INTRODUCTION

The importance of readily available and accessible information[1] on the environment cannot be under estimated if individuals and environmental groups are to play an effective role as environmental watchdogs. Ultimately, increased public access to environmental information contributes to greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and eventually, to a better environment. Stavros Dimas, the current EU Commissioner for the Environment, has commented, "Information can be a powerful catalyst for change towards increased protection of the environment…"[2]

It is also imperative that any publicly accessible environmental information is up-to-date in content because delayed or out-dated information may well turn out to be ineffective and meaningless in war against environmental disregard. Certainly, the importance of readily available information is evident in the area of planning law where individuals are subject to specific time limits, when they intend to enter either submissions or objections to either local planning authority or An Bord Pleanála stage, respectively. Moreover, an effective right of access to information is also critical, where an individual seeks to challenge decisions of public bodies through the process of judicial review, as an appellant is required to file for same within 28 days of the public bodies decision.

The central task of this of paper is to examine the extent to which Irish rules and regulations governing access to information on the environment meet European Community law requirements in this field. Specifically, I consider the position of European Community law in the area and its precise demands on EU States. Next, I

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[1] Information on the environment is extremely wide ranging in form. It encompasses Environmental Impact Statements; Public and office files relating to applications for licences and consents under pollution legislation; monitoring data files; planning files and prosecution files. For a precise definition of "Information on the environment" it is necessary to consider a number of relevant legislation provisions. See for example, Environmental Protection Agency Act, 1992 section 110 (3).

[2] http://www.euireland.ie/news/environment/0205/environmentalinformationdirec.html

entertain the position of Irish law, with particular attention given to The European Communities Act 1972 (Access to Information on the Environment) Regulations 1998 and the Freedom of Information Act 1997, as amended by the Freedom of Information (Amendment) Act 2003, and its approach to Community demands. Furthermore, I explore the existing confusion surrounding the complex matrix of laws relating to access to information on the environment. Finally, I discuss the key points of comparison and divergence between European and domestic law.

THE EUROPEAN DIMENSION: A BACKGROUND

Prior to February 14th 2005, Council Directive 90/313 EEC[3] ("the old Directive") provided for the freedom of 'access to information on the environment'. Effectively, this instrument, by itself, has been seen as setting into motion a greater climate of transparency, accountability and openness, through informing European Union citizens about environmental issues[4]. According to Meehan, Directive 90/313 EEC represented "the EC law standard below which public access [to environmental information] is not to fall".[5]

Before the implementation of the old Directive however, it was commonly considered, across industrial Europe, that certain records, containing information relating to recorded emissions of factories were totally confidential and the property of no one but the factory owner. Environmentalists had conversely argued that since these emissions leave the factories, and thereafter enter the public domain and form part of the air that we, as European citizens breathe – the public should have a right to know what these emissions are.

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[3] See, Appendix A, for summary of the old Directive.
[4] That would include environmental law, administration and enforcement.
[5] See Meehan, *'Freedom of Access to Information on the Environment: Recent Developments and Official Response"* [1998] I.L.T. 55.

Moreover, it has always been widely believed that environmental issues, in general, are best handled with the participation of all concerned and informed citizenry[6] at the relevant level. Public awareness and involvement depends above all on public access to information. Mullany has commented[7], that the Directive represented "both a departure from a widespread tradition of public secrecy and an ongoing desire to directly involve the citizen in environmental protection". In this regard it is submitted that, in general, developing EU environmental policy[8] has harmonised with the wide-scale shift in 'attitudes towards individual rights and especially towards the protection of individual autonomy', in the second half of the twentieth century[9]. In particular, the 'access to environmental information' Directive has proved a useful tool, for the questioning and challenging of 'public authorities' in relation to information in their possession.

While the operation of the Directive was largely successful, it was not without its critics. In fact, its operative weaknesses and problematic issues were examined when, in accordance with Article 8 of the old Directive, the Commission issued a report to the Council and the European Parliament, on the 29th of June 2000, which took account of the experience gained by the Member States in the operation of the old Directive. The report highlighted that some of the problematic areas included:

1. The actual definition of "information relating to the environment",
2. Art.2 (b): definitions of "public authorities",

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[6] Indeed the public's *right* of access to environmental information is based on a number of considerations. One is the idea that the public has a legitimate interest in knowing how public resources are used. Another central consideration is democracy.

[7] Mullany, *"Implementation of the EC Directive on Freedom of Access to Information in Ireland and other member States"* [1994] 12 Irish Law Times 138.

[8] It is important to note that 'The Treaty of Rome' 1957, which established the European Economic Community (EEC) made no reference to the environment. It was not until the Single European Act was introduced in 1987 that a legal basis for EU environmental Policy was provided. It has since been developed, extended and advance by later instruments such as the "Maastricht Treaty" 1992 (see Articles 2 and 130 R), the "Amsterdam Treaty" [1997] (see Article 1) and also the Dublin Declaration 2000.

[9] It is submitted that this shift toward a 'questioning psyche' is as a result of increasing challenges to relationships of authority, for example, relationships between doctor/patient and State/Citizen. See Mary Donnelly, *Consent: Bridging the Gap between Doctor and Patient 2002.* (Cork University Press) at page 10.

3. Art. 3(2) and 3 (3): interpretation of expectations,
4. Art. 3 (4): failure to respond
5. Art. 4: review procedures, etc.

Accordingly, new proposals were drafted to provide for these shortcomings, which ultimately mandated the adoption of a new Directive on 'access to environmental information' i.e. Directive 2003/04/EC[10] ("the new Directive").

The new Directive can be seen to have taken off from where the European Court of Justice's (ECJ) had stopped, in terms of its application of the old Directive. The ECJ in its interpretation had always adopted a purposive approach. As Ryall comments, "it is apparent from the case law that the Court is concerned to ensure that the fundamental objective of the directive, articulated in Article 1, is not undermined". Furthermore it is clear from the available case law that the ECJ has always focused on a broad and far-reaching right of access. In *Mecklenburg v. Kreis Pinneberg-Der Landrat*[11], the Higher Administrative of Schleswig-Holstein made a preliminary reference to the ECJ concerning the correct interpretation of Article 2(a) and Article 3(2), third indent. Here the Court held that the concept of "information on the environment" in Article 2(a) of the directive should be interpreted broadly[12] (also see *Commission v Germany*[13]). It is now proposed that the important features of the new Directive are more closely examined, so as to establish a measure of Community demands on Member States in this particular area.

THE NEW DIRECTIVE[14]:

In response to the adoption of the new Directive Stravos Diams, Commissioner for the Environment, said: "Europe's citizen now have not only the freedom but also the right to obtain environmental information that is held or produced by public authorities".

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[10] This Directive was adopted on January 28th, 2003 and was published in the official journal on February 14th, 2003.
[11] [1998] ECR I-3809.
[12] At para. 19.
[13] [1999] ECR I-5087.
[14] This Directive in effect strengths the existing EU rules in the area of environmental information, aligning them with the environmental information requirements of The UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). This Convention is undoubtedly the most far-reaching international set of rules in this area of environmental law.

Furthermore it provides that every natural or legal person, regardless of citizenship, nationality or residence, has a right of access to environment information held or produced by public authorities.

The main features of the new Directive can be summarised[15] as follows:

- It grants a **right of access to environmental information**[16] (as opposed to freedom of access under the old Directive) and to ensure that environmental information is made available and disseminated actively to the public;
- It provides **a broader definition of environmental information** [17] as well as a more detailed definition of public authorities;
- It establishes a deadline of **one month**[18] (reduced from two months under the old Directive) for public authorities to supply the information requested;
- It clarifies **the circumstances, i.e. exemptions, under which authorities may refuse to provide information**[19]**.** Access to information shall be granted if the public interest served by the disclosure out-weights the interest served by a refusal.
- It identifies **two types of review procedures**[20] for the public to challenge acts or omissions of public authorities relating to requests for environmental information.

Clearly, the new Directive, by broadening the definitions of 'environmental information' and 'public authority'[21], seeks to ensure each public authority is responsible for providing information about its own activities and their impact on the environment. It is submitted that this principle is in keeping with the general principle by which a natural or legal person responsible for doing something that has a negative impact on the environment must pay the associated costs i.e. 'The Polluter Pays Principle[22]'.

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[15] See, http://www.env-health.org/ac/1604/
[16] See Article 1(a) of the Directive.
[17] See Article 2.
[18] See Article 3, in particular Section 2 (a) and (b).
[19] See Article 4.
[20] See Article 6.
[21] See n 17.
[22] www.dianawallismep.org.uk/news/160.html

To be able to take responsibility for such environmental impact, the authority must be aware of it. A natural consequence of this is that the authority also has the responsibility of providing the public with information about the environmental impact. The Directive embraces this principle by imposing the duty to provide information, within a specific time-frame, about the environmental impact of decisions made in connection with the exercise of authority. This duty will apply to all the sectors within the public administration[23]. Furthermore it is obvious that the Directive is aware that in order for access to environmental information to have a democratic function, it is important that information is given in the course of the decision-making processes[24].

It is now proposed to consider the position of domestic law in this particular area. This should allow for a clear image of domestic law, which shall then be superimposed on Community commitments in order to ascertain the extent of compliance and overlap.

THE EXISTING MATRIX OF DOMESTIC MEASURES

The focus of this section will be on providing an overview[25] of the rights of access to environmental information conferred by The European Communities Act 1972 (Access to Information on the Environment) Regulations 1998[26] (hereinafter referred to as "the 1998 Regulations) and the Freedom of Information Act 1997 (hereinafter referred to as "the FOI Act"), as amended by the Freedom of Information (Amendment) Act 2003[27]. While both of the aforesaid instruments provide general provisions for access, it is important to keep in mind that a number of other, more

[23] See Article 2 (a)
[24] See Article 3, in general.
[25] A more detailed comparison between specific provisions of the domestic legislation as well as Community legislation is considered in the next section headed "Overlap or lack thereof ?"
[26] See, Ryall, *"Access to Information on the Environment"* [1998] 5 IPELJ 48.
[27] In effect, there are now two regimes for accessing environmental information –the 1998 regulations and the FOI Act.

specific, provisions exist, which also set down wide-ranging information rights[28]. It is said that the 1998 Regulations as well as the FOI Act supplement these more specific statutory rights of access enshrined in planning and environmental pollution legislation.

However, despite what would appear to be a complex matrix of legal sources upon which an applicant may ground an application for access to environmental information; such measures, and in particular the 1998 Regulations, have been criticised as taking a minimal approach to the requirements of the directive.[29] Ryall notes[30] that, despite the minimalist efforts of the legislature, the courts have only on a few occasions been called upon to consider and interpret the regulations[31]. Furthermore Ryall identifies that "this situation is explained by the fact that lengthy and expensive judicial review proceedings are not a practical option where individuals and environmental groups are aggrieved by a decision taken under the regulations[32]".

The 1998 Regulations: General Overview

The 1998 Regulations are considered as the most recent attempt to implement obligations arising under the old Directive. These regulations revoked and replaced the Access to information on the Environment Regulations 1996. In fact, it has been

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[28] See, for example, in the context of Environmental pollution legislation and in particular the Integrated Pollution Prevention and Control (IPPC) licensing system, the Environmental Protection Agency (Licensing) Regulations 1994 (S.I. No. 85 of 1994) Article 23, as substituted by Environmental Protection Agency (Licensing) (Amendment) (No. 2) Regulations 1995 (S.I. No. 76 of 1995), Article 3. The 1994 Regulations were amended by the Environmental Protection Agency (Licensing) Amendment Regulations 2004 (S.I. No. 394 of 2004) which came into force in July 2004; however, there was no change to Article 23.

[29] See Report from the Commission to the Council and the European Parliament on the Experience Gained in the Application of Council Directive 90/313/EEC of June 7, 1990, on Freedom of Access to Information on the Environment COM (2000) 400 final, especially at 32-34.

[30] See "Access to information on the environment – Ireland – March 2005"
by Áine Ryall, course-material for Principles of Environmental Law, available on blackboard.

[31] The Irish cases to date are: *Clissmann et al v. Wicklow Co. Co.,* unreported, High Court, February 21, 1994, Flood J., *Lowes v. Coillte Teo*., unreported, High Court, 5 March 2003, Herbert, J. and *Lowes v. Bord na Móna*, unreported, High Court, 27 March 2004.

[32] See n 29.

widely suggested that the 1998 Regulations, in effect, re-enacted the 1996 regulations almost *verbatim*, with the notable addition of article 5.

In particular, this article seeks to clarify the situation where specific rights to access under designated legislation offers a restrictive availability of information, usually in the form of time limits, as opposed to those under the more general right to access under the regulations. The article takes effect when a specific right of access to information has been extinguished as a result of the restrictive time limits and consequently it appears there is no longer statutory availability of the particular information. However in such circumstances, Article 5(2) makes it clear that the general right of access under the 1998 Regulations will also apply during and after any time-frame set out in the specific provisions listed under Article 5(2).

Moreover, Ryall also makes the point that "where the legislative measures in article 5(2) provide for a right of inspection only, an applicant may now apply for such information under the 1998 Regulations and argue that the right of access under the 1998 Regulations embrace a right to a copy of the information in question[33]".

The FOI Act: General Overview

It is certainly curious as to why no efforts have been made to elucidate the precise relationship between the 1998 Regulations and the FOI Act. However, section 46(2) is a critical important section when considering the existence of a relationship. This section provides that the Act does not apply to information, which is available to members of the public for inspection, removal or purchase, by virtue of other legislative provisions. Consequently, it was argued by the Department of the Environment that information available under the 1998 regulations is not available for access under the FOI Act and would thus venture through a less favourable regime of access. However, as Ryall points out it is now the position that there is "nothing preventing an individual from making an application for access to information under the FOI Act rather than the 1998 Regulation[34]".

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[33] Ryall, "Access to Information on the Environment" (1998) 5 *IPELJ* 48 at 50.
[34] See n.29

OVERLAP OR LACK THEREOF?

As mentioned above, there is a wide range of legislation, from the specific to the general, providing access to information on the environment. Indeed the extent of legislation makes it an extremely cumbersome task[35] for practitioners when choosing the appropriate manner in which to seek information for their clients. The specific focus of this section is on the key points of comparison and divergence between European and domestic law. In this regard, seven key points of comparison and divergence have been noted, each of which is now discussed:

1. Review procedures:

Under the province of the old Directive, no special review mechanism had been introduced into Irish law under the transposing legislation. This continues to be the position under the new Directive despite the fact that it provides for the setting up of an appeals procedure whereby a "court of law or another independent and impartial body" has the power to review decisions of public authorities on requests.

Practitioners will be well aware that of the two regimes in place for accessing information i.e. the 1998 Regulations and the FOI Act 1997, the FOI Act holds a distinct advantage. Where information is refused under the 1998 Regulations the possibility for appeal and review are extremely limited[36]. Judicial review along with its inherent difficulties i.e. expense[37] and time consumption, remains the only

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[35] It is note worthy that in transposing the obligations under the old Directive, Ireland revoked and replaced the principle transposing measure twice i.e. See the 1993, 1996 and the 1998 regulations. (Also note The Environmental Protection Agency Act 1992 is a principle transposing measure.) Furthermore Ireland used no less than 44 other pieces of secondary legislation in transposing the Directive. (See Annex A of the Report from the Commission to the Council and the European Parliament on the experience gained in the Application of Council Directive 90/313/EEC).

[36] Note that the Guidance Notes on Access to Information on the Environment published in 1993 indicate at para. 2.15(e) that refusals should not be made without an internal review procedure. Further, at para. 3.3, the Guidance Notes provide that: "In the event of a refusal of information it will be open to an aggrieved applicant to ask the public authority to undertake a further review of its decision." Also note, however, that this is only an administrative guideline, there is no express provision for internal review in the 1998 regulations.

[37] There has always been extreme difficult in securing free legal aid in the case of judicial review.

alternative unless the particular case in question involves a public body which falls with the remit of the Ombudsman[38]. However, the Ombudsman's jurisdiction is limited and she does not have the power to issue binding determinations.

The FOI Act on the other hand provides for a formal internal review as well as a different dispute resolution mechanism in the form of an "Information Commissioner[39]". The Commissioner has extensive powers of investigation and is ultimately empowered to make decisions, which are binding in nature and may only be appealed to the High Court on a point of law. Furthermore, decisions must be reached within time limits as identified in the FOI Act. The FOI Act therefore offers a more appropriate and flexible system to that which is in place under the 1998 Regulations.

Given the existence of the two access regimes, the present Ombudsman, Emily O' Reilly[40], has suggested that in light of changes to the current Irish measures necessitated by the advent of Directive 2003/4/EC[41], it is "desirable that consideration be given to aligning access under the FOI Act with the AIE [the 1998 Regulations] and aligning the appeal mechanisms of both regimes"[42]. Moreover, she acknowledges the practical difficulties of such an approach, namely "different time limits apply for the processing of requests under the FOI Act and AIE, while the range of bodies to which each regime applies differs"[43]. However, she explains that these should "not present insurmountable problems[44]".

While the FOI Act has provided an alternative to the 1998 Regulations in terms of an appropriate appeals mechanism, attention must also be given to the newly adopted

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[38] It is important to note that the Ombudsman jurisdiction does not extend to An Bord Pleanála and the Environmental Protection Agency.
[39] See s.34 of the FOI 1997.
[40] It is important to note that the current Ombudsman also holds the office of Information Commissioner. Therefore an alignment of the two regimes is certainly practical.
[41] Note that possibly the most important feature in terms of Review Procedures is that it affords the applicant the *right* to an internal or administrative review, as well as an external or judicial review.
[42] http://www.oic.gov.ie/REPORT03/2226_20a.htm
[43] See n.38
[44] See n.38

Freedom of Information (Amendment) Act 2003. This instrument has had a major effect on the in-built appeals mechanism of the FOI Act by reason of the introduction of a scheme of fees that applies to FOI requests since July 2003. While the concept of charges will be discussed below, at this point it is only necessary to consider fees relating to appeals and review.

Fees now apply in respect of an application for internal review (@ €75) and a review by the Information Commissioner (@ €150). The practical and direct result of such, is that the Commissioner will now be presented with fewer cases and opportunities in which to rule and ultimately the development of FOI law will be unnecessarily restricted. In this regard, the Commissioner has put forward a number of recommendations aimed at improving the operation of the amended FOI system. These include a specific call for a reassessment of the €150 fee. Ryall identifies "this fee, which was found to be almost unique among the jurisdictions studied in the comparative survey, has led to a marked reduction in the number of applications for review made to the Commissioner".

As noted above, change is drastically needed given that new Directive has been enforced since February 12th, 2005. It remains to be seen how the Department of the Environment will respond to the obligations, for an appropriate review and appeals mechanism, created in this Directive however there is no doubt but a formal administrative review procedure will be required in order to meet the access to justice requirements articulated in Article 6 of the Directive.

2. Charges:

In regards to charges made under the 1998 Regulations, these are made on a discretionary basis[45]. In practice, public authorities provided for minimum or maximum charge on the information sought. However, it may be noted that where

[45] Note that the 1993 Guidelines suggest that there should be a presumption in favour of free provision of information where costs were not really significant.

charges were made, the critical determinant was the volume of work involved in responding to the request.

As already mentioned, the Freedom of Information (Amendment) Act 2003, which came in force on 11 April 2003, introduced a number of significant changes. It is identified that "one of the most draconian and controversial restrictions [introduced] on the right of access is the scheme of fees[46]" that now applies to FOI requests and reviews. Prior to the introduction, a request for information under the Act was free of charge. The amendment Act has now introduced an 'up front[47]' fee of €15[48] for making a request for access to non-personal records[49]. The effect of this instrument has already been subject to much criticism, by reason of the fact that the use of the Act was found to have fallen by 50% while requests for non-personal information were also down by 75%[50].

The issue as to whether the €15 fee is lawful, as a matter of Community law in the specific context of a request for access to information on the environment is extremely contentious. There is clear authority from the ECJ, in the case of *Commission v. Germany*[51] and indeed, from the jurisprudence of *Mecklenburg*, that it is not permissible for a public body to levy a fee in respect of a request for access to such information. However, it is extremely probable that any argument against the up front fee could be contradicted by identifying with the specific regime of access available under to the 1998 regulations i.e. where no up front fee is imposed, which is after all the primary implementing measure as regards Directive 90/313/EEC.

Moreover, charges imposed for copies of documents sought, have also demonstrated a lack of harmony with Community expectations. Neither the 1998 Regulations nor the

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[46] See n.29

[47] A comparative survey presented in the report of the Information Commissioner in June 2004, evidenced that 'the structure and scale of up-front fees in Ireland is out of line with practice abroad.' Available at www.oic.ie

[48] Ryall notes in course material that 'The application fee was modelled on the €20 planning participation fee, which is currently the subject of Article 226 EC infringement proceedings. See n.29

[49] Freedom of Information Act 1997 (Fees) Regulations 2003 (S.I. No. 264 of 2003). Reduced fees apply in the case of requests submitted by medical cardholders and their dependents.

[50] See n.44

[51] Case C-217/97. Citation is [1999] ECR I-5087.

'specific' planning and environmental pollution legislation set out a specific schedule of charges to be applied by the concerned public authorities when dealing with requests for copies of documents. The regulations authorise a charge not to exceed an amount, which would be considered reasonable when one has regard to the cost of making available the information[52]. Thus the formulation of each is extremely subjective in nature. Conversely, the FOI Act sets out the permissible charges in detail under regulations.[53]

Article 5 of the new directive requires public authorities to publish a schedule of charges that may be levied for supplying environmental information. Ryall suggests that "this new obligation clearly holds the potential to eliminate inconsistent and arbitrary charges for access to information.[54]" Clearly, reform is need in order to bring domestic rules into line with Community demands given that while the FOI Act details permissible charges under its provisions, the 1998 Regulations remain arbitrary in this regard.

One finally point in regards to charges returns us to the notion of the 'up front' fees under the FOI Act as amended. Murphy[55] notes that the new Directive originally included a prohibition on the charging of an 'advance payment'. However, this prohibition was dropped and now the preamble of the Directive states, "Instances where an advanced payment will be required should be limited." Notwithstanding this reference, there is no express citing of advance payments anywhere in the body of the Directive. Consequently, it will be extremely interesting to see how the ECJ will interpret advanced payments and in particular the question of whether a public body is required to return an advanced or up front payment where the information is refused, given that there is no expressed provision of this obligation. However, it is submitted

[52] Under planning legislation the subjected fee shall 'not exceeding the reasonable cost' of making a copy'.
[53] Freedom of Information Act, 1997, section 47; Freedom of Information Act, 1997 (Section 47(3)) Regulations, 1998 (S.I. No. 139 of 1998) and Freedom of Information Act, 1997 (Section 47(3)) (Amendment) Regulations, 1998 (S.I. No. 522 of 1998).
[54] See n.29
[55] Murphy, "Public Access to Environmental Information under Directive 2003/04/EC" (2003) 10 *Irish Planning and Environmental Law Journal* 67 at 71.

that in such circumstances the ECJ will continue on the same line as *Commission v. Germany* where it found that public authorities were not entitled to charge applicants when information was refused.

3. Exclusions/Exemptions to the right of access:

The 1998 Regulations exclude two categories of information from its scope. These include, firstly information held in connection with or for the purpose of any judicial or legislative function[56] and secondly information which is required to be made available under any statutory provision.

The 1998 Regulations seem to go further than the FOI Act in that while the Act excludes records held by courts or tribunals, there are two exceptions. These are in respect of records, which are not created by the court or tribunal and the disclosure of such is not prohibited by the court or tribunal, and records relating to the general administration of the court or tribunal[57].

In regards to the second category of exclusion i.e. information otherwise available, this includes all information available under any statutory provision[58] subject to article 5 (2)[59]. This exclusion is drafted in much broader terms than the corresponding exclusion under the FOI Act. No such exception existed under the old Directive and thus, this was seen by many as "the major loophole in Ireland's transposition of the Directive[60]".

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[56] 'Judicial and legislative function' have been given interpretation in the *'Access to Information on the Environment: Guidance Notes'*, Department of the Environment, 1993. Furthermore the Irish courts have extensively considered the concept of judicial function in case law. For a detailed look at the concept of Judicial function see Morgan, *"The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell, Dublin, 1997) At 52-53, Professor Morgan formulates a definitive list of 'Judicial function indicators' which is deduced from his exploration of the cases: *Lynham v. Butler (No 2)* [1993] I.R. 74; *The State (Shanahan) v. The Attorney General* [1964] I.R. 239; and *McDonald v. Bord na gCon (no. 2)* [1965] I.R. 217. Another important point is that An Bord Pleanála had originally claimed that it escaped the scope of the Regulations on the basis that it had a judicial function. However, this has since been denied by the Department of the Environment, while not yet reaffirmed by the courts.

[57] See McDonagh, M., '*Freedom of Information Law in Ireland',* [1998] at 415 for further information.

[58] See Article 5 (1) (b).

[59] The effect of this article has already been considered earlier in the paper under the heading "**The 1998 Regulation: General Overview"** as well as **"The FOI Act: General overview"**.

[60] Hallo, R., (ed.) Wates, Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC (Kluwer, 1996), Chapter 7 on Ireland at 124.

Unlike the new and old Directives, the 1998 Regulations provides for both mandatory and discretionary grounds for exemption. The mandatory exemptions are in regards to personal information relating to individuals, materials supplied to the public authority by a third party and information, which, if disclosed, would be damaging to the environment. Indeed McDonagh identifies that similar or corresponding exemptions may be discerned within the FOI legislation.

In regards to discretionary exemptions, four forms are distinguished under domestic Regulations. These are (1) international relations, national defence or public security; (2) matters which are sub judice; (4) Commercial or industrial confidentiality or intellectual property or where the information relates to internal communications of public authority or to material which is still in the course of completion and (4) where the request is manifestly unreasonable having regard to the volume or range of information sought.

While the 1998 Regulations now apply only to matters, which are sub judice or under inquiry, the original scope of this exemption under the 1993 regulations as well as the old Directive had been to include matters that are or have been under inquiry. Moreover the discretion to refuse on grounds of 'confidentiality of the deliberations of public authorities', under the Regulations, was simply deleted. While the discretion to refuse a "manifestly unreasonable" request was also altered to require the authority to have regard to the nature or range of information sought. While, from an environmental point of view, the fewer restrictions on the accessibility of information the better, the regulations do offer some suggesting that the legislature has in mind other civil and political rights, such as the right to fair trial (considering the sub judice exemption) and it is important to acknowledge that a balance of rights does exist within these Regulations.

The Freedom of Information (Amendment) Act 2003 has itself enacted much more controversial amendments which restrict the scope of the broad right of access set

down in the original Act. For example, Section19 of the Act now provides for a mandatory rather than a discretionary ground of exemption for certain records concerning meetings of government. Moreover, records created by a 'committee of officials' (or working group) established to advise the Government on a particular matter are now exempt from release. Section 20 sets out a broader exemption concerning deliberations of public bodies. A request for access must now be refused where a Secretary General of a Department of State certifies that the record in question relates to the deliberative process of a Department and the possibility of review of the Secretary's decision (by way of an internal review or a review by the Information Commissioner) is expressly excluded. Amendments to section 46(1) provide inter alia that records given to Ministers for the purpose of answering parliamentary questions no longer fall within the scope of the Act.

The effect of these amendments will have a great effect on access to environmental information and will possibly have the effect of deflecting applicants to the more unfavourable regime of access found under the 1998 Regulation in search of information. The point is further strengthened when it is coupled with the introduction of fees for non-personal information as well as the costs for requesting both an internal review and a review by the Information Commissioner.

4. Time frame for dealing with requests:

Article 3(2) of the new Directive provides that information sought **be made available** to the applicant "as soon as possible" and within "one month" after receipt by the public authority of the applicant's request. This article marks a departure from the obligations of article 3(4) of the old Directive where the public authority was required to **respond** as soon as possible within two months. The new time frame does provide for an extension of one month but only where "the volume or complexity of the information" is such that the request cannot be satisfied within one month.

Clearly, the requirement to make such information available, as opposed to an obligation to respond, which could simply mean a requirement to acknowledge receipt of such requests, means that the Directive now provides a much more potent effect in the arsenal of the environmentalist.

In this regard, Irish measures had taken initiative when the 1994 review of the 1993 Regulations highlighted that the two month time limit as far too long. Consequently, the 1996 Regulations reduced the time limit to one month, while similarly allowing for an extension of a maximum of one month where there were specific and isolated reasons. These requirements continue under the 1998 Regulations considering that, as already mentioned, the 1998 regulations effectively reiterated the 1996 Regulations almost verbatim, except for article 5.

5. Core definitions e.g. “public authority" and “information relating to the environment”/"environmental information":

Public Authority:

As already mentioned above, there had initially been concern in regards to public bodies acting in a judicial or legislative capacity, given that it was originally argued that an Bord Pleanála that it was not within the ambit of the 1993 regulations[61].

Furthermore the definition of public authority in the 1998 Regulations[62] was wider than that in the old Directive as it, effectively, covered authorities holding information relating to the environment irrespective of whether their responsibilities related to the environment. The extent of overlap between existing Community and Domestic measures in this regard appears to be similar. While the FOI Act covers an exhaustive list, the 1998 Regulations would appear to cover any public authority outside its ambit and thus providing extensive cover to all public authorities. However on this note, it must be said that each case must be considered on its own merits as to whether or not it falls within the scope of domestic measures. It is also important to note that if a particular public authority was to fall outside ‘domestic scope’ then the doctrine of direct effect would be applicable to ensure to information sought is retrievable.

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[61] See n.54

[62] Here the definition of “public authority” is taken from s.3 of the Environmental Protection Agency Act 1992.

Environmental Information:

The definition of environmental information in the new Directive is essentially taken from the Aarhus Convention. This effectively provides for a much broader definition of environmental information as opposed to its definition under the old Directive.

The 1998 Regulations, unlike the FOI Act, apply to information rather than records. The definition of "Information relating to the environment", as adopted by the Regulations is defined in the Environmental Protection Agency Act 1992, under section 110. This definition reproduces the definition of information relating to the environment in the old Directive (see Article 2(a) of same) almost verbatim. Consequently, the definition must be modernised in order to bring it in line with the new Directive definition[63].

6. Nature of the "right" of access (e.g. manner in which it is articulated):

The new Directive phrases its objective in terms of a right[64]. This improves on the earlier position taken by the old Directive, which only ensured freedom of access under its own article 1.

Domestic instrument had taken initiative in this regard, offering a right of access subject to exceptions, as mentioned above, even before the 'Article 8' report (under the old Directive) was presented to the Council and European Parliament.

7. Is there any standing requirement i.e. locus standi?

The right of access provided for under the 1998 Regulations and the FOI Act applies to "any person". The interpretation Act 1937, under section 11, defines "person" as not limited to individuals, but extends to legal persons. McDonagh furthermore identifies that the exercise of the rights conferred by either instrument is not confined

[63] Again note the applicability of direct effect.
[64] See Article 1 (a) of the new Directive.

to Irish citizens or residents. However, it is important to remember that the 'up-front' fee of €15 for making a request for access to **non-personal** records is a clear disincentive for individuals who in a theoretical sense may find it difficult to establish the normal locus standi, i.e. the substantial interest test[65], in a court.

Consideration of Community demands, shows that the new Directive requires, under Article 2 (5), that information be made available "to any natural or legal person" regardless of citizenship, nationality or residence, has a right of access to environmental information held or produced by public authorities. Thus, it may be said that both Community and Domestic instruments envisage and entrust the same legal person, as protector of the environment.

CONCLUSION:

The effect of the new Directive is to extend the terms of the old Directive and to update its operations in line with information technology (I.T.) developments, so as to bring EU Environmental Policy in line with the Aarhus Convention. In doing so, it not only extends the old Directive but also the demands on the Member States.

The Irish system is without doubt extremely complex. The primary reason for this is the existence of three separate regimes under which information is available i.e. (1) specific legislative provision, (2) the 1998 Regulation and (3) the FOI Act, as amended. This fragmented approach is completely unsatisfactory if ordinary individuals and environmental groups, without any formal training or education in the area of 'access to environmental information', are expected to act succæssfully as watchdogs of the environment. The only alternative for such individuals or groups is to seek to the assistance of a practitioner or consultant, who is engaged to trawl through the multifaceted system, in search of the most appropriate approach of seeking and securing the information as quickly as possible. Furthering this, the

[65] See section 50 of the Planning and Development Act 2000. Also see the Sloan, McArdle and Conway v. An Bord Pleanála, unreported, High Court, March 7th, 2003, Kearns J. and O' Shea v. Kerry Co. Co. and Elmpath, unreported, High Court, September 1st, Ó Caoimh J.

individual or group will be presented with a hefty fee note, which will possibly have the effect of undermining the information received. There is also the possibility that information will be not sought at all, if the practitioner's 'section 68[66] notice' shows fees relating to the retrieval of such information to be extremely high.

It is submitted that the existing fragmented system completely undermines the demands imposed by Europe. Consequently, a complete overhaul is needed where by a single instrument of legislation is enacted to meet the exact demands of Community measures, while bearing in mind that the Community seeks to harmonise with the demands of the Aarhus Convention[67]. This instrument would set out a transparent schedule of charges, an appropriate review mechanism and set out predetermined forms for individuals and groups to make access much more accessible and easy, in much the same way as the Personal Injuries Assessment Board (P.I.A.B.)[68] has done. Moreover the instrument would take priority over all other legislative provisions and unless stated by the applicant to the contrary, the request would be pursuant to that instrument.

With the 14th of February well passed at this stage and still no sign of response from the Department of the Environment, it should not be long before a situation will arise where an individual or group will seek to enforce their European rights at domestic level. At this point it should be noted that invoking the doctrine of direct effect[69] and sympathetic interpretation of the new Directive may circumvent shortcomings in the Irish implementing regulations. However, it is important to note that domestic courts

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[66] Section 68 of the Solicitors Act obliges practitioners to estimate fees, which are likely to attach to the job at hand.

[67] Note that the new Directive itself, is not, as yet in complete harmony with the Aarhus Convention and further amendments will be forthcoming if it is to completely harmonise with the Convention.

[68] The P.I.A.B. system provides an easier and more 'layman friendly' system, whereby the ordinary public may fill in a predetermined form relating to details of their accident along with a doctors report and this is then submitted to the P.I.A.B. for consideration. Thus it removes the necessity of consulting a practitioner, thereby reducing fees. Note that this has been subject to a lot of criticism. See Binchy, *'Personal Injuries Assessment Board* [2004] (Round Hall Sweet & Maxwell) – [an assortment of essays and opinions].

[69] See the establishing cases of *Van Gend en Loos* [1963] ECJ and also Van Duyn v Home Office [1974] ECJ. Further case law reading includes Macarthys Ltd v Smith, [1979] ECJ and Publico Ministerio v Ratti [1979] ECJ.

are usually reluctant to meddle with the subjectivity of European Directive despite being perfectly entitled to, once the Directive is capable of direct effect[70]. The possibility of direct effect should not justify the fact that Domestic rules have not been adjusted accordingly to meet the demands of Community law. The situation needs appropriate and swift response[71]. We await reply.

David J. O' Flynn

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[70] See n.69

[71] See the Recent Parliamentary Questions by Mr. Sargent to the Minister for the Environment, Heritage and Local Government regarding the date on which he [the Minister] intends to publish the statutory instrument implementing EEC 2002/4, Access to Information on the Environment. [2389/05].