Submission by Environmental Justice Network Ireland (EJNI) to the Public Consultation on the regulation of costs payable under the Planning and Development Act 2024 (Scale of Fees)

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Introduction

The proposal to introduce scale fees for applicants in environmental judicial reviews has been put to public consultation. The consultation was released on the December 2025 with a closing date of the 15th January 2026. The consultation documents consist of a report on costs in environmental judicial reviews demonstrating the high level of costs involved in these complex cases ranging from €150,000 to €350,000. The reports and consultation documents do not make clear that this is the cost per side.

The current situation is that costs shifting provisions introduced to comply with the Aarhus Convention and EU law result in a situation where applicants for judicial review are able to recoup costs if they win but cover own costs if they lose. These can range from €150,000 - €320,000 on average in a High Court judicial review,[2] for one side alone, with costs exceeding this in the event of complex modular hearings, appeals to the Court of Appeal and Supreme Court and references to the CJEU. Access to justice is

[1] The Environmental Justice Network Ireland (EJNI) is a collaborative platform connecting researchers, NGOs, lawyers, and communities to tackle environmental and social injustice on the island of Ireland, aiming to support affected groups, enhance understanding of complex issues, and promote rights-based solutions for a fairer, greener environment through research, advocacy, and strategic work on issues like Brexit's environmental impacts, Just Transition, and human rights. For more visit https://ejni.net/ or email admin@ejni.net

[2] Figures cited from the OPR/Fieldfisher (December 2025) Research Report on Legal Costs in Planning and Environmental Judicial Reviews, pg. 7, provided with the consultation materials.

therefore predicated on "no foal, no fee" support provided to the public and NGOs by the legal profession, which effectively results in the legal profession already subsidising the cost of judicial review where it is unsuccessful. This means that legal professionals are highly selective about the types of judicial reviews they will bring forward on behalf of applicants, usually only doing so where there is a high probability of success or a point of law of public importance that has not yet been determined. This results in a filtering of cases from the public/NGOs based on merit, as demonstrated by the very high success rate of judicial reviews taken. Success at trial should not be the only metric for whether access to justice is overly broad. The existence of failed challenges does not automatically equate to unmeritorious claims. The nature of the common law is that it develops incrementally over time via the doctrine of precedent. Some rights are established only after consideration in several separate (unsuccessful) cases, and sometime novel cases are unsuccessful due to judicial conservatism rather than lack of merit. There are numerous examples of novel rights based cases that were unsuccessful before the Irish High Court, or Supreme Court, but which were later vindicated in the European Court of Human Rights, e.g. the right to legal aid in Airey,[3] or the right of gay people not to be criminalised, in Norris vs AG.[4]

The common law system results in a high degree of nuance, complexity and flexibility, and is associated with higher legal costs than civil law countries for a variety of reasons. The work done by lawyers in representing applicants is vital to the administration of justice and rule of law. Unfortunately, this consultation begins from an overly simplistic and incorrect premise – there is too much access to justice, which is equated with delays in permitting of infrastructure projects, presumably through the delays caused by the court process.

It then proceeds to suggest applying a sledgehammer to that problem – restrictive scale fees. It is never clearly articulated how this will deal with the problem of delays in infrastructure permitting. No examination of the bottle necks and push points for the supposed delays in planning permits preceded the decision to apply scale costs and other restrictions on access to justice contained in the Planning Act 2024.

The premise is articulated in the related Government Action Plan "Accelerating Infrastructure Report and Action Plan" released in December 2025 at the same time as the consultation. The Ministerial foreword claims that the amount of judicial review in Ireland is disproportionate to other EU countries. No figures are cited in support of this claim anywhere in the consultation documents. The Minister goes on to identify the problem as too much judicial review:

[3] ECtHR, Airey v. Ireland, No. 6289/73, 9 October 1979, para. 26. https://hudoc.echr.coe.int/eng?i=001-57420

[4] Norris v Ireland (1998) Application no. 10581/83) https://hudoc.echr.coe.int/eng?i=001-57547

> "*What is particularly worrying is that the number of judicial review cases is also rapidly growing. 2024 saw a 43 percent increase compared to 2023, and already 2025 has seen a further 30 percent increase in the number of cases brought to the Planning and Environment Court. As of today, An Coimisiún Pleanála is facing 135 individual judicial reviews. These range from objections to planning permissions granted to a single house, to the Metrolink project which is fundamental to reducing traffic congestion and greenhouse gas emissions in Dublin. This is unsustainable. Absent reform, an ever-increasing tide of judicial reviews could drown our courts system, paralyse infrastructure development and prevent the effective administration of justice. This can be tackled by addressing the incentives, unique to the Irish legal system, that drive an excess reliance on the courts to adjudicate on planning or regulatory matters. It can also be addressed by ensuring that the remedies applied by the courts are fit for purpose and balance the rights of the applicant appropriately against the common good.*"

Ireland had a very low level of judicial review of planning applications objectively speaking[5] (to my knowledge no appropriate per capitia comparison has ever been carried out) prior to 2022, and the recent spikes in judicial review in 2023 and 2024 must be put in the context of the implosion of An Bord Pleanala due to a corruption scandal in 2022[6] which saw the Bord effectively disbanded and replaced by An Comisiun Pleanála in 2025. During the period decision making dropped to an all time low.

This debacle resulted in massive backlogs, and the subsequent revelations, reports and inquiry into the Bord provided the evidence for many judicial reviews of decisions where conflict of interest or bias became undeniable.

The government utilising the consequences of government political appointees abusing their position as a reason to further reduce the opportunities for accountability in the planning system is deeply ironic.

It is also a breach of Ireland's Constitutional, EU and international law obligations in relation to the right of access to justice. Further, it will not speed up permitting of infrastructure, as it fails to tackle the actual pinch points and delays, such as historic

[5] E.g. see the pre-2023 figures cited in this report, drawn from An Bord Pleanála and OPR annual reporting and the Courts Service: EJNI & CLM (2022) Planning and Development Bill 2022: A solution in search of a problem https://communitylawandmediation.ie/change/planning-and-development-bill-2022-a-solution-in-search-of-a-problem/

[6] Kelly, Olivia, (24th June 2024), 'An Bord Pleanála decision rates decline sharply in 2023', Irish Times, available at https://www.irishtimes.com/ireland/housing-planning/2024/06/24/an-bord-pleanala-decision-rates-decline-sharply-in-2023/; See also Clifford, M. (23rd January 2025), 'Nothing to see here? The troubling conclusion of the An Bord Pleanála scandal', Irish Examiner, available at: https://www.irishexaminer.com/opinion/commentanalysis/arid-41562763.html.

under-resourcing, or the actual causes of judicial review such as poor quality first instance decision making.[7]

The Consultation approach report makes it clear that the actual cost of litigation in Ireland dwarfs the scale fees being offered by the Government in this proposal. This clearly means that the work done by applicant legal teams is expected to either go unpaid, or to be paid for by the applicant out of their own pocket. The first scenario will result in talented legal professionals leaving an area of work that will be untenable to practice in. The second scenario represents a regression of the current situation regarding access to justice where the applicant can recover all costs incurred in a successful judicial review, and covers own costs in an unsuccessful judicial review.

This will undoubtedly have chilling effect on access to justice.

Further this consultation proposes radically altering the mechanism by which legal costs in environmental matters are dealt with. This has societal implications and human rights implications for the right of access to justice and the protection of the environment. No human rights or any impact assessment of this regulatory approach has been even attempted to be made, and the result is a proposal that simply ignores the potential for human rights harms from this approach.

Some problems arising with the approach of the consultation are set out below:

1. Consultation framing –
    a. There is no evidence base for the level of costs chosen, and a massive dichotomy between the costs listed in the sources and the costs actually cited, leaving a large gap in costs provision in the scheme that will have to be supplemented by the applicant (usually NGOs or Members of the public). This does not accord with NPE (not prohibitively expensive) principles of Article 9(4) of the Aarhus Convention, or the concept of fair and equitable access to justice under the ECHR, EU Charter of Fundamental Rights and other instruments.
    b. The introduction of scale costs is framed as speeding up infrastructure permitting by lowering the level of judicial reviews. The implicit assumption is that access to justice is going to be less affordable under the new arrangements. This is an unacceptable restriction on the fundamental right of access to justice and breaches a number of EU and international laws as outlined below.

[7] Office of the Planning Regulator, (2022) Report on Phase 1 of a Review by the Ofice of the Planning Regulator of certain Systems and Procedures used by An Bord Pleanála pursuant to section 31AS of the Planning and Development Act 2000, as amended, available at https://www.opr.ie/wp-content/uploads/2022/10/OPR-Review-Report-Phase-1-of-ABP-Review-1.pdf; Climate Change Advisory Council (9th May 2023) Letter to Government Re: Planning Policy and Decarbonisation, available at https://www.climatecouncil.ie/media/climatechangeadvisorycouncil/contentassets/documents/news/Letter%20to%20Government%20re%20Planning%20in%20Ireland%20.pdf

2. Impact on fundamental rights– the consultation document clearly shows a gap between actual costs and the level of provision, as discussed above, intended to have a chilling effect on applicant side judicial reviews challenging planning permissions and eventually other environmental licences on environmental ground.
    a. This represents a regression in the level of access to justice available in Ireland. This would breach a number of EU Treaty obligations
    b. This also breaches a number of international law provisions aimed at guaranteeing this right, for example (comprehensive analysis is beyond the scope and timeframe of this consultation):
    c. This breaches the well-established Irish constitutional right of access to justice and right to legal representation.

3. Impact on permitting decisions
    a. There is no evidence that making judicial review inaccessibly expensive will speed up permitting. Excluding the outlier years cited as the basis for this action, which are caused by the "rebound effect" of An Comisiun Pleanála working through the prior backlog, judicial review of permitting in Ireland remains steady and low, with figures putting it between 0.3% - 5% of all permits granted, depending on the year and the method of calculation.[8]
    b. There is a likelihood of greater instances of unrepresented lay litigants resulting from the introduction of scale fees. This is not conducive to efficient administration of justice or protection of fundamental rights.
4. Impact on the environment & society
    a. Preventing or inhibiting challenges of permits on environmental grounds reduces oversight and accountability of the planning system. This will not be a good thing. Ireland's planning system has been beset by corruption and enquiries for over 30 years, with no end in sight. Less accountability will lead to proliferation of problems at a time when more ambition on environment is needed to tackle the triple planetary crisis.
    b. Cross border environmental protection: The diminution of the right of access to justice introduces divergence between the level of rights and practical protections for the environment either side of the border between Ireland and Northern Ireland. This potentially breaches the Good Friday/Belfast 1998 Peace Agreement and undermines protection of the environment on a shared island.

[8] E.g. see the pre-2023 figures cited in this report, drawn from An Bord Pleanála and OPR annual reporting and the Courts Service: EJNI & CLM (2022) Planning and Development Bill 2022: A solution in search of a problem https://communitylawandmediation.ie/change/planning-and-development-bill-2022-a-solution-in-search-of-a-problem/

International Treaties potentially breached by regression in the level of access to justice

Ireland and the EU are party to a number of international agreements that guarantee the right of access to justice, in environmental matters and in general. Pushing responsibility for the costs of access to justice back on the general public with the aim of limiting access to the courts will result in breach of the guarantee of access to justice

c. Aarhus Convention: Article 9(4) of the Convention provides an overarching standard for access to justice under Articles 9(1), (2) and (3) which includes requirements that procedures be fair, equitable and timely and non prohibitively expensive (NPE).
d. The European Convention on Human Rights.
    i. Article 6 guarantees the right of access to justice and fair trial.
    ii. Article 13 guarantees the right to an effective remedy for any person "whose rights and freedoms as set forth in this Convention are violated"[9]. It is well established that environmental harms fall within the "rights and freedoms" of the Convention, particularly in light of Klimaseniorinnen,[10] Cannavucciuolo[11] and Greenpeace Nordic.[12] Any restriction on the right to a remedy where a person's right to private and family life under Article 8, or any other Convention rights, are affected by environmental issues (for example property damage resulting from climate change), or are highly likely to be so affected, is entitled to a remedy. Where barriers are placed in the way of seeking such a remedy, this breaches the ECHR.
    iii. Access to the court must be "practical and effective" and must vindicate the right to access legal advice and representation. Arrangements that on paper give access to legal advisors but in reality restrict the applicant's ability to access legal advice are a violation of Article 6 and 13.[13]
e. The Good Friday/Belfast Agreement: The Agreement requires a "level playing field" of fundamental rights, particularly those rights contained in the ECHR which are explicitly protected by the "Rights, Safeguards and Equality of Opportunity" portion of the Agreement. The diminution of rights would also trigger mechanisms put in place as a result of Brexit to

[9] ECtHR, Airey v. Ireland, No. 6289/73, 9 October 1979, para. 26. https://hudoc.echr.coe.int/eng?i=001-57420
[10] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC] - 53600/20, Judgment 9.4.2024 [GC] https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22002-14304%22]}
[11] Cannavacciuolo and others v. Italy (2025) (Applications nos. 51567/14 and 3 others) https://hudoc.echr.coe.int/eng?i=001-241395
[12] Greenpeace Nordic and Others v. Norway (Application no. 34068/21) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-245561%22]}
[13] ECtHR, Anghel v. Italy, No. 5968/09, 25 June 2013; ECtHR, Bertuzzi v. France, No. 36378/97, 13 February 2003.

protect the 1998 Agreement. These are contained in the Protocol on Ireland/Northern Ireland and Windsor Framework, Article 2 of which provides for domestic legal action by individuals where the level of fundamental rights protection encompassed by the 1998 Agreement fall below that available at Brexit date. The 1998 Agreement nominates environment as an area of particular cross-border importance and the Windsor Framework mechanisms seek to preserve the conditions for cross-border cooperation by maintaining a parity of rights either side of the border. Further, the TCA prohibits environmental and social regressions, provisions which would be breached by restricting access to justice through imposition of unfair cost burdens.[14]

f. The EU Charter of Fundamental Rights:
    i. Article 37 – commits to a high level of environmental protection.
    ii. Article 47 – the right to an effective remedy. This requires practical and effective access to justice. The Charter (Article 52) confirms this right is analogous to the right set articulated by the ECtHR under Article 6 of the ECHR.
g. The Paris Agreement: Infrastructure has climate emissions implications, and the Paris Agreement contains non-regression and public participation provisions. The agreement has formed the basis of litigation on fundamental rights taken by the public, including their associations, organisations and groups.[15]
h. Some other instruments like the Universal Declaration of Rights, the International Covenant on Civil and Political Rights (ICCPR),[16] and the International Covenant of Economic, Social and Cultural Rights (ICESCR)[17] are explicitly recognised in EU law, are ratified by Ireland, and contain expressions of the principles of access to justice and of non-regression in relation to the rights therein.[18] Article 78(1) TFEU recognises the Geneva Convention 1951 and its 1967 Protocol. The CJEU has recognised the Vienna Convention on the Law of Treaties 1969 as part of the EU legal order

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[14] NIHRC (2025) Briefing on the 'The Environment, Human Rights and the Windsor Framework' , an independent research report https://nihrc.org/publication/detail/nihrc-briefing-on-the-environment-human-rights-and-the-windsor-framework-independent-research-report ; see also EJNI (2023) Linking the Irish Environment: Exploring the role of civil society in promoting cross-border environmental cooperation https://ejni.net/publications/linking-the-irish-environment-exploring-the-role-of-civil-society-in-promoting-cross-border-environmental-cooperation/; EJNI (2024) Demystifying the costs of environmental justice on the island of Ireland https://ejni.net/wp-content/uploads/2025/07/EJNI-Costs-Handbook-Dec-2024.pdf

[15] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC] - 53600/20, Judgment 9.4.2024 [GC] https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22002-14304%22]}

[16] United Nations General Assembly. (1966, December 16). International Covenant on Civil and Political Rights, Office of the United Nations High Commissioner for Human Rights. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

[17] United Nations General Assembly. (1966, December 16). International Covenant on Economic, Social and Cultural Rights. Office of the United Nations High Commissioner for Human Rights. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

[18] Article 2(1) IECSR.

via the obligation to respect international law as expressed in the Treaties (e.g. Article 21 TEU).[19] Ireland is a signatory to the Vienna Convention on the Law of Treaties which requires good faith implementation of international agreements ratified by a State Party.

i. The ICCPR in particular mandates equality in access to justice at Article 14(1). In General Comment No. 33[20] the Human Rights Committee emphasised that costs burdens would breach this principle. Ireland has ratified the Optional Protocol[21] to the ICCPR in 2012[22], which requires the State Party to recognise and implement the communications of the Human Rights Committee.

EU Laws potentially breached by these provisions

The EU Treaties as a whole and in light of the case law of the CJEU, constitute a binding legal framework that requires the EU to take immediate, positive and progressive action to address threats to fundamental rights epitomised by the triple planetary crisis. They also require the EU to act in accordance with the established principles of international law, including by performing in good faith the obligations of international agreements it has committed to, and by complying with the established rules and principles of customary international law.[23] To this extent, the EU Treaties strongly draw on and reflect the principles codified in the Vienna Convention on the Law of Treaties 1969 (VCLOT), which have been recognised by the CJEU as relevant to the interpretation of EU law.[24]

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[19] Commission vs Hellenic Republic Case C-203/07 P, ECLI:EU:2008:606 at para 63; Case C-366/10 Air Transport Association of America (ATAA) & ors [2011] ECLI:EU:C:2011:864 [101], . See discussion of CIL in the EU context in Molnár T. The Court of Justice of the EU and CIL Interpretation: Close Encounters of a Third Kind? In: Fortuna M, Gorobets K, Merkouris P, Føllesdal A, Ulfstein G, Westerman P, eds. *Customary International Law and Its Interpretation by International Courts: Theories, Methods and Interactions*. The Rules of Interpretation of Customary International Law. Cambridge University Press; 2024:156-185.

[20] UN Human Rights Committee (2007) "General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial" , https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FGEC%2F4721&Lang=en at para 11: "Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1.[20] In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them."

[21] Optional Protocol to the International Covenant on Civil and Political Rights (1966) https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-international-covenant-civil-and-political

[22]UN (2008), Status of Ratification, Optional Protocol to the ICCPR, https://indicators.ohchr.org/

[23] Customary international law is defined as refers to '*international custom, as evidence of a general practice accepted as law*' in the Art. 38(1)(b) ICJ Statute. Also described in similar terms in the Draft Conclusions on the Identification of Customary International Law, Vol. II, part 2, Yearbook of the ILC 2018, 90.

[24] E.g. see Commission vs Hellenic Republic Case C-203/07 P, ECLI:EU:2008:606 at para 63, available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=71BAD8DB2A4651EC05133B243CA9DB4E?text=&docid=67889&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3367576#:~:text=1%20By%20its%20appeal%2C%20the,judgment%20under%20appeal%27)%2C%20by. Case C-366/10 Air Transport Association of America (ATAA) & ors [2011] ECLI:EU:C:2011:864 [101]; Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Joined Cases C-402/05 P and C-415/05 P, (2008) ECLI:EU:C:2008:461. https://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&doclang=EN See discussion of CIL in the EU context in Molnár T. The Court of Justice of the EU and CIL Interpretation: Close Encounters of a Third Kind? In: Fortuna M, Gorobets K, Merkouris P, Føllesdal A, Ulfstein G, Westerman P, eds. Customary International Law and Its Interpretation by International Courts: Theories, Methods and Interactions. The Rules of Interpretation of Customary International Law. Cambridge University Press; 2024:156-185; and in Tridimas, T., & Konstantinidis, M. (2024). *Customary international law in the case law of the CJEU: In search of consistency*. Matrix Chambers. https://www.matrixlaw.co.uk/wp-content/uploads/2024/02/Customary-international-law-in-the-case-law-of-the-CJEU-In-search-of-consistency.pdf . This relationship is discussed further below.

In the Achmea Case C284/16,[25] the Court of Justice affirmed that EU law is based:

> '*on the fundamental premiss that each Member State shares with all the other Member States and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU*'. According to the Court, '*Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU'*.

Article 191 – 194 TFEU cover the conferral of competency in relation to environment and energy which is shared between the Member States and the EU on the basis of the principles of subsidiarity and proportionality. Article 191(1) TFEU creates a strong obligation to take action on climate change, setting out the objectives of EU environmental policy as:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Article 191(2) commits the EU to a high level of environmental protection, the precautionary principle and the polluter pays principles. The EU Charter of Fundamental Rights, at Article 37, also commits the EU to a high level of environmental protection.

Articles 191-194 TFEU and Article 37 of the EU Charter of Fundamental Rights together require the EU and the Member States to maintain a high level of environmental protection, which is reinforced by the surrounding Treaty framework including Article 11 TEU (environmental integration), the Article 2 TEU values and Article 21. The CJEU has held that, in the case of scientific or evidential uncertainty as to the existence or extent of risks to human health, the precautionary principle requires that protective/proactive measures should be taken.[26]

It is also clear from the case law of the CJEU that international agreements that are entered into by the EU in areas of its competence, or by the EU and its Member States in

[25] Case C-284/16 Slovak Republic v Achmea BV, EU:C:2018:158, para 34 and the case law cited https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62016CJ0284

[26] Judgment of 5 May 1998, in United Kingdom v Commission, C-180/96, EU:C:1998:192, paragraph 99; and judgment of 5 May 1998 in The Queen v Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others, C-157/96, EU:C:1998:191, paragraph 63

areas of shared competence such as the environment, will be binding on the EU institutions and the Member States.[27] In particular the CJEU has made clear that EU secondary legislative measures incompatible with binding international agreements will be invalid. In ATAA,[28] an amendment to the original ETS Directive including aviation within its scope was reviewed in 2008. The ECJ relied on the Kyoto Protocol, the precursor to the Paris Agreement, which was found to form an 'integral part' of EU law, as well as Article 191 and the objective of a high level of environmental protection. The ECJ stated:

> '*50 It should also be pointed out that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union [...].*
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> *51 It follows that the validity of an act of the European Union may be affected by the fact that it is incompatible with such rules of international law. Where such invalidity is pleaded before a national court, the Court of Justice ascertains, as is requested of it by the referring court's first question, whether certain conditions are satisfied in the case before it, in order to determine whether, pursuant to Article 267 TFEU, the validity of the act of European Union law concerned may be assessed in the light of the rules of international law relied upon (see, to this effect, Intertanko and Others, paragraph 43).*'

When taken together, it is clear that the EU Treaties require the EU institutions and Member States to comply with their obligations under the international agreements cited above, and to protect EU and global populations from environmental harm and climate change. This is further reinforced by the interpretation of the obligations of states in recent climate rulings by various international courts and tribunals, as well as domestic courts across the EU27 - which have found the Paris Agreement obligations in relation to mitigation and adaptation, as well as reporting, to be binding on state parties.[29]

Effect of the interaction between EU Treaty provisions and international law

The EU is obliged by the EU Treaties to act in accordance with customary rules of international law, and to be guided by the principles of international law. They are also bound by the provisions of Treaty that they sign up to in accordance with the recognised

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, para 3: R. & V. Haegeman v Belgian State, Case 181/73, (1974). ECLI:EU:C:1974:41, para 3. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61973CJ0181 – ratified international agreements are an 'integral part' of EU law. Repeated in many judgments since including International Air Transport Association (IATA) and European Low Fares Airline Association (ELFAA) v Department for Transport, Case C-344/04, ECLI:EU:C:2006:10, para 41 https://curia.europa.eu/juris/showPdf.jsf?docid=57285&doclang=EN; (2016). *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín*, Case C-243/15, ECLI:EU:C:2016:838, para 45 (the Aarhus Convention is an "integral part" of EU law). https://curia.europa.eu/juris/document/document.jsf?text=&docid=185199&doclang=EN
Case C-284/16 Slovak Republic v Achmea BV, EU:C:2018:158, para 34 and the case law cited, CJEU (2018, February 27). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62016CJ0284

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[28] Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, Case C-366/10, ECLI:EU:C:2011:864. https://curia.europa.eu/juris/document/document.jsf?text=&docid=117193&doclang=EN

principles of the Vienna Convention on the Law of Treaties. The international law principles binding on the EU in the context of environmental protection include:

- The duty to prevent significant harm to the environment.[30]
- The duty of climate mitigation.
- Customary law obligates equal sovereigns to respect one another's rights.[31]
- The duty to prevent transboundary harm.[32]
  This duty is an element of customary international law. It is codified in the Espoo Convention on environmental impact assessment in a transboundary context.[33] In that context it consists of procedural and notification obligations. The Aarhus Convention also mentions transboundary effects.
- The duty to cooperate internationally for the protection of the environment.[34]
  The ICJ indicated that this was an established element of international law, and it was recognised in the UN Charter Article 1.[35]
- The obligation to act with due diligence and not regress on environment/climate commitments.[36]
  The ICJ at para 135 & 136 of their Advisory Opinion on Climate Change set out the duty of due diligence and indicated that it required states '*to employ all means reasonably available to them, so as to prevent [harm] so far as possible*.' Under this duty, if necessary, states must take precautionary measures which take account of scientific and technological information, relevant rules and international standards, and which vary depending on each State's respective capabilities. Other elements of the required conduct include undertaking risk assessments and notifying and consulting other States, as appropriate. Para 138 identifies that the duty of due diligence is stringent and entails not only the

[30] Articles 191-194 TFEU and Article 37 of the EU Charter of Fundamental Rights require a high level of environmental protection be maintained by the EU and it's MSs. This is related to the precautionary principle. In the case of scientific or evidential uncertainty as to the existence or extent of risks to human health, protective/proactive measures should be taken. See the CJEU case law: Judgment of 5 May 1998, in United Kingdom v Commission, C-180/96, EU:C:1998:192, paragraph 99; and judgment of 5 May 1998 in The Queen v Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others, C-157/96, EU:C:1998:191, paragraph 63.
[31] Corfu Channel (1949) ICJ Rep. 4, 22
[32] E.g. Mayer, B. (2023). Progression requirements applicable to state action on climate change mitigation under Nationally Determined Contributions. Int Environ Agreements 23, 293–309 https://doi-org.ucc.idm.oclc.org/10.1007/s10784-023-09614-w, Citing :Legality of the Threat or Use of Nuclear Weapons in Armed Conflicts (1996) ICJ Rep. 226, §29.
[33] International Court of Justice. (2025, July 23). Advisory Opinion on the Obligations of States in respect of Climate Change (Case No. 187). https://www.icj-cij.org/node/205614
[34] This is also known as the duty to cooperate in good faith, and so is related to the duty to perform treaty obligations in good faith, codified in the VCLOT, Article 26, recognised by the CJEU as an applicable principle under EU law in Commission vs Hellenic Republic Case C-203/07 P, ECLI:EU:2008:606. Article 21, commitment to the international rule of law. Duty of sincere co-operation intra-EU. This is an obligation of customary international law, e.g. see ICJ, Nuclear tests (Australia v. France) (New Zealand v. France). Judgments of December 20, 1974, paras. 46 and 49, respectively; Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion of July 8, 1996, para. 102, Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, para. 145 and Arbitration Tribunal, Lac Lanoux Arbitration (France v. Spain). Decision of November 16, 1957, p. 21. The EU is obliged to respect customary international law as a result of Article 2 and Article 21 see discussion above. This is also an obligation under the Article 1(3) of the United Nations Charter, which is recognised as a fundamental part of the EU legal system, see Article 21 TEU and others discussed above. It is found in Article 7 of the Rio Declaration 1992.
[35] International Court of Justice. (2025, July 23). Advisory Opinion on the Obligations of States in respect of Climate Change (Case No. 187). https://www.icj-cij.org/node/205614 , para 138,
[36] International Court of Justice. (2025, July 23). Advisory Opinion on the Obligations of States in respect of Climate Change (Case No. 187).e.g. para https://www.icj-cij.org/node/205614

adoption of rules but vigilance in the enforcement and exercise of administrative control. [37]

- The duty of performance.[38]
- The duty of progressive realisation of human rights.[39]
- The duty of non-regression of human rights.[40]
- The principle of common but differentiated responsibilities.[41]
- The duty of good faith.[42]
- The duty of equity.[43]
- The duty of intergenerational equity.[44]
- The obligation of systemic integration (requiring interpretation of rule sets in the surrounding context of relevant international law instruments, and not in isolation from them).[45]
- The precautionary principle.[46]

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[37] Ibid., at para 254 where the ICJ stated '*254. It bears recalling in this regard that the standard of due diligence varies depending on the particular circumstances to which the standard applies. These circumstances include the obligation in question, the level of scientific knowledge, the risk of harm and the urgency involved (see paragraphs 134-138 above). In the present instance, the Court considers that the standard of due diligence attaching to the obligation to pursue domestic mitigation measures is stringent on account of the fact that the best available science indicates that the "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (very high confidence)" (IPCC, 2023 Summary for Policymakers, p. 14, Statement B.2) (see paragraphs 138 above and 258-259 below)*.'

[38] Article 26 of the Vienna Convention, related to the duty of good faith discussed at Fn. 143 above.

[39] See discussion below.

[40] See discussion below.

[41] Principle 7, Rio Declaration on Environment and Development 1992, A/CONF.151/26/Vol.I, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf; UNFCCC, Article 3, paragraph 1; Kyoto Protocol, Article 10; Paris Agreement, Article 2, paragraph 2, and Article 4, paragraph 3).

[42] See Commission vs Hellenic Republic Case C-203/07 P, ECLI:EU:2008:606 at para 63, available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=71BAD8DB2A4651EC05133B243CA9DB4E?text=&docid=67889&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3367576#:~:text=1%20By%20its%20appeal%2C%20the,judgment%20under%20appeal%27)%2C%20by. The Second Chamber found that Article 18 (duty not to defeat the spirit and purpose of an agreement signed even if not fully ratified), and Article 31 (general rules of interpretation, including interpretation in good faith and interpretation of international agreements in the context of relevant international law) of the Vienna Convention on the Law of Treaties were applicable in an action the Commission against the Hellenic Republic for non-payment of a financial agreement relating to subletting of representative offices in Abuja, Nigeria jointly entered into by a number of EU MSs with the Commission. Both the CFI and the CJEU Second Chamber recognised the applicability of the non-defeat and good faith, despite the EU not being a party to the Vienna Convention, on the basis of the VCLOT Articles representing an encoding of these principles as rules of customary international law. C-308/06 Intertanko and Others [2008] ECR I-0000, paragraph 52 cited in support.

[43] ICJ 'when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice"' para 152, ICJ (2025). *Advisory Opinion on the obligations of States in respect of climate change (Case No. 187)*. https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf.

[44] Article 3, paragraph 1, of the UNFCCC. The ICJ recognised this principle at para 155 of the recent Advisory Opinion on climate change.

[45] Article 31(3)(c) United Nations. (1969). *Vienna Convention on the Law of Treaties*. United Nations Treaty Series, 1155, 331. https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en; See also McLachlan, C. (2008). The principle of systemic integration and Article 31(3)(c) of the Vienna Convention. *International and Comparative Law Quarterly*, 54(2), 279–320. https://doi.org/10.1093/iclq/lei001; and the InterAmerican Court of Human Rights in the Case of the Ituango Massacres v Colombia, Villa García and ors v Colombia, Preliminary objections, merits, reparations and costs, IACHR Series C No 148, IHRL 1532 (IACHR 2006), 1st July 2006, Inter-American Court of Human Rights [IACtHR]; and the European Court of Human Rights in Demir and Baykara v Turkey, Admissibility, merits and just satisfaction, App No 34503/97, IHRL 3281 (ECHR 2008), [2008] ECHR 1345, (2009) 48 EHRR 54, [2009] IRLR 766, 12th November 2008, Council of Europe; European Court of Human Rights [ECHR]; Grand Chamber [ECHR]. Finally see reference to this principle in the recent ICJ Advisory Opinion on Climate Change: International Court of Justice. (2025, July 23). Advisory Opinion on the Obligations of States in respect of Climate Change (Case No. 187). https://www.icj-cij.org/node/205614.

[46] Article 191(2) TFEU. In Craeynest the CJEU held that this required a strict standard of review. '*In the light of the precautionary principle, the Court has specified a strict standard of review in connection with the appropriate assessment under Article 6(3) of the Habitats Directive. (24) It must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned. (25) Otherwise it is not possible to authorise the plan or project under Article 6(3) and it is conceivable at most to grant an authorisation for imperative*

- The polluter pays principle.[47]

The potential for human rights to be invoked in the face of environmental harms is both common sense and axiomatic in legal doctrine. This was once disputed in certain quarters,[48] but the extraordinary series of rulings of courts and international tribunals in recent years have firmly established the grounds for the protection of human rights if infringed by environmental harm.[49]

Rule of non-regression/retrogression in customary international law

The Committee of the International Covenant on Economic and Social Rights (ICESCR)[50] recognises non-regression in its General Comment No.3 to Article 2(1) in 1981[51] (and in many declarations and documents subsequent to it, some of which are set out below) as well as its character as a necessary corollary to progressive realisation obligations.[52] This twin nature of progressive realisation/non-regression has also been recognised in other international law sources.[53] Progressive realisation is expressly recognised as applicable to fundamental rights by the text of Article 2(1) of the ICESCR:

> '*Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant*

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reasons of overriding public interest pursuant to Article 6(4).' Craeynest and Others v Brussels Hoofdstedelijk Gewest and Others, Case C-723/17, ECLI:EU:C:2019:533. https://curia.europa.eu/juris/document/document.jsf?text=&docid=211190&doclang=EN

[47] Article 191(2) TFEU

[48] See discussion on this debate in ICJ Advisory Opinion on Climate Change 23 July 2025 at para 143 – 145. https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf; and covered by Alan Boyle in Boyle, A., (2012)Human Rights and the Environment: Where Next?, *European Journal of International Law*, Volume 23, Issue 3, Pages 613–642, https://doi.org/10.1093/ejil/chs054

[49] E.g. for example see Urgenda v Netherlands, ECLI:NL:RBDHA:2015:7145 (District Court of the Hague, 24 June 2015), ILDC 2456 (2015) (Urgenda I). Urgenda v Netherlands, ECLI:NL:GHDHA:2018:2591 (Court of Appeal of the Hague, 9 October 2018), English translation in (2020) 67 NILR 342 (Urgenda II); Urgenda v Netherlands, ECLI:NL:HR:2019:2007 (Supreme Court, 20 December 2019), English translation in (2020) 59 ILM 811 (Urgenda III). see: The recent Advisory Opinion of the ICJ on the Obligations of States in relation to Climate Change, 23 July 2025, para 224 & 242, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf; IACtHR Advisory Opinion on Climate Change, 25 May 2025, para 336, https://www.corteidh.or.cr/docs/opiniones/seriea_32_en.pdf; ITLOS Advisory Opinion on Climate Change, 21 May 2024, para 250, 441 (3)(b), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf; ECtHR in 'KlimaSeniorinnen', 9 April 2024, para 436, https://hudoc.echr.coe.int/eng#_ftnref41

[50] United Nations. (1966). International Covenant on Economic, Social and Cultural Rights. Adopted by General Assembly resolution 2200A (XXI) on 16 December 1966. United Nations Treaty Series, vol. 993, p. 3. Entered into force 3 January 1976. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

[51] Paras 2 & 13, United Nations Human Rights Committee. (2004). General comment no. 31 (80): The nature of the general legal obligation imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13). Adopted at the 2187th meeting, 80th session. https://digitallibrary.un.org/record/533996

[52] General Comment No. 3, United Nations Human Rights Committee. (2004) General comment no. 31 (80): The nature of the general legal obligation imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13). Adopted at the 2187th meeting, 80th session. https://digitallibrary.un.org/record/533996 now replaced by General Comment 31. United Nations Human Rights Committee. (2004). *General comment no. 31 (80): The nature of the general legal obligation imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13). Adopted at the 2187th meeting, 80th session. https://digitallibrary.un.org/record/533996; See also Audrey Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 Human Rights Quarterly 23, 38 DOI:10.1353/hrq.1996.0003, available at https://www.researchgate.net/publication/236719653_A_Violations_Approach_for_Monitoring_the_International_Covenant_on_Economic_Social_and_Cultural_Rights; and O'Connell, R., Nolan, A., Harvey, C., Dutschke, M., & Rooney, E. (2016). Applying an international human rights framework to state budget allocations: Rights and resources. (1st Edition ed.) (Routledge Research in Human Rights Law).Routledge. https://doi.org/10.4324/9780203797839 at page 70.

[53] E.g. see United Nations High Commissioner for Human Rights. (2007). Report of the United Nations High Commissioner for Human Rights: Social and human rights questions: human rights (E/2007/82). United Nations Economic and Social Council. https://docs.un.org/E/2007/82.

by all appropriate means, including particularly the adoption of legislative measures.'

Further, Article 5 of the ICESCR prohibits destruction of rights established, and restriction or derogation from human rights.

The twin concepts of progressive realisation and non-regression ultimately synthesise a number of accepted rules of conduct of States in international law. Non-regression and progressive realisation are practical expressions of the conduct required by States to fulfil the principles of good faith engagement and performance (pacta sunt servanda, Article 26 VCLOT)[54] and systemic integration (requiring interpretation of rules to consider the surrounding context of relevant international law instruments, rather than isolating them).[55] Parties cannot plead sovereignty or features of their domestic legal system to justify non-compliance with a Treaty obligation (Article 27 VCLOT). Parties also have an obligation not to act in a manner that would frustrate the implementation of the Treaty or defeat its purpose. A non-defeat obligation is expressed in Article 18 of the VCLOT and applies not just to ratified Treaties, but also (rather unusual for the VCLOT) to agreements signed and awaiting ratification. This is relevant to interpretation of the EU's obligations under the European Convention on Human Rights, which the EU has signed but not ratified. Article 18 of the VCLOT in relation to agreements entered into but not ratified was successfully argued by the EU Commission against Greece in Commission vs Hellenic Republic Case C-203/07P.[56]

Inhibiting access to justice potentially gives rise to a lowering of the overall protection for fundamental rights in general as well as the level of protection of the fundamental right of access to the Court. Doing so without properly scoping the human rights and environmental impacts of such measures breaches the duty of due diligence and good faith. This is highly problematic and would place Ireland in breach of international law.

Conclusion

The approach of scale costs suggested by the consultation report is at odds with the data presented in that report and will result in difficulty for applicants accessing lawyers and prohibitively expensive legal fees for applicants. This would represent a serious inhibition

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[54] Article 26, United Nations. (1969). *Vienna Convention on the Law of Treaties*. United Nations Treaty Series, 1155, 331. https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en

[55] Article 31(3)(c) United Nations. (1969). *Vienna Convention on the Law of Treaties*. United Nations Treaty Series, 1155, 331. https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en; See also McLachlan, C. (2008). The principle of systemic integration and Article 31(3)(c) of the Vienna Convention. *International and Comparative Law Quarterly*, 54(2), 279–320. https://doi.org/10.1093/iclq/lei001; and the InterAmerican Court of Human Rights in the Case of the Ituango Massacres v Colombia, Villa García and ors v Colombia, Preliminary objections, merits, reparations and costs, IACHR Series C No 148, IHRL 1532 (IACHR 2006), 1st July 2006, Inter-American Court of Human Rights [IACtHR]; and the European Court of Human Rights in Demir and Baykara v Turkey, Admissibility, merits and just satisfaction, App No 34503/97, IHRL 3281 (ECHR 2008), [2008] ECHR 1345, (2009) 48 EHRR 54, [2009] IRLR 766, 12th November 2008, Council of Europe; European Court of Human Rights [ECHR]; Grand Chamber [ECHR]. Finally see reference to this principle in the recent ICJ Advisory Opinion on Climate Change: International Court of Justice. (2025, July 23). Advisory Opinion on the Obligations of States in respect of Climate Change (Case No. 187). https://www.icj-cij.org/node/205614.

[56] See Commission vs Hellenic Republic Case C-203/07 P, ECLI:EU:2008:606 at para 63, available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=71BAD8DB2A4651EC05133B243CA9DB4E?text=&docid=67889&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3367576#:~:text=1%20By%20its%20appeal%2C%20the,judgment%20under%20appeal%27)%2C%20by

on access to justice in Ireland, weakening environmental oversight and accountability at a time when it has never been more important. It will damage cross-border environmental protection. It will not result in speeding up of infrastructure permitting, as the largest delays reside in the dysfunctional planning system. Investing in the planning system, training and supporting first instance decision makers, and properly resourcing the courts to process cases more quickly could result in enhanced fundamental rights and environmental oversight while speeding up permitting. This should be considered as an alternative approach.