

## ONGOING EU ENVIRONMENTAL INFRINGEMENT CASES AGAINST IRELAND<sup>1</sup>

### Background

Breaking EU law can have legal consequences in two stages. At the first stage (under Article 258 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 226 of the EC Treaty)), the European Commission can refer the Member State to the European Court of Justice (ECJ),<sup>2</sup> which gives its judgment re whether or not a breach of EU law has occurred. While this can certainly have resource implications for the government - e.g. defending the case and subsequent work to comply with an adverse judgment - a judgment at this stage is not usually a major concern from the government's perspective, since the prospect of financial penalties is a long way off.

The second stage (under Article 260 TFEU (ex Article 228 of the EC Treaty)) arises only if the Member State fails to comply with the ECJ's judgment in a timely manner. It ends with the Commission applying to the ECJ for a second time, this time asking that a financial penalty be imposed on the Member State for failing to comply with the ECJ's earlier judgment. A second judgment from the ECJ is required for a fine to be imposed.

### *First stage*

Proceedings at the first stage (under Article 258 TFEU), which are often triggered by complaints made to the European Commission by members of the public, are broken down into certain procedural steps:

(1) There is usually a period of informal contact between the Commission and the Member State;

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<sup>1</sup> This document covers proceedings brought against Ireland by the European Commission under Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU). It does not deal with references to the ECJ from Irish courts on points of interpretation under Article 267 TFEU. The first such reference from an Irish court in an environmental case was made only relatively recently, by the Supreme Court in *Sweetman, Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government v. An Bord Pleanála* (Appeal Nos. 59 and 60 of 2010) – Case C-258/11, heard by the ECJ on 12 September 2012.

<sup>2</sup> Which, post-Lisbon, is formally known as the Court of Justice of the European Union, although it is still colloquially referred to as the European Court of Justice, or ECJ.

- (2) The first formal stage is a Letter of Formal Notice (setting out the Commission's case), which the Member State is usually given 2 months to respond to;
- (3) If the Commission isn't happy with the Member State's response, it can issue a Reasoned Opinion (another formal letter), and the Member State is again normally given 2 months to respond;
- (4) If the Commission isn't satisfied with the Member State's response (by the deadline for responding to the Reasoned Opinion), it can refer the case to the ECJ.

Once a case is before the ECJ, there is first (in some cases) an oral hearing at the ECJ in Luxembourg, and then (in some cases)<sup>3</sup> a written Opinion from one of the ECJ's Advocates General (AG). This is an independent, expert view on the position under EU law, which serves to inform the judges' final decision in the ECJ. While the AG's Opinion is an authoritative view of the position under EU law, note that it does not carry the same force as a judgment from the ECJ itself. Advocates General are freer to make progressive arguments, pushing the boundaries of EU law, so their Opinions are often a good place to look for potential arguments and the direction in which EU law might go, but the ECJ's judgments are the place to look for a definitive statement of the position under EU law. Often, though not always, the ECJ will agree with the AG's Opinion, and adopt some, if not all, of the arguments made in the Opinion. Note also that an AG's Opinion is entirely separate from a so-called Reasoned Opinion (formal letter from the European Commission addressed to the party alleged to be in breach, referred to in step (3) above), notwithstanding the confusing similarity in terminology. After the AG's Opinion (if there is one), the final step at the first stage of proceedings is the ECJ's judgment itself, which establishes whether or not there has been a breach of EU law. AG's Opinions and the ECJ's judgments are available here <http://curia.europa.eu/> and here <http://eur-lex.europa.eu/en/index.htm>.

### *Second stage*

Cases at the second stage (i.e. following a judgment from the ECJ establishing a breach) proceed along similar procedural lines to cases at the first stage:

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<sup>3</sup> The ECJ may, if it considers that the case raises no new point of law, proceed to judgment without an Opinion from an Advocate General.

- (1) There's usually a period of informal contact between the Commission and the Member State, with the Commission asking what the Member State is doing to comply with the ECJ's earlier judgment;
- (2) Crucially, post the Lisbon Treaty, there is now only one formal stage before a case can be referred back to the ECJ for a fine, unlike the separate "Letter of Formal Notice" and "Reasoned Opinion" stages at the first stage of proceedings. The formal stage at the second stage of proceedings is simply a written warning, typically giving the Member State two months to respond;
- (3) If the Commission isn't happy with the Member State's response to its written warning, the Commission can refer the case to the ECJ, asking for a fine to be imposed;
- (4) Again, once the case is before the ECJ, there may first be a hearing, then (perhaps) an AG's Opinion, and there will always need to be a (second) judgment from the ECJ for a fine to be imposed. A fine can comprise a lump sum penalty to punish past non-compliance and a periodic penalty payment (e.g. a fine calculated daily) to ensure speedy compliance going forward. Again, AG's Opinions and ECJ judgments at the second stage are available via the links cited above.

At present it is not possible, as a general principle, for individuals or NGOs to get hold of copies of Letters of Formal Notice, Reasoned Opinions, written warnings, or the Member State's responses in environmental cases, at least until after a case has closed – and even then it may be a struggle. Certain NGOs (e.g. ClientEarth) are working at the EU level to challenge the fact that it is not currently possible to gain access to these documents as a matter of course.

## Discussion

While Ireland has lost *lots* of cases at the first stage (Art 258 TFEU), proceedings against Ireland at the second stage (Art 260 TFEU) have never so far run their course to the very end (i.e. to a second judgment from the ECJ), such that Ireland has to date never been fined for breaching EU law. Indeed, only five Member States (Greece, France, Spain, Italy, Portugal) have ever been fined, across all sectors of EU law. That said - and as you'll see from the table at the very end of this document - seven cases at the second stage are ongoing against Ireland at present, and two of these were heard before the ECJ on 4 October 2012 - these two cases are open and shut; as such, Ireland will very soon face its first fine for breaching EU law. In terms of timing, based on experience of recent fines against other countries, the judgments in these two cases - imposing the fines - are likely to be handed down around April 2013. Such fines are unsurprising, and not before time, given Ireland's historic environmental record:

<http://ec.europa.eu/environment/legal/law/statistics.htm>; also see  
[http://www.irishenvironment.com/irishenvironment/articles/Entries/2010/6/1\\_Andrew\\_L.R.\\_Jackson,\\_The\\_Emerald\\_Isle\\_Ireland's\\_environmental\\_compliance\\_record\\_in\\_cross-EU\\_terms.html](http://www.irishenvironment.com/irishenvironment/articles/Entries/2010/6/1_Andrew_L.R._Jackson,_The_Emerald_Isle_Ireland's_environmental_compliance_record_in_cross-EU_terms.html); and see the table below, which gives the latest position). Commentators will be watching closely to assess the impact of the forthcoming fines on Ireland's environmental compliance record.

While fines have been very rare to date across the EU - there have been only 11 fines (Greece 5; France 3; Italy 1; Spain 1; Portugal 1) across all sectors of EU law - all have been imposed since 2000, nine of the eleven have been imposed since 2006, and seven have been imposed since December 2008 alone, so the European Commission is undoubtedly making growing use of its power to request a fine.<sup>4</sup> Further, the level/prospect of fines certainly concentrates minds in government: e.g. in 2005 France was fined a lump sum of €20m, plus €57.7m for each 6 months of continuing non-compliance with the ECJ's judgment (C-304/02); more recently, on 17 November 2011 Italy was fined €30m as a lump sum, plus a periodic penalty calculated according to a complex formula (Case C-496/09). While Ireland would not expect to be fined at such a level given the criteria for calculating fines (which include GDP, capacity to pay, and the number of votes held in the Council),<sup>5</sup> the risk of a fine nevertheless poses a powerful incentive to comply, even if it takes much too long at present to reach the point at which such pressure is felt.

Of the cases listed on the table at the end of this document, *in general* the ones the government will be most worried about will be those at the second stage (Art 260 TFEU); and the more advanced a case is at the second stage (NB. a fine is only legally possible after the deadline for responding to the written warning at the second stage has passed), the more worried the government will be. This explains why the government is currently so anxious to deal with the issue of septic tanks, for example. The more urgent a case is on the table below, the more the government is under pressure to act, and hence the more leverage we (citizens and NGOs) are likely to have.

That said, it is important not to miss the boat in seeking to make strategic use of ongoing cases: once a Reasoned Opinion (or written warning at the second stage) has been issued, generally speaking no additional matters can be raised by the Commission,

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<sup>4</sup> Across all sectors of EU law, in only thirteen cases has the ECJ found a Member State in breach of its obligations under Article 228(2) EC (Article 260 TFEU): Cases C-387/97 (Greece), C-278/01 (Spain), C-304/02 (France), C-177/04 (France), C-119/04 (Italy), C-503/04 (Germany), C-70/06 (Portugal), C-121/07 (France), C-109/08 (Greece), C-568-07 (Greece), C-369/07 (Greece), C-407/09 (Greece), C-496/09 (Italy), **eleven of which resulted in a fine** (C-119/04 (Italy) and C-503/04 (Germany) did not).

<sup>5</sup> See [http://ec.europa.eu/community\\_law/docs/docs\\_infringements/memo\\_05\\_482\\_en.pdf](http://ec.europa.eu/community_law/docs/docs_infringements/memo_05_482_en.pdf).

since the Commission would need to bring fresh proceedings or issue a supplementary Reasoned Opinion to raise new issues, and it may not be keen to do that. So the Commission's case is in most cases limited to whatever is in the Reasoned Opinion or any supplementary Reasoned Opinion (at the first stage) or written warning (at the second stage). This holds true as a general principle, though in certain cases it may be possible to raise issues later; e.g. where the ECJ's judgment at the first stage establishes a *general* breach (more below). For example, where the breach is a general failure to designate sufficient areas under a particular Directive (e.g. the Shellfish Waters Directive), it may be possible to raise specific examples of sites that should have been designated, *after* the Commission has issued its Reasoned Opinion at the first stage, and even after the ECJ has given its judgment establishing a breach. That said, it is important to communicate any points to the Commission in relation to an ongoing case before a written warning has been issued at the second stage (Art 260 TFEU) – after that, persuading the Commission to raise fresh points may prove very tricky. Thus, in certain respects, cases ranked yellow (3) below may present greater strategic opportunities for individuals/NGOs than cases ranked red (1) or orange (2): i.e. once a written warning has been issued at the second stage, the Commission may not be keen to raise entirely new points, since fresh proceedings or a supplementary written warning would be needed.

Those cases ranked orange or red (2 or 1) are all effectively at the second stage (with the exception of 2010/2161 – see note on p.6 below) and will hence be a priority for the government. If it can be shown that the government is not complying with the ECJ's judgments in those cases, there is a real risk of a fine, increasing according to the urgency of the case as indicated below.

Two cases listed on the table at the end of this document are of particular note. The first is case C-494/01, which concerned illegal landfills, and was the judgment which first established the concept of a 'general and persistent' breach of EU law (it is perhaps no surprise that Ireland has the dubious honour of being on the receiving end in this groundbreaking case).<sup>6</sup> These systemic (or 'general and persistent') breach cases are a relatively new concept, and they are highly significant for our purposes. Previously, an issue could only be raised in second stage (Art 260 TFEU) proceedings if it formed part of the Commission's case at the first stage (i.e. before the ECJ gave its judgment establishing whether or not the government was in breach). This is not the case with systemic breach cases. To explain, because the ECJ has held that Ireland has systematically failed to control illegal landfills, the Commission can raise new examples of such landfills as part of the second stage proceedings to enforce the ECJ's judgment in C-494/01. While this may seem a technical issue, it has significant practical implications. By skipping the necessity for a new case

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<sup>6</sup> See Wennerås, P. (2006). A new dawn for Commission enforcement under Articles 226 and 228 EC. *Common Market Law Review* 43: 31-62

(i.e. fresh first stage proceedings), and instead bringing issues up at the second stage of an ongoing case (where the prospect of a fine is a reality, and the government is under real pressure), several years can be shaved off the time at which the government is forced to comply. So send any examples of illegal landfills to the Commission now!

Providing the Commission with information that establishes systemic problems is likely to have a greater impact than providing them with evidence of one-off breaches (indeed, these systemic cases are the ones the Commission is prioritising these days). So, it would be better to provide evidence of a systemic failure to, for example, control peat extraction in Natura 2000 sites than to provide the Commission with evidence of problems in one site. And by providing enough examples to sustain a systemic breach case, an individual or NGO can open the floodgates, in effect, allowing others to provide examples that can be addressed as part of the same case, even after a judgment from the ECJ. This was the case with C-418/04: thanks to BirdWatch Ireland's work in 2000, aquaculture issues raised by other NGOs will now be dealt with much more rapidly than would otherwise have been the case. It points to the need for individuals/NGOs to act strategically, and to coordinate campaigns where possible. But again, even in systemic breach cases that have reached the second stage (Art 260 TFEU), it is important to remember that issues should be raised with the Commission before it issues a written warning in the second stage proceedings.

The second case of note is infringement complaint 2010/2161, which relates to turf cutting in EU protected areas. As you will see from the table below, the case is still in its early stages, but we have nevertheless ranked it as one of the most urgent from the government's perspective. Why is this case an exception? The proceedings began with a Letter of Formal Notice issued in first stage (Art. 258 TFEU) proceedings in January 2011. In May 2011, Friends of the Irish Environment provided [evidence](#) of a systemic breach (ongoing turf cutting within many of the protected areas). As a result of this evidence, the Commission accelerated its infringement process, and gave the government only 1 month (instead of the standard 2 months) to respond to its Reasoned Opinion in the first stage proceedings. The Commission could now, if it wanted, bring an action for 'interim measures' against the government, under Article 279 TFEU. This means that the Commission could, if necessary, seek an injunction from the ECJ to force the government to take action immediately, pending the outcome of the ongoing legal proceedings. This power to seek an injunction has been used only very rarely by the Commission, though most cases have related to nature conservation – see, for example, the following cases relating to spring hunting for birds in Italy and Malta, and the building of a motorway in Poland: Cases C-503/06 R (Italy), C-193/07 R (Poland), Case C-193/07 RII (Poland), Case C-76/08 R (Malta) and C-573/08 R (Italy). The Commission decided not to bring an action for interim measures against Ireland this year regarding turf cutting in Natura 2000 sites, notwithstanding clear evidence of widespread, [continuing damage in 2012](#). However, the option remains a possibility for the 2013 season and beyond.



<b>Case number</b>	<b>Urgency for Govt (red (1) most urgent)</b>	<b>Main Directive(s) in case</b>	<b>Article 258: Letter of Formal Notice (LFN)</b>	<b>Article 258: Reasoned Opinion (RO)</b>	<b>Article 258: Being Referred to the ECJ</b>	<b>Article 258: AG's Opinion issued?</b>	<b>Article 258: ECJ judgment to be implemented? Date of judgment</b>	<b>Art. 260: Written warning</b>	<b>Article 260: Being Referred to the ECJ</b>	<b>Article 260: AG's Opinion issued?</b>	<b>Article 260: ECJ judgment and fine?</b>
Original case: C-66/06  (2000/5196)  For fines: C-279/11	<b>1</b>	85/337/EEC on EIA – <b>agriculture and aquaculture</b>	→	→	→	No Opinion	→ 20 Nov 2008	→	→ Fine sought: lump sum by formula plus €33,080 per day until comply	Heard by ECJ on 4 October 2012. Judgment and fine likely around April 2013	
C-50/09  (1997/4703)	<b>1</b>	85/337/EEC on EIA. conformity of Irish legislation in relation to projects involving both land-use consent and pollution control consent and issues relating to a national monument at Lismullen	→	→	→	No Opinion	→ 3 March 2011	→ Feb 2012	✓ June 2012 Application to ECJ being drafted		



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2010/2161	<b>1</b>	Implementation of the Habitats/ EIA Directives (92/43/EEC and 85/337/EEC) in relation to Irish Peatlands. Turf cutting in Natura 2000 sites, etc.	→	✓	<b>*SEE NOTE ON p.6 RE WHY THIS CASE IS SO URGENT*</b>						
C-215/06 (2000/4384)	<b>2</b>	85/337/EEC on EIA – <b>retention planning permission; Derrybrien wind farm</b>	→	→	→	No Opinion	→ 3 July 2008	✓ Additional LFN March 2010			

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C-418/04 (1998/2290)	<b>2</b>	79/409/EEC on wild birds <b>and</b> 92/43/EEC on habitats – <b>land use plans, designation of SPAs for birds, protection of certain species</b>	→	→	→	→ 14 Sept 2006	→ 13 Dec 2007	LFN under old Art. 228 EC procedure in Oct 2009, but no Art. 260 TFEU warning to date			
C-183/05 (2001/4917)	<b>2</b>	92/43/EEC on habitats – <b>species protection</b>	→	→	→	→ 21 Sept 2006	→ 11 Jan 2007	✓ Additional LFN March 2010			
C-494/01 (1999/5112)	<b>2</b>	75/442/EEC the waste directive – <b>implementation of certain provisions</b>	→	→	→	→ 23 Sept 2004	→ 26 April 2005	✓ Oct 2010 (+ Art. 228 EC LFN in June 2007)			

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C-316/06 (2004/ 2033)	<b>3</b>	91/271/EEC on urban waste water treatment - obligations to provide 6 agglomerations with secondary wastewater treatment facilities	→	→	→	No Opinion	✓ 11 Sept 2008				
C-158/12 (2008/ 2070)	<b>4</b>	Licensing of piggeries and poultry farms under 2008/01/EC concerning IPPC (codified version of 1996/61/EC)	→	→ Nov 2010	✓ March 2012						
2001/5176	<b>4</b>	92/43/EEC on habitats - regarding the protection of designated areas, particularly protected bogs.	→	✓ June 2006	This case linked to 2010/2161 above						

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2007/2238 2006/4641	4	Transposition of 2000/60/EC the water framework directive	→	✓ Nov 2011							
2011/0471	4	Non-transposition of the Fuel Quality Directive (98/70/EC)	✓ March 2011								
2011/0834	4	Non-transposition of Directive 2009/31/EC on the geological storage of CO2	✓ July 2011								
2012/4028	4	Access to justice (EIA, IPPC, industrial emissions, etc)	✓ May 2012								