other strengthened public participation requirements this represents a significant step towards Aarhus compliance.
o) Monitoring of adverse effects will be required to be specified in the decision, including the methods. This was formerly a requirement in SEA but not EIA.
p) The standard regarding consideration given to alternatives seems to have been raised. The directive uses the language of the SEA directive in referring to "reasonable alternatives". It will be interesting to see if this impacts on the current position in UK law that alternatives do not need to be considered.
q) Member States will have to set down criminal penalties for breaches of the provisions of the implementing legislation, which will be a new departure in this area. The introduction of criminal penalties and subsequent prosecutions is likely to result in more litigation about the precise meaning of the individual provisions of the implementing legislation in both jurisdiction which, it is to be hoped, will further clarify the law in the area.

It seems likely, given the ongoing problems with transposition of the old EIA Directive[53] in Ireland, that next year will see the introduction of yet more problematic legislation, and further litigation on the issues of bringing national legislation into line with EU law. If the current piecemeal implementation by way of amending Statutory Instruments continues to be utilised, this is an area of law that is set to become ever more byzantine.

[52] Art 126 & 127 Planning and Development Regulations 2001 as amended by Art 31 of S.I. No. 685/2006 – Planning and Development Regulations 2006
[53] E.g. Commission v Ireland Case C50/09

8. The Aarhus Convention

The Aarhus Convention is a Multilateral Environmental Agreement ratified and effected in EU Law. It was signed by the EU and subsequently approved by Decision 2005/370[54]. It is also ratified by individual Member States (and finally by Ireland in 2012)[55] . In that regard the obligations contained in it trickle down in a variety of ways. There is the requirement of the arms of the State to have regard to international agreements binding on Ireland. Post-ratification, Ireland must answer directly to the Aarhus Convention Compliance Committee, which is a soft law compliance mechanisms who's decisions are declaratory in nature only. The most significant way the Convention has been felt to date is through our compliance with the measures introduced by EU Law to give effect to their obligations under it.

The Irish Courts have concluded that the Aarhus Convention is not part of Irish law[56] and that it only has effect insofar as the provision of EU law giving effect to it were effective in Ireland[57]. The court did acknowledge that, since ratification, judicial notice ought to be taken of the provisions of the Convention in interpreting Irish legislation, but that if the legislation did not give full effect to the provisions of the Convention "*the only remedy in that situation would be for the Oireachtas to amend the law*".

The UK ratified the Aarhus Convention in February 2005, with a declaration that they only recognise procedural and not substantive rights arising therefrom[58]. As in Ireland, the Convention does not form part of the UK law as such[59]. However, in both jurisdictions judicial notice must be taken of the Conventions provisions (and one would assume the declarations of the Compliance Committee) and it has had a massive normative influence on UK and Irish Law, which is the primary purpose of such an instrument.

That the EU can be held accountable also before the ACC for failures by the Member States who do not implement fully is confirmed by the Swords' Case[60] before the Compliance Committee, where it was confirmed the EU was responsible for Ireland's failure to carry out an EIA of the NREAP, even though Ireland had not ratified the Convention at that remove.

The ECJ have also examined the legal status of the Convention in the European legal order and have determined that although it does not have direct effect, national courts must interpret rules

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[54] [2005] OJ L124/1, 17/05/2005, p. 1

[55] Browne, D. "*Ireland's Compliance with the Aarhus Convention*", (2015) 22(2) I.P.E.L.J. 43-62

[56] McCoy v Shillelagh Quarries [2015] IECA 28 (Court of Appeal, Hogan J.) This case concerned the application of the costs provisions in s.3 of the Environmental Miscellaneous Provisions Act 2011, with its specialised costs regime, to the case before the Court.

[57] Flynn, T. "*An Overview of Recent Developments in Environmental Law*", Thomson Reuters Roundhall Planning & Environmental Law Conference 2015, 07/11/2015, Dublin.

[58] Upon signature in 1998 and ratification in 2005, the United Kingdom declared: ' *The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the " right " of every person to " live in an environment adequate to his or her health and well-being " to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention*. ' Depositary notification C.N.124.2005.TREATIES-2(XXVII.13).

[59] Walton v Scottish Ministers [2012] UKSC 44, [2013] 1 CMLR 858 .

[60] ACCC/C/2010/54 (European Union) findings and recommendations of 29.06.2012 ECE/MP.PP/C.1/2012/12

established under EU competence on the environment in a manner that is consistent with the Aarhus Convention. They pronounced in the Slovakian Brown Bears Case[61]:

> *'In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law*.'[62]

From this it can be seen that the Conventions' obligations are woven into the fabric of the European, Irish and UK legal orders, mainly through their EU level implementation. This is perhaps complicated by the haphazard and sometimes flawed EU level implementation of the Convention, which raises the spectre of a Member State being found wanting by the ACCC despite having fully implemented all relevant EU provisions.

Kramer[63] highlights the gaps in participation in environmental decision making created by the EU regime, pointing out that 2011/92/EU, 2010/75/EU and 2000/60/EU and the different waste directives mentioned in 2003/35/EU do not cover all decision making in environmental matters. Most medium and small projects and installations are assessed at the Member State's discretion. Also the legislative framework does not capture a range of environmental decision making such as decisions on the "*authorisation of products and processes, management decisions, monitoring methods and processes, derogations, omissions to decide etc*." He also highlights the lack of specificity in how the "public concerned" is defined, and how consultation is to be carried out.

There are also issues with the EU's implementation of the application of the Aarhus Convention to its own institutions[64] [65].

It should also be stated that in the event of a Brexit, the UK will continue to be a party to the Aarhus Convention. The Convention should exert a strong norm-creating influence on UK Environmental law in the area of EIA which should ensure similar standards in the area of transparency, public participation and reasoned decision making. However, obviously, a Brexit would remove the threat of EU level enforcement and leave just the soft-law mechanism of the ACCC and the hard law mechanism of the domestic courts to ensure that standards are maintained as required. Given that international law conventions do not give rise to private rights, continued maintenance of standards after a Brexit will depend in large part on political will and the strength of lobbying done to create same.

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[61] C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, paragraphs 30-38, 43, 50-52, (the 'Slovakian Brown Bears Case').

[62] C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, paragraphs 30-38, 43, 50-52.

[63] Kramer, L. *EU Environmental Law*, 8th Ed.2015 Sweet and Maxwell, London, para 4-10.

[64] Kramer, L. *EU Environmental Law*, 8th Ed.2015 Sweet and Maxwell, London, paras 4-04 – 4-21.

[65] Lee, M. *EU Environmental Law, Governance and Decision Making*, 2nd Ed. 2014, Vol 43, Modern Studies in European Law, Hart Publishing, Oxford and Portland Oregon, Ch.7 & Ch.8 contain extensive critiques of EU compliance with Aarhus obligations.

9. Further Change is Likely

The fact remains that even if the new EIA Directive were to be perfectly implemented by 16th May 2017, this would not necessarily guarantee full compliance with the Aarhus Convention in this area.

Ratification is complete and a Bill to give effect to the Aarhus Convention is reportedly underway[66]. The Aarhus Convention will become a part of Irish Law in a fundamental way. How will the Courts reconcile the gaps in the EU Framework with the individual obligations of Ireland as an individual Party of the Convention?

Article 6(4) of the Aarhus Convention makes it clear that for public participation to be effective it must take place at an early stage while all the options are open.

"Early" means when all options are open and effective public participation can take place[67]. The Compliance Committee have for example made it clear that the entering of an agreement between the public authority and a private company may not constitute the taking of a decision, but it may still narrow down the range of available options to be considered in the decision-making process[68].

As at 2009, 16 EU member States provide for scoping as a separate procedural stage with mandatory public participation and 9 EU member States provided for mandatory public participation in screening[69].

The above approaches have not, however, to date been made explicit requirements in EU law. The Compliance Committee noted that "the Convention does not in itself clearly specify the exact phase from which the EIA should be subject to public participation. Indeed to do so would be particularly difficult, taking into account the great variety of approaches to conducting EIA that exist in the region"[70].

Article 6(5) requires that the Parties should encourage applicants to identify the public concerned and to enter into discussions with them before applying for a permit. This is clearly phrased in non-mandatory language, but is perhaps indicative of what is meant by early, effective participation. Art 6(4) is clearly couched in imperative terms.

There are currently no provisions in EU, Irish[71],[72] or UK EIA /law that could be said to achieve this level of early participation. While the new EIA Directive will certainly strengthen public consultation once the application is filed, it does not envisage this type of participation.

The COWI Report "*Study concerning the report on the application and effectiveness of the EIA Directive*" from 2009 indicates that other Member States take a different approach, with public consultation happening at the screening or scoping stages[73].

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[66] Spence, D. "*The Legal Mechanics of Public Participation*", Thomson Reuters Roundhall Planning & Environmental Law Conference 2015, 07/11/2015, Dublin.

[67] Pg. 145, United Nations, "The Aarhus Convention: An Implementation Guide", Second edition, 2014. Pg.156. Aarhus Convention Compliance Committee

[68] ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2011/2/.

[69] Brussels, 23.7.2009 COM(2009) 378 final, "Report From the Commission To the Council, the European Parliament, the European Economic and Social Committee and the Committee of The Regions on the application and effectiveness of the EIA Directive (Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC)".

[70] United Nations, "*The Aarhus Convention: An Implementation Guide*", Second edition, 2014. Pg.156.Aarhus Convention Compliance Committee, Pg. 145.

[71] *Klohn v An Bord Pleanála* [2009] 1 IR 59: the decision maker cannot have any real regard to alternatives, unless there has been a failure to adequately consider alternatives.

[72] Department of Environment, Community and Local Government, '*Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment (2013)*', March 2013.

'According to Hungarian EIA laws, public participation starts in the screening/scoping phase. The public is invited to comment on several topics including the location of the planned project, the necessity of the EIA and suggestions on the content of the EIA documentation.'[74]

'Some Member States have several phases where public consultation is stipulated whereas other Member States only have one phase, i.e. the consultation phase as required by Article 6(4) of the EIA Directive.'[75]

It is arguable that public consultation as provided for by the EIA Directive does not fulfil the requirement of Article 6 of the Aarhus Convention to provide public participation opportunities at the earliest possible stage when all options are before the decision maker. This is supported by the comments of the Aarhus Convention Compliance Committee in their second Implementation Guide[76] where they stated '*EIA and SEA procedures, as currently regulated at the national and international level, cannot be considered to fully implement the Convention's public participation requirements*'.

Garcia-Ureta states on this issue '*…no matter how significant the assessment of environmental effects may be, if a decision has already been taken (at a political level) as to the need to execute a project, the former procedure is likely to have only a minor impact on obtaining development consent, save as an inconvenience that must nevertheless be overcome."*[77]

It seems that difference between "consultation" (passive involvement) and participation"(active involvement) has not yet been recognised in the legal framework or accepted at EU level. Many of the public participation measures introduced in this and other legislation are actually transparency measures.

Genuine public participation would involve consideration of all options and alternatives, including what Glasson[78] refers to as the "no action" or "business as usual" option – a discussion of the need for the project and whether the costs outweigh the benefits. As things stand there is no real consideration of genuine alternatives.

Other issues remain also. For example, Lee[79] refers to the danger of having a system where all scientific information is put together by the developer, and she questioned whether public bodies are sufficiently resourced to properly scrutinise the documents submitted. Flynn[80] mentions these issues as well in this discussion of Case C-50/09 Commission v Ireland, mentioning that the case raised questions regarding developer led processes and independent verification of developer findings regarding baseline conditions and impacts.

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[73] European Commission, DG ENV, "S*tudy concerning the report on the application and effectiveness of the EIA Directive*" Final report June 2009 COWI http://ec.europa.eu/environment/archives/eia/pdf/eia_study_june_09.pdf

[74] European Commission, DG ENV, "S*tudy concerning the report on the application and effectiveness of the EIA Directive*" Final report June 2009 COWI http://ec.europa.eu/environment/archives/eia/pdf/eia_study_june_09.pdf Pg.49

[75] European Commission, DG ENV, "S*tudy concerning the report on the application and effectiveness of the EIA Directive*" Final report June 2009 COWI http://ec.europa.eu/environment/archives/eia/pdf/eia_study_june_09.pdf Pg. 50

[76] United Nations, "The Aarhus Convention: An Implementation Guide", Second edition, 2014. Pg.156.

[77] Garcia-Ureta, A. '*Directive 2014/52/eu on the Assessment of Environmental Effects of Projects: New Words or More Stringent Obligations*?' (2014) 22(6) Env. Liability: 239.

[78] Glasson, J., "*Introduction to Environmental Impact Assessment*", 4th Ed., Routledge Taylor Francis Group, London & New York, 2012, Para 4.5.2

[79] Lee, M., *EU Environmental Law, Governance and Decision Making*, 2nd Ed. 2014, Vol 43, Modern Studies in European Law, Hart Publishing, Oxford and Portland Oregon, pg. 168.

[80] Flynn, T., "*Reform of Environmental Law in Ireland – Some Key* Issues", Law and the Environment 2013 – 11th Annual Conference for Environmental Professionals, Faculty of Law, University College Cork, April 25th 2013 , available at https://www.ucc.ie/en/lawsite/eventsandnews/pastevents/2013/ .

It remains to be seen how these issues will be dealt with by the National Courts and at EU level, and it is anticipated that the guidance of the Aarhus Convention Compliance Committee will be most helpful in navigating the difficulties of implementation.

10. Conclusion

As can be seen from the above, Environmental Impact Assessment as it is conducted in either jurisdiction, it will remain largely the same in broad outline. However, many small changes and refinements are required to both the Irish and UK regime as a result of the new EIA Directive, and practitioners will have to follow the changes closely to remain compliant with the new standards.

The most obvious changes introduced by the Directive include the new definition of the Environmental Impact Assessment to include the four stage process. In Irish Law this will require the revision of the current definition. In the UK, the introduction of a formal definition encompassing the four stages of the process, preparation of the EIS, public consultation, review by the relevant authority, and the issuing of a reasoned decision by the authority. However, in practical terms this will not represent a massive shift as the courts in both jurisdictions have consistently interpreted the process in a global manner consistent with the new definition.

Of much more practical significance are the factors to be considered, which will change in both jurisdictions, expanding the list to include population and human health, biodiversity, land and. This will increase the workload and complexity in preparing an EIS, and likely result in longer documents, and a greater workload for impact assessors and the public authorities alike.

The new reason giving approach to screening will increase accountability in the area, in both jurisdictions.

Accreditation for experts preparing EIS's in the area will be required in both jurisdictions, which will possibly require standards setting from government, recognition of prior experience and qualifications and a transition period for obtaining necessary certification by existing practitioners. This may also lead to the establishment of a professional body in the area. If practitioners were to come together to establish a professional body which sets standards and determines when they are met this would likely satisfy the requirement without the need for legislation specifying the standard.

Integrated decision making in the area of Habitats and EIA is to be welcomed, and will represent a significant change in practice. However, there is likely to be significant variation in the implementation of this joint assessment process, given that its exact details are left largely to the discretion of the individual Member States. The streamlining of decision making for transboundary effects is also a positive development, but not one that will drastically change how EIA is conducted.

The Directive aims to enhance public participation. Articles 6 and 9 and to really ask decision makers to genuinely engage with the public, with language changes attempting to deepen the extent to which the contributions of the public are taken on board. Article 8a prescribes detailed reasoned decision making to address the results of public consultation and demonstrate how they have been taken into account. However it is unlikely that this will result in drastic changes in practice to how public consultation phases of EIA are conducted in UK and Ireland, as many of these measures are already implemented in both jurisdictions stemming from the common law jurisdiction emphasis on fair procedures in decision making. It is arguable that the significance of these provisions lies in a

norm-setting, in that they send a strong message that public participation ought to be effective, and genuinely taken into consideration by the decision maker.

Overall then, this Directive represents a refinement, an integration and a streamlining of current EIA practices in both jurisdictions, and sends out a strong message about facilitating genuine and effective public participation.

[81]In relation to the Brexit issue, which affect implementation in the UK, it seems that it will be some time before the Article 50 notification will be served, and until then the UK should in theory be compliant with all obligations required by membership of the EU such as implementing Directives by their due dates. Also once Article 50 notification is served, the UK will continue to be part of the EU for another two years while the de-coupling takes place. It therefore seems that legally speaking the Directive will still be effective in the UK territories at the time of the due date for implementation. Once implemented, it seems unlikely that standards will be rolled back drastically in the area.

However if Article 50 notification has been served, by the due date for implementation of the Directive, at that remove it is likely that implementation of EU law will slide off the agenda of legal issues being addressed by Government departments.

In this context it will be important to pay attention to the provisions of the Aarhus Convention, as this will still govern the process of EIA in the UK. It is likely that even if Brexit occurs, provided the UK remains a party to Aarhus, the EIA regime will remain broadly comparable between the jurisdictions, due to the need to maintain compliance with Aarhus, which is a big driver of the changes in the EIA Directive. The most significant change occurring as a result of any eventual Brexit in this area will be the loss of the EU Commission oversight, with enforceable fines and penalties for failure to meet the standards set in the international law regime. Also, hugely significant is the loss of a hard-law mechanism for complaints regarding non-compliance, by way of the European Court of Justice, which never be completely replaced by the Aarhus Convention Compliance Committee, as it is a soft law mechanism. The domestic courts will not be able to hear complaints from private individuals regarding breaches of the Aarhus Convention, unless legislation is passed making the Aarhus Convention part of domestic law. This is certainly being considered by the Irish Government and a proposal for an Aarhus Bill[82] seems to be underway, but at the time of writing I am not aware of any such measures proposed by the UK.

It also seems logical that the UK would seek to maintain a trading relationship with other EU countries and therefore must engage in the European Economic Area, or similar arrangement. This would suggest continued implementation of legal measures such as this Directive, as part of the necessary obligations of continued trade relations with the European Union.

Finally, as mentioned above in the discussion on the Aarhus Convention, regardless of the whether the Directive is implemented or not, further strides will need to be taken in the future towards fully implementing the requirement of early public participation when all options are on the table and full consideration of viable alternatives by the developer which are put to the public in consultation. This is necessary in both jurisdictions to comply with the letter and spirit of the Aarhus Convention.

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[81] At the time of original writing the referendum on whether the UK would exit the EU had not yet taken place. This section was introduced to take account of that result shortly before going to print.

[82] Government Legislative Programme, Spring/Summer Session 2015, Paul Kehoe, T.D., Government Chief Whip and Minister of State at the Department of the Taoiseach Published: 14th January, 2015. [Accessed 02/08/2016] http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/Government_Legislative_Programme_Spring_Summer_2015.pdf

However, at this remove it is not possible to do anything more than speculate on the shape of the changes to come as a result of the referendum.