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ARTICLE

Enforcing the Environmental Impact Assessment Directive in Ireland: Evolution of the Standard of Judicial Review

Áine Ryall*

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Abstract
The specific characteristics of each national system of judicial review reflect the indigenous legal framework and well-established administrative culture. It is necessary, therefore, to contextualize judicial review against the background of the idiosyncrasies of the local legal and administrative systems and what the national system regards as 'unlawful' decision making. An analysis of the contemporary jurisprudence of the Irish courts – in the specific context of enforcement of environmental impact assessment law – reveals a complex web of principles, which continue to evolve and to be influenced by European Union (EU) law. The article maps the development of these principles and assesses whether the standard of review (or the intensity of scrutiny) applied by the Irish courts is compatible with the EU law principle of effective judicial protection.

Keywords: Judicial review, Effective judicial protection, Environmental impact assessment

1. INTRODUCTION

This article examines the standard of judicial review in the particular context of enforcement of the European Union (EU) Environmental Impact Assessment (EIA) Directive[1] before the Irish courts. An analysis of the contemporary Irish jurisprudence reveals a complex web of principles, which continue to evolve and to be influenced by EU law. The article maps the development of these principles and assesses whether the standard of review (or the intensity of judicial scrutiny) in Irish law is compatible with the EU law principle of effective judicial protection.

* School of Law, University College Cork (Ireland), and Vice-Chair of the Aarhus Convention Compliance Committee.
Email: a.ryall@ucc.ie.
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1 Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment (codification), [2012] OJ L 26/1, as amended by Directive 2014/52/EU, [2014] OJ L 124/1.

The standard of review is influenced heavily by the overarching national legal and judicial structure. There are no specialist environmental courts in Ireland: environmental cases are heard in all of the courts, from the District Court to the Supreme Court.[2] It is the parties to the litigation who present evidence to the court, including expert technical and scientific evidence, and it falls to the court to assess this evidence.[3] Environmental decisions are taken by a range of public authorities, which include local authorities, *An Bord Pleanála* (the Planning Appeals Board), and the Environmental Protection Agency.[4] Challenges to administrative decisions in environmental matters, including the grant of development consent, are brought by way of judicial review proceedings in the High Court.

This article concentrates on judicial review of decisions taken by *An Bord Pleanála*, with a particular focus on enforcement of the EIA Directive. It opens by explaining the particular context in which judicial review operates in Ireland and what the national system regards as 'unlawful' decision making. This is followed by an analysis of the jurisprudence where the Irish courts have been called on to revisit the standard of review in light of developments in EU law. In addition to mapping the evolution of the principles governing the standard of review in EIA cases, the analysis provides insights into how the Irish judiciary integrates EU law obligations into domestic environmental law more generally. The sharp increase in the number of challenges to environmental decisions in recent years (in particular, unpopular decisions to grant development consent for renewable energy infrastructure, and especially onshore wind farm development) has presented the Irish courts with fresh opportunities to examine well-established common law principles, including the

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2 While there has been some recent academic discussion around the idea of a specialist environmental court for Ireland and what such a development might involve, this idea has not attracted any significant degree of political attention or support to date: Á. Ryall, 'A Framework for Exploring the Idea of an Environmental Court for Ireland' (2015) 22(3) *Irish Planning and Environmental Law Journal*, pp. 87–95, and F. Clarke, 'A Possible Environmental Court: The Constitutional and Legal Parameters' (2015) 22(3) *Irish Planning and Environmental Law Journal*, pp. 96–9.

3 For an insightful modern statement of the significant difficulties the courts face when presented with 'a major conflict of expert and other evidence' and 'a very tangled web of scientific and other data', see *Brownfield Restoration Ireland* v. *Wicklow County Council and the Environmental Protection Agency (No. 3)* [2017] IEHC 456, para. 207 (per Humphreys J). The Rules of the Superior Courts (RSC) (SI No. 15 of 1986) (as amended) provide that the court may appoint an 'assessor' (or 'assessors') in a particular case, but such an appointment is very rare in practice: see generally RSC, Order 36, rule 41 (as amended); see also RSC, Order 63B, rule 23 and Order 64, rule 43 (as amended), concerning competition proceedings and admiralty proceedings respectively. An assessor is a person with 'skill and experience' in a particular field whose role is to assist the court in understanding or clarifying a matter, or evidence in relation to a matter.

4 In practice, most applications for judicial review in the environmental field are brought against decisions of *An Bord Pleanála*. Established in 1977 under the Local Government (Planning and Development) Act 1976, the functions of *An Bord Pleanála* include hearing appeals from planning decisions taken at first instance by local authorities. An appeal in this particular context is a full appeal, *de novo*, on the merits of the planning decision. However, it is important to note that in certain cases, including proposed development involving infrastructure of strategic importance, *An Bord Pleanála* is the first-instance decision maker rather than an appellate body; see further the organization's website, available at: http://www.pleanala.ie. For a recent detailed analysis of *An Bord Pleanála* see Department of Environment, Community and Local Government, 'Organisational Review of An Bord Pleanála by the Independent Review Group', Feb. 2016, available at: http://www.housing.gov.ie/planning/bord-pleanala/review/organisational-review-bord-pleanala.

standard of review.[5] This body of jurisprudence confirms that (for the time being at least) the High Court is satisfied that the current standard of review complies with the requirements of the principle of effective judicial protection. The article interrogates this conclusion and identifies potential for future developments in the jurisprudence, in particular as to the level of judicial scrutiny that a review of the 'substantive' legality of decisions (as opposed to a review of alleged 'procedural' deficiencies) may require.

2. JUDICIAL REVIEW OF ADMINISTRATIVE DECISION MAKING: GENERAL PRINCIPLES

There are several grounds on which a challenge may be brought against an environmental decision in judicial review proceedings in Ireland. These include:

- breach of a statutory and/or procedural requirement;
- where the decision maker had regard to an irrelevant consideration or failed to consider a relevant consideration;
- breach of constitutional justice or fair procedure;
- failure to state adequate reasons for a decision (this is an important and popular ground of challenge);[6]
- breach of constitutional rights and/or rights under the European Convention on Human Rights; and
- breach of EU law.[7]

However, the *merits* of a decision may be challenged only indirectly on the basis that the decision in question is 'unreasonable' or 'irrational'. 'Unreasonable' or 'irrational' in this particular context has been interpreted very narrowly by the Irish courts.[8] In *State (Keegan)* v. *Stardust Victims' Compensation Tribunal*, Henchy J in the Supreme Court described judicial review on the grounds of unreasonableness as inquiring:

> whether the conclusion reached in the decision can be said to flow from the premises. If it plainly does not, it stands to be condemned on the less technical and more understandable test of whether it is fundamentally at variance with reason and common sense.[9]

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5 Á. Ryall, 'Delivering Energy Policy in Ireland: Protest, Dissent and the Rule of Law', in R.J. Heffron & G.F.M. Little (eds), *Delivering Energy Law and Policy in the EU and the US* (Edinburgh University Press, 2016), pp. 554–8.

6 The scope of the decision maker's duty to give reasons for a planning decision involving EIA is a live issue before the Supreme Court at the time of writing (see Section 4).

7 See generally M. de Blacam, *Judicial Review*, 3rd edn (Bloomsbury, 2017), pp. 155–528; G. Simons, *Planning and Development Law*, 2nd edn (Thomson Round Hall, 2004), pp. 655–720.

8 De Blacam (ibid., para. 27.07) distinguishes between 'unreasonableness' and 'irrationality' as follows: 'The irrational is limited to the absurd or perverse, whereas the unreasonable includes a broader range of wrongful acts'.

9 *State (Keegan)* v. *Stardust Victims' Compensation Tribunal* [1986] IR 642, p. 658.

The classic statement of principle is found in the judgment of Finlay CJ in *O'Keeffe* v. *An Bord Pleanála* in which the Supreme Court confirmed that the circumstances in which a court can intervene on the basis of irrationality 'are limited and rare'.[10] More specifically, a court cannot interfere with an administrative decision on the grounds that it would have raised different inferences or conclusions from the facts, or because it is satisfied that the case against the contested decision was stronger than the case for it.[11] The justification for this position is grounded firmly in the particular expertise of the decision maker, in this case planning authorities and *An Bord Pleanála*. The judges themselves are not expert in specific technical and scientific matters. The courts also justify the approach adopted in *O'Keeffe* by emphasizing the fundamental principle of the separation of powers and the fact that under the relevant legislative frameworks the *Oireachtas* (Parliament) has vested the task of making often complex and controversial administrative decisions in expert public authorities rather than the courts.[12] The courts are also understandably alert to the practical importance of certainty for developers, particularly in the case of significant infrastructure projects, and the need for finality in the planning process.[13]

O'Keeffe demands that in order to succeed on the basis of alleged 'irrational' decision making, the applicant seeking judicial review must prove that the decision maker had no relevant material before it to support its decision.[14] This approach obviously sets a very high threshold, which is difficult to meet in practice. It is essential to appreciate, however, that 'unreasonableness' or 'irrationality' is only one of the many grounds on which an environmental decision may be challenged and that the High Court's judicial review jurisdiction is not as narrow as a consideration of '*O'Keeffe* irrationality' alone might suggest.[15] As Clarke J (as he then was) explained in *Sweetman* v. *An Bord Pleanála*:

> A court is also entitled (and indeed is duty bound) to consider matters such as whether the decision-maker had regard to factors which ought not properly have been included in the consideration or failed to have regard to factors which should properly have been

[10] *O'Keeffe* v. *An Bord Pleanála* [1993] 1 IR 39, p. 71.

[11] Ibid., p. 71.

[12] As McMahon J in the High Court explained in *Klohn* v. *An Bord Pleanála* [2007] IEHC 111, para. 37: 'The legislature, in its wisdom, vested the power to make [a decision on the adequacy of the Environmental Impact Statement] in a body which has expertise and experience in these matters. Such a body is much better qualified and in a much better position to make such technical decisions in this specialised area than the Court, which has to rely on expert evidence to inform it in these cases. The courts will only interfere in such decisions where they appear so irrational that no reasonable authority or decision maker in this position would have made such a determination'.

[13] Consider, e.g., the comments of McGovern J in *North Kerry Wind Turbine Awareness Group* v. *An Bord Pleanála* [2017] IEHC 126, paras 39–40. The learned judge cited *Berkeley* v. *Secretary of State for the Environment* [2000] UKHL 36, in which Lord Hoffmann emphasized that a balance must be struck between ensuring the effectiveness of the EIA Directive and avoiding an overzealous response to cases of minor non-compliance. McGovern J also adopted the comments of Advocate General Sharpston to the effect that the EIA Directive 'is not about formalism' as representing a useful guide for the Irish courts in reviewing planning decisions involving EIA (see Joined Cases C-128/09, C-129/09, C-130/09, C-131/09; C-134/09 and C-135/09, *Boxus and Roua and Others* v. *Région wallonne*, EU:C:2011:667, para. 79 of the Opinion).

[14] *O'Keeffe*, n. 10 above, pp. 71–2.

[15] *Sweetman* v. *An Bord Pleanála* [2007] IEHC 153, paras. 6.12–6.13.

> considered. *O'Keeffe* irrationality only arises in circumstances where the decision-maker properly considered all of the matters required to be taken into account and did not take into account any matters which should not. The limitations inherent in the *O'Keeffe* irrationality test, therefore, only arise where all, but only, those matters properly considered were taken into account and the decision-maker comes to a judgment based on all those matters. It is in those circumstances that the court, by reason of the doctrine of deference, does not attempt to second guess the judgment of the [decision-maker] provided that there was material for coming to that decision. In particular the court does not attempt to reassess the weight to be attached to relevant factors.[16]

In *Meadows* v. *Minister for Justice, Equality and Law Reform*,[17] the Supreme Court determined that where an administrative decision impacts on constitutional rights or fundamental rights, the courts should have regard to the principle of proportionality when called on to review any such decision. This principle requires 'that the effects on, or prejudice to, an individual's rights by an administrative decision be proportionate to the legitimate objective or purpose of that decision'.[18] *Meadows* presented proportionality review as an element of the well-established *O'Keeffe* test for assessing administrative unreasonableness rather than a stand-alone ground for judicial review.[19] While the impact of the principle of proportionality in the specific context of environmental judicial review still remains to be teased out fully, it is notable that in *Meadows* Denham J (as she then was) recalled that the test set down in *O'Keeffe* applied to 'a specialised area of decision making where the decision maker has special technical or professional skill', such as planning and development.[20] A court 'should be slow to intervene in a decision made with special competence in an area of special knowledge'.[21]

The question then is whether the standard of review (or the intensity of scrutiny) that the Irish courts apply to environmental decision making is compatible with the EU law principle of effective judicial protection. The next section examines the jurisprudence where this difficult issue has been considered by the Irish courts in the specific context of enforcement of EIA law. It begins by setting out the principles that the Court of Justice of the European Union (CJEU) has developed to date as regards the standard of review.

3. ENVIRONMENTAL JUDICIAL REVIEW: EVOLVING PRINCIPLES

3.1. *The EIA Directive before the CJEU*

Article 11 of the EIA Directive[22] requires Member States to provide access to a review procedure to enable enforcement of the obligations created in that Directive. The

16 Ibid., paras 6.12–6.13.

17 *Meadows* v. *Minister for Justice, Equality and Law Reform* [2010] 2 IR 701.

18 Ibid., p. 723 (per Murray CJ).

19 Ibid., p. 723 (per Murray CJ), and pp. 742–3 (per Denham J) (the concept of proportionality is 'inherent in any analysis of the reasonableness of a decision').

20 Ibid., p. 738.

21 Ibid.

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specific requirement is for a review procedure before a court of law (or other independent and impartial body established by law) 'to challenge the substantive or procedural legality of decisions, acts or omissions' subject to the public participation provisions set out in the Directive. This requirement is modelled closely on Article 9(2) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).[23] However, neither the Convention nor the Directive articulates the standard of review to be applied by the national court. Both instruments refer explicitly to national law, indicating a measure of deference to Member States and confirming the importance of the specific national context in determining whether local arrangements are compatible with the Convention and EU law. The Aarhus Convention implementation guide explains that Article 9(2) enables the public to challenge decisions, acts or omissions 'if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality)'.[24] What the guide describes as 'mixed questions' (such as the failure to properly take comments into account) are also covered.

The jurisprudence of the CJEU concerning national remedies for breach of EU law refers to a 'manifest error' test for judicial review. In *Upjohn* the Court confirmed that EU law did not require Member States to establish a procedure for judicial review that involves a more extensive review than that applied by the CJEU itself in similar cases.[25] Where EU authorities enjoy a wide measure of discretion, the exercise of that discretion is subject to limited judicial review. The CJEU will intervene only where the exercise of such discretion is vitiated by 'a manifest error or a misuse of powers', or where the decision maker clearly exceeded the bounds of its discretion.[26] The court must also examine the accuracy of the findings of fact and law made by the decision maker.[27] The national regulatory authority in *Upjohn* took its decisions following 'complex assessments in the medico-pharmacological field'.[28] The CJEU firmly rejected Upjohn's argument that the only way to prevent the exercise of the rights conferred under the directive at issue[29] from being rendered virtually impossible or excessively difficult was to facilitate judicial review whereby national courts could substitute their own assessment of the facts and, in particular, of the scientific evidence for the assessment made by the national authority.[30] It follows from *Upjohn*

22 N. 1 above.

23 Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/treatytext.html.

24 *The Aarhus Convention: An Implementation Guide*, 2nd edn (United Nations Economic Commission for Europe, 2014), p. 196, available at: https://www.unece.org/env/pp/implementation_guide.html. While the guide is not legally binding, the CJEU confirmed in Case C-182/10, *Solvay* v. *Région wallonne*, EU:C:2012:82, paras 26–7, that as 'an explanatory document' it may be taken into consideration, where appropriate, together with other relevant material, for the purpose of interpreting the Convention.

25 Case C-120/97, *Upjohn Ltd* v. *The Licensing Authority*, EU:C:199:14, para. 35.

26 Ibid., para. 34.

27 Ibid., para. 34.

28 Ibid., para 33.

29 Directive 65/65/EEC relating to Proprietary Medicinal Products [1965–66] OJ English Special Ed. 20.

that a limited form of judicial review (rather than review of the merits of the contested administrative decision) is acceptable in certain circumstances. At the same time, however, the CJEU's ruling demands that national procedures governing judicial review of decisions of public authorities must enable the court dealing with an application for annulment of such a decision 'effectively to apply the relevant principles and rules of [EU] law when reviewing its legality'.[31] Delivering on this obligation may require national courts to recalibrate existing domestic principles governing judicial review, including the degree of judicial scrutiny applied to administrative decisions involving EU law.

The CJEU jurisprudence confirms that, by virtue of the principle of national procedural autonomy, Member States enjoy a degree of discretion in implementing the obligations set out in Article 11 of the EIA Directive,[32] subject, as ever, to the principles of equivalence and effectiveness.[33] In particular, it is for the Member States to determine which court (or independent body established by law) has jurisdiction in respect of the review procedure and the procedural rules that should apply. While there is now an extensive body of jurisprudence from the CJEU governing access to justice to enforce the EIA Directive at national level, the Court, to date, has not examined the specific issue of the standard (or intensity) of judicial review in any significant detail.[34] In *Commission* v. *Ireland* the CJEU determined that the judicial review procedure available under Irish law could be considered to constitute *transposition* of Article 10a (now Article 11) of the EIA Directive[35] in as much as it requires that the applicant must be able to challenge the substantive or procedural legality of certain acts, decisions or omissions.[36] Because the Commission had not alleged *incorrect* transposition of Article 10a in these infringement proceedings the Court did not examine the extent of the review actually carried out by the Irish courts.[37]

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30 *Upjohn*, n. 25 above, para. 33.

31 Ibid., para. 36.

32 Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV* v. *Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG*, EU:C:2010:773 (*Trianel*), para. 43; Case C-72/12, *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider* v. *Rhineland-Palatinate*, EU:C:2013:712 (*Altrip*), para. 45; Case C-570/13, *Gruber* v. *Unabhängiger Verwaltungssenat für Kärnten*, EU:C:2015:231, para. 37; Case C-71/14, *East Sussex County Council* v. *Information Commissioner, Property Search Group and Local Government Association*, EU:C:2015:656 (*East Sussex*), para. 52.

33 On the principles of equivalence and effectiveness and their impact see K. Lenaerts, 'National Remedies for Private Parties in the Light of the EU Principles of Equivalence and Effectiveness' (2011) 46 *Irish Jurist*, pp. 13–37. Essentially, the principle of equivalence demands that claims based on EU law must not be treated less favourably than claims based on national law, while the principle of effectiveness requires that it must not be 'virtually impossible' or 'excessively difficult' to enforce EU law in the national legal system.

34 For an analysis of the jurisprudence see Á. Ryall, 'Access to Justice in Environmental Matters in the Member States of the EU: The Impact of the Aarhus Convention', Jean Monnet Working Paper 5/2016, available at: http://www.jeanmonnetprogram.org/wp-content/uploads/JMWP-05-Ryall.pdf.

35 The codification of the EIA Directive in 2011 led to a renumbering of its articles.

36 Case C-427/07, *Commission* v. *Ireland*, EU:C:2009:457, paras 87–8.

37 Ibid., para. 89.

In *Altrip* the CJEU ruled that it was not permissible for a Member State to limit the right to challenge the legality of a decision to cases where no environmental assessment was carried out, as opposed to where an assessment was undertaken but was alleged to be deficient.[38] Recalling its earlier *Trianel* ruling,[39] the Court confirmed that Article 10a (now Article 11) of the EIA Directive did not restrict the pleas that could be put forward to challenge the substantive or procedural legality of a decision.[40] Excluding the possibility of challenging a decision where an environmental assessment is allegedly defective 'would render largely nugatory' the provisions of the EIA Directive governing public participation.[41] Such an approach would run counter to the objective of ensuring 'wide access' to the courts as required by the Directive.[42] In *Commission* v. *Germany* the CJEU recalled that the objective of Article 11 of the EIA Directive 'is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety'.[43]

The reference for a preliminary ruling in *East Sussex*[44] concerned, inter alia, the correct interpretation of the access to justice provision in Article 6 of Directive 2003/4/EC on Public Access to Environmental Information.[45] The ruling of the CJEU in this case provides helpful guidance on the standard of review that applies in the context of that Directive.[46] As is the case with Article 11 of the EIA Directive, the text of Article 6 of Directive 2003/4/EC establishes a right to a review procedure but does not specify the extent of review required. It was therefore a matter for Member States to determine the extent of review, subject to the principles of equivalence and effectiveness.[47] Here, the referring tribunal explained to the CJEU that the relevant national (English) law limited the scope of judicial review to whether the administrative decision was '*Wednesbury* unreasonable',[48] or irrational, illegal or unfair, and provided very limited scope for reviewing the relevant factual conclusions reached by the decision maker. Drawing on its established jurisprudence, including

[38] *Altrip*, n. 32 above, para. 37.

[39] N. 32 above.

[40] *Altrip*, n. 32 above, para. 36.

[41] Ibid., para. 37.

[42] Ibid.

[43] Case C-137/14, *Commission* v. *Germany*, EU:C:2015:683, para. 80.

[44] *East Sussex*, n. 32 above.

[45] [2003] OJ L 41/26.

[46] For a detailed analysis of the reasoning of the CJEU in *East Sussex* see M. Eliantonio & F. Grashof, 'C-71/14, *East Sussex County Council* v. *Information Commissioner, Property Search Group, Local Government Association* (Judgment of 6 October 2015) – Case Note' (2016) 9(1) *Review of European Administrative Law*, pp. 35–47.

[47] *East Sussex*, n. 32 above, para. 57.

[48] *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1948] 1 KB 223 is the case in which what came to be known as '*Wednesbury* unreasonableness' was first articulated by Lord Greene MR. On the meaning of '*Wednesbury* unreasonableness' see R. Moules, *Environmental Judicial Review* (Hart, 2011), pp. 213–20. Essentially, as Moules explains (ibid., p. 214), the essence of 'unreasonableness' in the *Wednesbury* sense is that 'there is a range of reasonable responses to any administrative problem, and provided the decision-maker remains within that reasonable range, it does not matter that the court disagrees with the outcome'.

Upjohn, the Court confirmed that the exercise of EU law rights is not made impossible in practice or excessively difficult merely by the fact that a procedure for judicial review of administrative decisions does not permit 'complete review' of those decisions.[49] The Court again insisted, however, that any national judicial review procedure must enable the court tasked with reviewing the lawfulness of an administrative decision to effectively apply the relevant principles and rules of EU law.[50] The *East Sussex* ruling therefore confirms that, subject to this fundamental proviso, judicial review that is limited as regards the assessment of certain questions of fact is, in principle, compatible with EU law.[51] The overarching general requirement is, as ever, that the national courts must ensure the effective application of EU law by public authorities. It is notable that, although the CJEU drew on its earlier ruling in *Upjohn*, there is no mention of the 'manifest error' test at any point in the *East Sussex* judgment.

Applying the principles established in *East Sussex* to judicial review proceedings that allege breach of the EIA Directive, it can be concluded that the CJEU requires a national court to verify that the relevant rules and principles of EU law were applied effectively by the decision maker. Although stated in general terms, this is, in effect, the *minimum standard* of review that must be applied by a national court and it embraces both substantive and procedural legality. As Advocate General Cruz Villalón observed in *Altrip*: 'From the point of view of EU law, the criteria governing the scope of review provided for in Article 10a [now Article 11] of the EIA Directive follow in particular from the principle of effectiveness [of EU law]'.[52]

It is possible therefore that the CJEU may choose not to provide further precision around the standard of judicial review mandated by Article 11 of the EIA Directive in its future case law. Instead, it may prefer to continue to articulate general principles based on the overarching goal of delivering the effectiveness of EU law, as it did in *Upjohn* and, more recently, in *East Sussex*. In so far as references for preliminary rulings are concerned, the focus must be on obligations established by EU law rather than detailed analysis of the idiosyncrasies of particular national systems of judicial review.[53] It follows that general statements of principle are to be expected in CJEU rulings. Moreover, articulating general principles for the national courts to apply in the context of their own particular domestic legal frameworks makes practical sense given the wide diversity in the legal systems operating across the Member States.

3.2. *Judicial Review involving EU Law before the Irish Courts*

The question of the appropriate standard of review when EU law is at issue in administrative decision making has surfaced on a number of occasions before the

[49] *East Sussex*, n. 32 above, para. 58.

[50] Ibid., para. 58.

[51] Ibid., para. 58.

[52] Case C-72/12, *Altrip*, EU:C:2013:422, para. 84.

[53] See the observations of Advocate General Sharpston in Case C-71/14, *East Sussex County Council* v. *Information Commissioner, Property Search Group and Local Government Association*, EU:C:2015:234, para. 58.

Irish courts. In *SIAC Construction Ltd* v. *Mayo County Council* (a public procurement case) Fennelly J in the Supreme Court observed that EU institutions enjoy 'a wide discretion' when assessing the factors to be considered in determining the award of a public works contract and that such decisions will be annulled only if a 'manifest error' can be demonstrated.[54] It followed that Member States were required to apply the same standard of review to national awarding authorities. Fennelly J found further support for this conclusion in the *Upjohn*[55] ruling. He considered that:

> [t]here are obvious common threads which run though any system of review of administrative decisions, especially where the primary decision-making function is administrative or governmental. *The function of the courts is to guarantee legality, though that notion itself has a number of elements, some procedural and some substantive.*[56]

Although the courts recognize that awarding authorities have a wide margin of discretion, they also recognize that this discretion cannot be unlimited. As Fennelly J explained: 'The courts must exercise their function of judicial review so as to make the principles of the public procurement directives effective. In the case of *clearly established error*, they must exercise their powers'.[57]

SIAC echoes the consistent principles emerging from the CJEU jurisprudence. It provides clear authority in Irish law that the extent of the review carried out by the national court must ensure the effectiveness of the particular directive at issue.[58] It is also noteworthy that the analysis of Fennelly J refers expressly to judicial review of *both* substantive and procedural legality.

The CJEU jurisprudence, and the *Upjohn* ruling in particular,[59] indicate that the 'manifest error' test involves a greater degree of judicial scrutiny than the more deferential *O'Keeffe* standard. It will be recalled that *O'Keeffe* irrationality merely requires the Irish courts to verify whether there was *any* relevant material before the decision maker to support its particular assessment and/or conclusion.

Contemporary Irish EIA jurisprudence on the standard of review

Turning to the modern Irish jurisprudence on the standard of review in EIA cases, in *Sweetman* v. *An Bord Pleanála* Clarke J in the High Court acknowledged the 'undoubtedly limited basis' on which a court can review a contested administrative decision.[60] However, as noted in Section 2 above, Clarke J also emphasized that '*O'Keeffe* irrationality' is only one of the many grounds on which the legality of a decision may be challenged in Irish law. Clarke J recognized the potential for flexibility in the approach a court may adopt in judicial review proceedings,

54 *SIAC Construction Ltd* v. *Mayo County Council* [2002] IESC 39, para. 78.

55 *Upjohn*, n. 25 above.

56 *SIAC*, n. 54 above, para. 81 (emphasis added).

57 Ibid., para. 85 (emphasis added).

58 For a detailed analysis of *SIAC* see Á. Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Hart, 2009), pp. 108–11.

59 *Upjohn*, n. 25 above, para. 34.

60 *Sweetman*, n. 15 above, para. 6.11.

depending on the particular context in which the decision was taken. If EU law (in this case Article 10a of the EIA Directive) required a greater level of scrutiny in relation to environmental judicial review applications, then this could be 'accommodated within the existing judicial review regime'.[61] Following this line of analysis, it falls to the national court to determine the level of scrutiny that is required in a particular case in order to meet the obligations set out in the EIA Directive. Clarke J was satisfied, however, that Article 10a did not mandate a complete appeal on the merits.[62] Instead, what the Directive requires, in addition to a review of the procedures followed, is a review of the substantive legality of the decision (review of both substantive and procedural legality).[63] Drawing on *SIAC*, the High Court was satisfied that Irish judicial review law 'goes a long way towards (and indeed may well meet) that requirement'.[64] Following *SIAC*, Clarke J reasoned that it was difficult to see how the requirement in Article 10a to provide for review of the substantive legality of a decision could oblige Member States to provide a level of scrutiny beyond the 'manifest error' test applied by the CJEU.[65] The High Court was therefore satisfied that:

> to the extent that it may emerge that it may be necessary to allow, in certain circumstances, for a review so as to meet that test which goes beyond the existing parameters of Irish judicial review law, that law is more than capable of being applied by the courts to accommodate that requirement.[66]

Sweetman is an important acknowledgement of the flexibility inherent in common law principles to adapt to the evolving requirements of EU law. The main significance of this judgment is that it set down an important marker that the traditional *O'Keeffe* standard of review might need to be recalibrated in certain circumstances in order to meet the requirements of EU law.

In *Klohn* v. *An Bord Pleanála* McMahon J in the High Court suggested *obiter* that if an EU measure is at issue, it may be more appropriate to adopt the standard of review that the CJEU applies when it is called on to review decisions of EU institutions (the 'manifest error' test).[67] Citing *SIAC* and *Sweetman*, the High Court offered two justifications for this approach. Firstly, the 'non-demanding' *O'Keeffe* standard could be considered too low and, secondly, the adoption of the 'manifest error' standard applied by the CJEU would go some way towards ensuring an element of uniformity throughout the EU.[68] In *Keane* v. *An Bord Pleanála*, in which the applicant alleged that no proper EIA had been carried out, Hogan J in the High Court queried *obiter* (on the basis of *SIAC* and *Sweetman*) whether the *O'Keeffe* test

[61] Ibid., para. 6.16.
[62] Ibid., para. 6.19.
[63] Ibid., para. 6.19.
[64] Ibid., para. 6.19.
[65] Ibid., para. 6.21.
[66] Ibid., para. 6.21.
[67] *Klohn*, n. 12 above, para. 29.
[68] Ibid., para. 29.

or the 'manifest error' test should be applied in EIA cases.[69] Hogan J did not reach any definitive conclusion on this point, however. Instead, the High Court noted that even if the 'manifest error' test was applied in this case, it could not be said that *An Bord Pleanála* 'had not properly examined the materials and the law'.[70] In *Ratheniska Timahoe and Spink (RTS) Substation Action Group* v. *An Bord Pleanála*[71] the applicant argued that the *O'Keeffe* test was 'too extreme' in the context of a challenge alleging, inter alia, that *An Bord Pleanála* had failed to carry out a proper EIA. Haughton J in the High Court concluded that the 'more limited' '*O'Keeffe* irrationality' test, rather than the 'manifest error' test that was applied in *SIAC*, was 'both well established and remains appropriate'.[72] The *O'Keeffe* test 'continues to bind the High Court', at least in its review of decisions of *An Bord Pleanála*, including EIAs that form part of such decisions. Subsequently, in *Carroll* v. *An Bord Pleanála*, in which the applicant alleged, inter alia, that *An Bord Pleanála* had failed to carry out a proper EIA, Fullam J in the High Court confirmed that:

> [t]he *O'Keeffe* irrationality test remains central in the Irish law of judicial review so far as planning decisions involving environmental assessments are concerned. The test is the final assessment in a reasoning process which requires the court to consider whether the decision maker has had regard to factors which ought not properly have been included in the consideration or failed to have regard to factors which should properly have been considered.[73]

In reaching this conclusion the High Court recalled that in *Meadows*[74] Denham J in the Supreme Court had emphasized that *O'Keeffe* applies to areas of special skill and knowledge, such as planning and development. Fullam J insisted that the preponderance of authority 'is against imposing a greater level of scrutiny than is currently required under Irish judicial review law in respect of decisions relating [to] issues of environmental assessment'.[75]

Judicial review and the Environmental Impact Statement

A consistent line in the Irish EIA jurisprudence is that it is for the decision maker to determine whether the information provided by the developer in the Environmental Impact Statement (EIS) is adequate.[76] This body of case law provides a particularly striking example of judicial deference to the expert knowledge of the decision maker.[77]

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69 *Keane* v. *An Bord Pleanála* [2012] IEHC 324, paras 18 and 19.

70 Ibid., para. 20.

71 *Ratheniska* v. *An Bord Pleanála* [2015] IEHC 18.

72 Ibid., para. 75.

73 *Carroll* v. *An Bord Pleanála* [2016] IEHC 90, para. 40.

74 *Meadows*, n. 17 above.

75 *Carroll*, n. 73 above, para. 42. It is notable that Fullam J observed that even if a higher standard of scrutiny was applied by the court in the form of the 'manifest error' test, this would not avail the applicant in this case: ibid., para. 66. The High Court could find no evidence of 'manifest error' in the assessment by *An Bord Pleanála* of the likely effects on human health – in particular, noise and shadow flicker – of the proposed wind farm development.

76 The term 'Environmental Impact Statement' (or EIS) is used in the Irish context to describe the information provided by the developer under Art. 5 EIA Directive (described as 'the environmental impact assessment report' in Art. 5).

The contemporary jurisprudence continues this deferential approach. In *People Over Wind and Environmental Action Alliance Ireland* v. *An Bord Pleanála*[78] Haughton J in the High Court confirmed that 'the adequacy of the information in the EIS is primarily a matter for the decision maker'. Here, the applicant for judicial review had argued, inter alia, that:

> [t]he [decision maker (i.e. *An Bord Pleanála* (the Board))] had before it an environmental impact statement (EIS) that was inadequate in that it failed to properly describe the proposed development and its effects and contained material that was inaccurate and incorrect. Accordingly no, or no lawful EIA was or could have been conducted.[79]

Haughton J determined that:

> [t]he standard of review applicable to the Board's decision in this respect is that set out in *O'Keeffe* v. *An Bord Pleanála* [1993] 1 IR 39. The Court cannot interfere with the decision merely on the grounds that '… it is satisfied that on the facts as found it would have raised different inferences and conclusions or … it is satisfied that the case against the decision made by the [Board] was stronger than the case for it'. In order to show that the Board has acted irrationally, it would be necessary for the applicants to establish that the Board 'had before it no relevant material which would support its decision'. There clearly was relevant material before the Board. Nor could it be said that in relying on this material, the Board's decision was 'fundamentally at variance with reason and common sense'. Accordingly, the applicants must fail on this ground. It follows from this that the Board was entitled to conduct an EIA.[80]

In *Balz* v. *An Bord Pleanála* Barton J in the High Court explained that:

> [w]hereas the EIS must comply with the relevant planning regulations, the adequacy of the information supplied in it is primarily a matter for the decision maker. Once the statutory requirements have been satisfied the court is not concerned, in planning terms, with the qualitative nature of the EIS.[81]

People Over Wind and *Balz* confirm that the High Court must determine whether the EIS complies with the requirements laid down in planning legislation (which is obviously a question of law),[82] but it is primarily a matter for the decision maker to assess the *quality* of the information presented in the EIS and to determine whether it is sufficient. The decision maker's qualitative assessment as to the adequacy of the information is subject to the limited *O'Keeffe* standard of review.

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77 See, e.g., *Kenny* v. *An Bord Pleanála (No. 1)* [2000] IEHC 146; *Kenny* v. *An Bord Pleanála (No. 2)* [2001] IEHC 39; *Arklow Holidays Ltd* v. *Wicklow County Council* [2003] IEHC 68; *Kildare County Council* v. *An Bord Pleanála* [2006] IEHC 173. The early case law is considered in Ryall, n. 58 above, pp. 221–3.

78 *People Over Wind and Environmental Action Alliance Ireland* v. *An Bord Pleanála* [2015] IEHC 271.

79 Ibid., para. 8.

80 Ibid., para. 101.

81 *Balz* v. *An Bord Pleanála* [2016] IEHC 134, para. 55.

82 The relevant planning legislation requires that the EIS must contain certain specified information (in line with Art. 5 EIA Directive), including a non-technical summary: Planning and Development Regulations 2001 (SI No. 600 of 2001) as amended, Art. 94 and Sch. 6.

A 'manifest error' test?

Most recently, in *Holohan* v. *An Bord Pleanála*[83] Humphreys J in the High Court embarked on a more detailed analysis of the relevant authorities on the standard of review in order to determine the following question. Can the High Court reject a finding of *An Bord Pleanála* on the content of an EIS in the case of 'manifest error'? Having set out the principles established in the *Upjohn* line of authority of the CJEU, Humphreys J summarized the position in accordance with the relevant Irish jurisprudence. As explained above, this is to the effect that an assessment of the adequacy of the information provided in the EIS has generally been regarded as primarily a matter for the discretion of *An Bord Pleanála* and subject to judicial review only on the basis of the well-established *O'Keeffe* test.[84] Humphreys J noted that the suggestion by Hogan J in *Keane* that the *O'Keeffe* test might need to be replaced by a 'manifest error' test had not gained support in subsequent decisions of the High Court. Moreover, in both *Ratheniska* and *Carroll* the High Court had determined that there was no uncertainty in Irish law as to the appropriate standard of review in EIA cases. Having noted the CJEU ruling in *East Sussex*, Humphreys J concluded that the 'fundamental' answer to the standard of review point was to be found, in his view, in the decision of the Court of Appeal in *NM (DRC)* v. *Minister for Justice, Equality and Law Reform*.[85] *NM* was an immigration case in which Hogan J concluded that contemporary, post-*Meadows* judicial review under Irish law constitutes an effective remedy for the purposes of the Asylum Procedures Directive.[86] In *NM* Hogan J recalled the fundamental principle that 'the judicial review court cannot review the merits of the decision'.[87] The court can, however, annul a contested decision on the ground of unreasonableness (in the *Keegan* and *O'Keeffe* sense – that is, there is no material capable of supporting the decision or where the decision flies in the face of fundamental reason and common sense), or lack of proportionality, or where the decision 'strikes at the substance of constitutional or EU law rights'.[88] The court can also ensure that the decision maker's conclusions flow from the premises (*Keegan*) and can annul a decision for a material error of fact.[89]

Having listed the grounds on which the court *can* intervene, Humphreys J proceeded to consider what the judicial review court *cannot* do:

> The answer appearing from case law to this question is that the court cannot decide that the exercise by a decision-maker of a discretion, or a finding as to fact, is simply wrong (or even clearly wrong) on the merits, if there is material to support it and if the

83 *Holohan* v. *An Bord Pleanála* [2017] IEHC 268.

84 Ibid., para. 91.

85 *NM (DRC)* v. *Minister for Justice, Equality and Law Reform* [2016] IECA 217.

86 Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13.

87 *Holohan*, n. 83 above, para. 99.

88 Ibid., para. 100.

89 Ibid., para. 100. On the difficult question of the (limited) scope for judicial review of error of fact in Irish law see De Blacam, n. 8 above, pp. 229–35.

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> conclusion is reached by a logical process, without factual error and supported by reasons, and does not disproportionately interfere with rights.[90]

The rationale behind this position is grounded in the separation of powers.[91] Humphreys J drew on the classic statement of Lord Brightman in *R* v. *Chief Constable of North Wales Police, ex parte Evans* to emphasize this fundamental point: the court should not be permitted to find that an administrative decision is wrong because by doing so the court would 'be itself guilty of usurping power'.[92] Humphreys J concluded that given 'the wide scope of judicial review in Ireland' it was *acte clair*[93] that it provided an 'effective remedy'.[94] There was therefore no justification, in the judge's view, for the High Court to exercise its discretion to make a reference to the CJEU for a preliminary ruling on this point.[95]

The jurisprudence considered in this section demonstrates that, as least in so far as the contemporary High Court authorities are concerned, the standard of review to be applied in EIA cases is settled and that the well-established *O'Keeffe* test continues to apply.

4. EFFECTIVE JUDICIAL PROTECTION?

Does the Irish system of judicial review provide effective judicial protection in the case of alleged breach of the EIA Directive by a public authority? More specifically, what is the appropriate standard of review, and does Irish law meet this standard? The first step in any attempt to answer these questions is to recall what EU law requires in this situation. The EIA Directive itself demands that a review of the 'substantive or procedural legality' of decisions must be available.[96] The CJEU has confirmed – although not in any ruling so far where the EIA Directive itself was at issue – that a limited form of judicial review that restricts the national court in its ability to revisit the assessment of certain questions of fact, does not, in itself, breach the principle of effectiveness. At a minimum, however – and this is the key point here – judicial review must enable the national court to apply effectively the relevant principles and rules of EU law.[97] A system that provides for review of procedural legality *only* is not

[90] *Holohan*, n. 83 above, para. 101.

[91] Ibid., para. 102.

[92] Ibid., para. 102, citing Lord Brightman in *R* v. *Chief Constable of North Wales Police, ex parte Evans* [1982] 1 WLR 1155, p. 1173.

[93] In Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA* v. *Ministry of Health*, EU:C:1982:335, para. 16, the CJEU explained that the correct application of EU law may be 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised [before the national court] is to be resolved' (i.e., the matter is *acte clair*).

[94] *Holohan*, n. 83 above, para. 103.

[95] It is notable that, although the standard of review was considered to be *acte clair*, the High Court decided to refer a total of 11 questions to the CJEU on a range of matters relating to the correct interpretation of the EIA Directive and Directive 92/43/EEC on the Conservation of Natural Habitats and Wild Fauna and Flora [1992] OJ L 206/7 (Habitats Directive): ibid., para. 142.

[96] See further European Commission, Commission Notice on Access to Justice in Environmental Matters, C(2017) 2616 final, 28 Apr. 2017, paras 127–50, concerning '[t]he need to scrutinize both procedural and substantive legality'.

[97] *East Sussex*, n. 32 above, para. 58.

sufficient. Both the substantive *and* procedural legality of decisions must be open to review.[98]

Under Irish law, judicial review is concerned with reviewing the legality of administrative decisions. It does not involve an appeal on the merits, although the doctrine of administrative unreasonableness and/or irrationality permits a limited review of the merits in certain circumstances. As Bingham has observed, in the common law system judicial review of legality is:

> an appropriate judicial function, since the law is the judges' stock-in-trade, the field in which they are professionally expert. But they are not independent decision-makers and have no business to act as such. They have, in all probability, no expertise in the subject matter they are reviewing. They are auditors of legality: no more, but no less.[99]

There is a wide range of well-established grounds available on which the legality of an environmental decision may be challenged in Ireland, including an alleged breach of EU law. In the specific context of enforcement of EIA obligations, a decision may be challenged on multiple grounds (depending on the particular circumstances of the case) including, for example:

- failure to transpose the EIA Directive or failure to transpose it correctly;
- failure to carry out an EIA where this is required by law;
- deficiencies in the EIS;
- failure to take into account comments from the public;
- a defective EIA; and/or
- failure to provide adequate reasons.

Drawing the various threads together, the analysis of the Irish EIA jurisprudence presented here reveals that the courts have consistently applied the '*O'Keeffe* irrationality' test where it is alleged that the information presented in the EIS was deficient or that the EIA undertaken by the decision maker was defective in some material respect. The *O'Keeffe* test, by definition, defers to the expertise of the decision maker; the court will not interfere with the exercise of discretion provided that the decision maker's conclusion is not unreasonable or irrational on the basis of the relevant material. *O'Keeffe* therefore provides for a limited degree of judicial scrutiny.

The question then is whether, in the circumstances in which it applies, the *O'Keeffe* test is sufficient to ensure the effectiveness of the EIA Directive? Notwithstanding that the current thinking in the High Court is that the *O'Keeffe* test is indeed sufficient, there has been surprisingly limited analysis of the test against the benchmark of the principle of effectiveness. Moreover, it must be recalled that in *Sweetman*,[100] *Klohn*,[101] and *Keane*[102] three different High Court judges queried whether a more

[98] *Commission* v. *Germany*, n. 43 above, para. 80.
[99] T. Bingham, *The Rule of Law* (Allen Lane/Penguin, 2010), p. 60.
[100] *Sweetman*, n. 15 above.
[101] *Klohn*, n. 12 above.
[102] *Keane*, n. 69 above.

robust standard of scrutiny (such as a 'manifest error' test) may be required. It is difficult therefore to accept the strong conclusion in *Holohan*[103] that the appropriate standard of review is *acte clair*.

What is currently lacking in Ireland is an authoritative analysis of the standard of review issue from the Supreme Court in the specific context of a case involving the EIA Directive, and a reference to the CJEU may be necessary to settle the matter definitively. While a limited degree of judicial scrutiny is acceptable in areas where the decision maker is vested with a wide discretion, the application of the EIA Directive in practice will often involve mixed questions of law and fact on which the decision maker's discretion is clearly constrained by the obligations set down in the Directive. Limited judicial scrutiny, such as that provided for by *O'Keeffe*, is inappropriate in such cases. Whether a project is likely to have significant effects on the environment, the content of the EIS and the comprehensiveness of the EIA are fundamental matters if the objectives of the Directive are to be achieved. Determining these matters involves the decision maker in mixed questions of law and fact; these are not matters where the decision maker enjoys wide discretion. The deferential *O'Keeffe* test is not sufficient to ensure that the principles and rules of EU law are applied effectively (which is the standard demanded by the CJEU). A more robust level of scrutiny is required. The difficulty lies in articulating this more robust standard in precise terms that can be applied by courts in practice and understood by the public.

The 'manifest error' test applied by the CJEU is a good starting point for the national courts in developing an appropriate standard of review. A suitably robust level of review could be described as requiring the court to verify, on an objective basis, whether the decision maker complied with the substantive and procedural requirements of EU law. Such a review would not involve the courts in second-guessing the conclusions reached by the decision maker. Instead it would require the court to verify that there was no 'manifest error' in the decision maker's assessment of the evidence before it. While it is clearly not the role of the judicial review court to undertake its own fresh assessment of the scientific evidence in EIA cases, it cannot abdicate its responsibility to examine whether the decision maker assessed the evidence and reached its findings and conclusions in compliance with the law. This, in turn, serves to highlight the fundamental importance of the adequacy of the statement of reasons provided by the decision maker in order to facilitate effective judicial review.[104] It is notable in this context that there are recent examples in the Irish jurisprudence where the courts have, in effect, involved themselves with the merits of an environmental decision, albeit on the basis of inadequate reasons provided by the decision maker.[105] The scope of the decision maker's duty to give reasons for a planning decision involving EIA is a live issue at the time

[103] *Holohan*, n. 83 above.

[104] See *Balz*, n. 81 above, paras 57–9.

[105] Consider, e.g., *Kelly* v. *An Bord Pleanála* [2014] IEHC 400, and the commentary on this decision by G. Simons, 'Merits-Based Review of Planning Decisions' (2015) 22(1) *Irish Planning and Environmental Law*, pp. 14–18.

of writing, with two appeals on this important point pending before the Supreme Court.[106]

5. CONCLUSION

A close reading of the contemporary Irish EIA jurisprudence suggests that although the courts consistently refer to, and defend, the *O'Keeffe* test as the standard to be applied, in practice some judges are inclined to engage in a fairly close analysis of the material that was before the decision maker. It will be recalled that *O'Keeffe* simply requires the court to determine whether there was sufficient material to support the conclusions drawn by the decision maker. The actual degree of judicial scrutiny applied in making this determination – at least in some cases – may be more intensive and less deferential than is suggested by the courts' persistent invocation of the *O'Keeffe* formula.[107] It remains the case, however, that in order to bring a greater degree of certainty to this area of law, an authoritative statement of principle from the Supreme Court is necessary.

The judges' enthusiasm for *O'Keeffe* is understandable given the courts' lack of technical and scientific expertise in environmental matters, their sharp awareness of the importance of certainty for developers and, of course, the overarching fact that the *Oireachtas* (legislature) has specifically designated specialist bodies such as *An Bord Pleanála* to determine particular matters. *O'Keeffe* also facilitates the judiciary in maintaining a clear line between judicial review, on the one hand, and revisiting the merits of administrative decisions on the other. Where mixed questions of law and fact are at issue, however, it is difficult, if not impossible, to draw such a clear line.

It is necessary, therefore, to reformulate the standard of review that applies in such cases and move away from the 'no material' focus of *O'Keeffe*. As Clarke J pointed out in *Sweetman*,[108] the common law is sufficiently flexible to adapt in order to accommodate a more stringent test for judicial review if this is required by EU law. It is hoped that an opportunity will arise in the not too distant future for the Supreme Court to consider how best to recalibrate the standard of review in EIA cases to align it more closely to the principle of effectiveness. Of course, any move to intensify the extent of judicial scrutiny in EIA cases, or in other cases involving EU (environmental) law, raises the potential for a 'double standard' situation to develop whereby a different standard of review may be applied by the court depending on whether enforcement of national law or EU law is at issue in a particular case. To a certain

[106] *Connelly* v. *An Bord Pleanála* [2017] IESCDET 57 (appeal from [2016] IEHC 322, n. 107 below); *North Kerry Wind Turbine Awareness Group* [2017] IESCDET 102. See also the reference for a preliminary ruling in Case C-461/17, *Holohan* v. *An Bord Pleanála*, currently pending before the CJEU, which concerns, inter alia, the scope of the decision maker's duty to give reasons in the specific context of conducting an appropriate assessment under the Habitats Directive, n. 95 above.

[107] Consider, e.g., *Balz*, n. 81 above, paras 158–80; *Connolly* v. *An Bord Pleanála* [2016] IEHC 322, paras 24–7; and *North East Pylon Pressure Campaign Ltd* v. *An Bord Pleanála* [2017] IEHC 338 (a challenge to the decision of *An Bord Pleanála* to grant approval for development of the North-South Interconnector project), paras 168–94, concerning consideration of alternatives to the proposed development and assessment of health impacts (in particular, electric and electro-magnetic fields).

[108] N. 15 above, para. 6.21.

extent, developments to date under the Aarhus Convention and EU environmental law have already led to an element of 'gold plating' of the rules governing access to justice in environmental matters when compared with other areas of national law.[109] It will be interesting to see whether the overarching principle of effective judicial protection will ultimately lead to a 'spillover' effect whereby recent improvements in access to justice in environmental matters are replicated in other areas of EU law and, in turn, at national level.

The analysis of the jurisprudence on the standard of review in EIA cases presented here demonstrates that there are some aspects of the national legal system that are more resistant to the influence of EU law than others. The deeply ingrained *O'Keeffe* test is a good example of this in Ireland. It has endured since 1991 notwithstanding criticism by commentators[110] and the doubts expressed by a number of judges as to its adequacy when EU law is at issue. It is interesting to observe that, over time, other aspects of Irish judicial review law and practice have evolved significantly under the influence of EU law generally and of the access to justice obligations in the EIA Directive in particular.[111] The rules governing standing in environmental judicial review have been modified to accommodate 'wide access to justice' for individuals and non-governmental organizations.[112] Special costs rules have been introduced for certain categories of litigation in an attempt to transpose the ban on prohibitive costs in environmental matters.[113] There remains significant uncertainty around the scope of the ban on prohibitive costs, however, and it is not at all clear at the time of writing whether the current Irish rules meet EU law requirements. The recent Supreme Court judgment in *Conway* v. *Ireland*[114] indicated *obiter* that, at least in certain circumstances, civil legal aid may be required in order to deliver effective access to justice. This groundbreaking judgment raises the prospect of interesting developments in the jurisprudence in the future to facilitate effective access to the courts to enforce EU environmental law.[115]

Beyond the field of EIA, it is notable that, in the specific context of the prescriptive obligations imposed on the decision maker under Article 6(3) of the Habitats Directive,[116] there are cases where the Irish courts have applied a robust level of review to verify whether *An Bord Pleanála* carried out an appropriate assessment in accordance with law.[117] This particular inquiry involves the court in an appraisal of

[109] See Á. Ryall, 'Aarhus Convention and Access to Justice in Environmental Matters: Some Critical Reflections' (2013) 20(4) *Irish Planning and Environmental Law Journal*, pp. 165–8.

[110] See, e.g., Simons, n. 7 above, paras 12-76–12-97.

[111] See generally Á. Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?', in R. Caranta, A. Gerbrandy & B. Müller (eds), *The Making of a New European Culture: The Aarhus Convention* (Europa Law, 2018), pp. 129–56.

[112] Ibid.

[113] Ibid.

[114] *Conway* v. *Ireland* [2017] IESC 13.

[115] See also the observations of Clarke J in *Persona Digital Telephony Ltd* v. *Minister for Public Enterprise, Ireland and the Attorney General* [2017] IESC 27, paras 2.6–2.9.

[116] N. 95 above.

[117] See *Kelly*, n. 105 above; and *Balz*, n. 81 above.

the technical and scientific evidence underpinning the appropriate assessment in order to ensure that there is no gap in the material on which the assessment and determination are based. The adequacy of the reasons provided by the decision maker in support of its conclusions is a critical factor in these cases.

Recent developments in the area of standing, costs and civil legal aid demonstrate that the Irish courts are well aware of the access to justice obligations arising under the Aarhus Convention and EU law. Generally speaking, the Irish judiciary, and in particular the Supreme Court, appear keen to give effect to these obligations in practice, notwithstanding the potential for disruption to well-established features of the national legal system. Moreover, there are currently four references for preliminary rulings from Ireland pending before the CJEU concerning a wide range of issues relating to the EIA Directive and the Habitats Directive, including the correct interpretation of the ban on prohibitive costs.[118] The number of references demonstrates that the Irish judiciary appreciates the importance of identifying the correct interpretation of EU environmental law in the interests of legal certainty. The standard of review stands out, however, as one area where the judiciary has not, as yet, grappled fully with the implications of EU law for environmental judicial review. It remains to be seen how this important issue will evolve in the jurisprudence in the future.

[118] The pending references from Ireland are: (Case C-164/17) *Grace and Sweetman* v. *An Bord Pleanála* [2017] IESC 10; (Case C-167/17) *Klohn* v. *An Bord Pleanála* [2017] IESC 11; (Case C-470/16) *North East Pylon Pressure Campaign Ltd* v. *An Bord Pleanála* [2016] IEHC 490; (Case C-461/17) *Holohan*, n. 106 above.