

AVOSETTA MEETING, STOCKHOLM, 2-3 OCTOBER 2009

IRISH REPORT : Enforcement of Environmental Law

Q.1. Most important tools for the enforcement of environmental law and the relative “weight” of private law, administrative law and criminal law for the enforcement.

Most environmental law is enforced by local authorities in their various roles e.g. as planning authorities, waste management authorities, water services authorities, authorisation bodies for many water and air emissions, noise control authorities etc. However the EPA enforces laws relating to IPPC and major waste activities and it has a special role in making sure local authorities themselves comply with the law and that they exercise their enforcement functions properly. There is very little criminal enforcement of environmental laws. Most criminal cases are taken by a local authority or the EPA although major offences must be enforced by the Director of Public Prosecutions. He rarely enforces environmental crimes. Prosecutions by the EPA are often successful. Most enforcement is by administrative notices. I would say over 90% of enforcement is by this means. Judicial enforcement is the least common method of enforcement. For example, in 2007, the EPA issued 683 notices for non compliance with waste and IPPC legislation, successfully brought 12 prosecutions and had 30 prosecutions on hand and it had passed two serious cases to the Director of Public Prosecutions for prosecution on indictment.¹ The EPA is usually successful when it prosecutes.

Q.2. I: Which sanctions are provided under national law (criminal, administrative etc.)?

Criminal sanctions include fines and/or imprisonment. Fines can be very large (over E25 million) and five years is usually the maximum term of imprisonment. However, in some cases criminal sanctions can include confiscation of vehicles and payment of a fine which reflects the extent of environmental damage. Those convicted of criminal offences must usually pay the costs of the prosecutions. Since prosecutions taken by local authorities and the EPA are in the lower courts (which can only impose small fines) the costs of prosecution can often exceed the fines imposed. Non-compliance with an administrative notice is a criminal offence and it entitles the enforcing authority to take the required action at the expense of the person served with the notice. Sanctions imposed by a court on a civil action include injunctions to do or not to do something or requirements to remediate, pay for the costs of investigation, mitigation and consequential losses.

Q.2.II: Can NGOs and/or citizens challenge the enforcement – or lack of enforcement – by the competent authority, or is it within the full discretion of the competent authority to decide whether and how offences should be sanctioned? (If NGOs and citizens can challenge such decisions and omissions, including failures of a procedural character, please describe how.)

Any persons, including an NGO (loosely defined because practically any group can constitute itself an NGO) can enforce most environmental laws by prosecution or judicial action. Only public authorities may enforce by administrative notice. Public authorities have a discretion as to whether or not they enforce but

¹ Annual Report 2007, at 20.

in two situations they have to investigate and *consider* enforcing when requested by any member of the public i.e. (i) where there is an allegation of breach of planning legislation and (ii) and NGO has a specific right to request enforcement of the Environmental Liability Directive. In addition, any person or NGO can complain to the Ombudsman or (where EC law is involved) the EC Commission, about inadequate enforcement.

If a permit is granted without an EIS, any person or NGO may challenge the decision by way of judicial review. In some cases, they are required to have participated in the decision making procedure first. If an activity is carried out without the required IPPC permit or in contravention of the terms of the permit, any person or NGO may seek a court order to enforce IPPC legislation.

Q.2.III: In light of European Community law, including the possible direct or indirect effect of directives, does national law grant NGOs and/or affected citizens the right to take direct enforcement measures against the polluter?

Yes and some individuals and NGOs do enforce environmental laws. I am involved currently with two cases before the High Court for not complying with planning legislation taken by a residents association and another case taken by a group of individuals against an industry which they allege is polluting groundwater. The interesting thing is that the public authorities had also initiated enforcement actions in these cases.

Q.2.IV: Could the competent authority under national law be held liable for erroneous acts and for omissions (non-enforcement) in the cases listed below? If so, how?

Generally IPPC and Waste legislation provides that the EPA cannot be liable for the way it has or has not carried out its powers and duties providing it acts *bona fide*. A similar protection applies to local authorities carrying out waste functions.² This exemption from environmental liability does not apply in the waste sphere where the EPA or a local authority has not implemented EC law. There is no statutory liability for *not* enforcing environmental laws. However, it might be possible in some cases to bring a constitutional action or an action on the basis of the European Convention of Human Rights in some cases where a public authority does not enforce environmental laws properly.

The decisions of the EPA or competent authority on any environmental authorisation can be challenged by any person or NGO and set aside.

- a. *When an EIA project is established without an EIA permit – Yes. Any person or NGO can enforce. -*
- b. *When conditions attached to the EIA decision, granting a development consent, are disregarded Any person or NGO can enforce. -*
- c. *When an IPPC facility is established without an IPPC permit Any person or NGO can*

² Section 67(1) of the Waste Management Act provides that:

"no action or other proceedings lie or are maintainable against the Agency or a local authority for the recovery of damages in respect of any injury to persons, damage to property or other loss alleged to have been caused or contributed to by a failure to exercise any power or carry out any duty conferred or imposed on the Agency or local authority by or under this Act."

enforce. -

- d. *When an IPPC facility is permitted without prior assessment in accordance with article 6(3) of the Habitat Directive – Yes. Any person or NGO can enforce. -*
- e. *When an IPPC facility is operated in violation of conditions of an IPPC permit Any person or NGO can enforce. -*
- f. *When an IPPC facility releases greenhouse gases beyond what is provided for by allowances under the ET Directive Any person or NGO can enforce. -*
- g. *When an IPPC facility has negative impact on Natura 2000 sites beyond the threshold in article 6(2) of the Habitat Directive – Yes – at least in theory.*
- h. *When water plans adopted under the Water Framework Directive – or for the moment existing water quality standards laid down in the “old” water directives – are not complied with Any person or NGO can enforce standards. A judicial review could be sought by them to compel the competent authority to make the plans. Water quality standards in any applicable directive can be enforced by any person or the EPA.*
- i. *When air plans under the Air Framework Directive are not complied with. Any person or NGO can enforce standards. A judicial review could be sought by them to compel the competent authority to make the plans. Air quality standards in any applicable directive can be enforced by any person or NGO or the EPA or a local authority in some cases.*

Please, comment on whether you find the national means of enforcement adequate, and if, based on the national experiences, you have any general suggestions for improving the enforcement.

Enforcement of waste and IPPC legislation by the EPA is relatively good in practice. Enforcement of planning legislation and other legislation by local authorities is not. One of the reasons is that there are too many local authorities (87) and they have not the resources for enforcing. They should cooperate with each other and use specialist enforcement personnel but they are reluctant to do this. Many local authorities do not even know what environmental laws they should be enforcing and they get very little guidance from central government on how they should be exercising their functions.

Q.3 How is article 9(3) of the Aarhus Convention, regarding access to administrative or judicial procedures for members of the public to challenge violations of environmental law, complied with? In which situations is it NOT complied with?

Generally compliance is very good on access to justice except on the matter of costs and delays in court cases. In one recent case, the 5 year permit challenged by the NGO had almost expired by the time the Supreme Court had given its judgment. Costs in Ireland are very high indeed and the loser must usually pay them. In practice, courts do not always award costs against NGOs but the uncertainty on this issue is a deterrent.

Q.4 Possible factors, such as costs, length of procedures or other practical matters, that may prevent effective access to justice for members of the public.

Q.5 Do NGOs and/or citizens have access to injunctive relief and interim legal remedies? Do you know

any national cases which have dealt with this?

There are numerous cases where NGOs and citizens have enforced environmental laws although most of them concern planning legislation. There are also numerous cases where NGOs and citizens (mostly the latter lately) have applied for judicial reviews alleging non compliance with EC law.

Q.6 Are there any examples where a final administrative decision has been reopened because of a complaint based on later case law from the ECJ?

No but there is a current dilemma on this matter in Ireland arising out of ECJ decision

Q.7 Has there been any national case in which the State or the local authority have been held liable for not remedying environmental damage or other damage in violation of EC environmental law?

No and public authorities are immune from such actions in most cases.

Q.8. Do you know of any significant developments, good practices or failures (e.g. cases, new laws, new institutional arrangements, or new policies) with regard to the enforcement of EC environmental law, not covered by the previous questions, that you would like to highlight?

Yes. What should the position be when you have a breach of environmental law and both an NGO and a public authority seek to enforce the law against the polluter?

What should the position be when a developer who acted in good faith in accordance with all applicable and relevant national law finds that his permit is invalidated because the State or a competent authority failed to comply with EU law (a) in the manner in which they dealt with the permit application (b) in the decision made on the permit application? This situation could happen where the competent authority negligently fails to apply EC law or where it applies the law as understood and it subsequently transpires that it has not complied with EC law because of a decision of the ECJ.