



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 12 September 2013¹

Case C-530/11

European Commission

v

United Kingdom of Great Britain and Northern Ireland

(Aarhus Convention — Directive 2003/35/EC — Access to justice — Concept of ‘prohibitively expensive’ judicial procedures — Transposition)

I – Introduction

1. It is well known that in the United Kingdom court proceedings are not cheap. Legal representation in particular can result in considerable cost. As an unsuccessful party is generally ordered to bear the costs of the successful party, litigation involves considerable risks in terms of costs.

2. On the other hand, the Aarhus Convention² and the provisions in Directive 2003/35³ implementing it in relation to certain procedures require that judicial procedures in environmental law matters not be prohibitively expensive. In *Edwards*,⁴ the Court examined the meaning of that requirement in general terms against the background of English law. In the present case, it must be determined specifically whether the United Kingdom has correctly transposed the relevant provisions.

3. At issue in this connection, first, is the discretion of the courts to cap in certain cases the costs of the defendant for which an applicant may be liable in the event that he is unsuccessful. Further, it must be clarified whether it is compatible with European Union law that on exercising that discretion courts at the same time cap the costs of the applicant for which the defendant – in general a public body – may be liable in the event that it is unsuccessful. Finally, it is contested whether, in the proceedings concerned, the availability of interim relief may be made conditional on an undertaking by the applicant for such relief to pay damages for the losses resulting from the relief granted in the event that he is unsuccessful in the substantive action. As a preliminary matter, the extent to which directives may be transposed by case-law also requires examination.

¹ — Original language: German.

² — Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 4).

³ — Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

⁴ — Case C-260/11 [2013] ECR.

II – Legal framework

A – *International law*

4. The relevant rules on the legal costs of environmental proceedings are contained in the Aarhus Convention, which was signed by the then European Community on 25 June 1998 in Aarhus (Denmark).⁵

5. Article 6 of the Convention provides for public participation in relation to the approval of certain activities.

6. Article 9 of the Convention regulates access to justice in environmental matters. The present case concerns procedures referred to by Article 9(2):

‘Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

...

have access to a review procedure before a court of law and/or another independent and impartial body established by law to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 ...’

7. Article 9(4) refers, *inter alia*, to costs:

‘In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. ...’

B – *Law of the European Union*

8. In implementing the provisions on access to justice laid down in Article 9(2) of the Aarhus Convention, Article 3(7) of Directive 2003/35 inserted Article 10a into the Environmental Impact Assessment Directive (EIA Directive)⁶ and Article 4(4) of Directive 2003/35 inserted Article 15a into the Integrated Pollution and Prevention Control Directive (IPPC Directive).⁷ Paragraph 5 of each of those inserted provisions lays down, in identical words, rules on costs:

‘Any such procedure shall be fair, equitable, timely and not prohibitively expensive.’

5 — Approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

6 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), codified by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

7 — Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8) and replaced by Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

C – Law of the United Kingdom

9. Under rule 44.3.(2) of the Civil Procedure Rules for England and Wales, in general the unsuccessful party will be ordered to pay the costs of the successful party. However, having regard to the circumstances of the case, the court may make a different order. In particular, rule 44.3.(6) allows courts to make orders capping a party's liability for the costs of another party. A similar legal position applies in Scotland and Northern Ireland.

10. Rule 25 of the Civil Procedure Rules concerns interim remedies. That rule is supplemented by a practice direction which provides in paragraph 5.1 that any order for an injunction must contain an undertaking given by the applicant for the injunction to the court to pay any damages which the opposing party sustains which the court considers the applicant should pay. In addition, pursuant to paragraph 5.1A, the court should consider whether to require such an undertaking also in relation to losses which third parties may suffer as a consequence of the order. However, courts have the discretion not to require those undertakings. Whilst the rules in Northern Ireland are similar, Scots law makes no provision for such an undertaking to pay damages.

11. Following the Court's judgment in *Edwards*,⁸ the United Kingdom supplemented these provisions to take account of the Aarhus Convention and Articles 3(7) and 4(4) of Directive 2003/35; however, *ratione temporis*, those amendments are not the subject of the present proceedings.

III – Pre-litigation procedure and forms of order sought

12. As a result of a complaint, the Commission called upon the United Kingdom on 23 October 2007 to submit observations concerning whether it had fulfilled its obligations under Articles 3(7) and 4(4) of Directive 2003/35.

13. Notwithstanding the replies of the United Kingdom of 20 December 2007 and 5 September 2008, the Commission addressed a reasoned opinion to that Member State on 22 March 2010 in which it contended that it had failed to transpose those provisions correctly and, moreover, that it did not apply them correctly. The Commission called upon the United Kingdom to take the necessary measures to comply with the opinion within a period of two months, that is to say, by 22 May 2010.

14. Notwithstanding the United Kingdom's reply of 19 July 2010 the Commission maintained its assessment and on 18 October 2011 it brought the present action. It claims that the Court should:

- (1) declare that, by failing to transpose fully and apply correctly Articles 3(7) and 4(4) of Directive 2003/35, the United Kingdom has failed to fulfil its obligations under that directive;
- (2) order the United Kingdom to pay the costs of the proceedings.

15. The United Kingdom contends that the Court should:

- (1) declare that the United Kingdom has not failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35;
- (2) order the Commission to pay the costs.

16. By order of 4 May 2012, the President of the Court granted the Kingdom of Denmark and Ireland leave to intervene in support of the form of order sought by the United Kingdom.

⁸ — Cited in footnote 4.

17. The parties made written submissions and, with the exception of Denmark, took part in the hearing on 11 July 2013.

IV – Legal appraisal

18. Although the Commission bases its action on Articles 3(7) and 4(4) of Directive 2003/35, in the discussion of the pleas it appears to me more expedient to refer to the provisions thereby introduced, that is to say, Article 10a of the EIA Directive and Article 15a of the IPPC Directive. Pursuant to the identically worded fifth paragraph of each of those provisions, procedures for the review of approvals on the basis of each of those directives are not to be prohibitively expensive. This implements Article 9(4) of the Aarhus Convention in relation to the review procedures specified in Article 9(2) of the Convention.

19. By its action, the Commission contests both the transposition of that rule in all three of the United Kingdom's jurisdictions, that is to say, England and Wales (including Gibraltar), Scotland and Northern Ireland (in this regard see section B below), and its application (in this regard see section C below). First, however, I should like to set out aspects of the recent ruling in *Edwards*⁹ of fundamental relevance to the present case and, in the light thereof, consider certain arguments raised by the parties which although concerned with litigation costs do not assist in clarifying the individual pleas advanced by the Commission (in this regard see section A below).

A – Preliminary observations

20. The fifth paragraph of Article 10a of the EIA Directive, the fifth paragraph of Article 15a of the IPPC Directive and Article 9(4) of the Aarhus Convention establish an obligation referred to here as an obligation of costs protection. Its characteristics were specified in *Edwards*.

21. Pursuant to that judgment, the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. In that connection, account must be taken both of the interest of the person wishing to defend his rights and the public interest in the protection of the environment.¹⁰

22. In addition, the Court held that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings. The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned.¹¹ These include, in principle, the costs of legal representation.

23. Finally, the Court clarified in *Edwards* that, contrary to the argument advanced by Denmark, the requirement that judicial proceedings should not be prohibitively expensive cannot be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal.¹² However, that finding cannot be interpreted as meaning that in assessing the permissible cost burden in appeal proceedings the costs already incurred in courts below may be ignored. Instead, each court must ensure that the costs at all levels of jurisdiction taken together are not prohibitive or excessive.

9 — Cited in footnote 4.

10 — *Edwards*, cited in footnote 4, paragraph 35.

11 — *Edwards*, cited in footnote 4, paragraphs 27 and 28.

12 — *Edwards*, cited in footnote 4, paragraph 45.

24. Denmark is correct to point out, however, that in certain review proceedings professional representation may be unnecessary. This is conceivable, for example, if the competent body concerned has extensive responsibility for the procedure and, for that reason, investigates of its own motion all the relevant arguments and circumstances. However, the possibility that representation may be unnecessary must be assessed in the context of each specific case having regard to all the legal and practical circumstances and custom and practice.

25. In the present proceedings, it is not disputed that legal representation is necessary before the courts of the United Kingdom and that this can result in considerable costs. The Member State explains this by referring to the particular characteristics of the adversarial system under common law which imposes particularly high demands on the legal representatives of the parties.

26. As is the case before the European Union judicature, in the United Kingdom the unsuccessful party is in general ordered to pay the costs of the legal representation. Consequently, if they are unsuccessful, the applicants specified in Article 10a of the EIA Directive and Article 15a of the IPPC Directive must, as a rule, cover both their own costs and those of the opposing party. If the action is successful, however, their costs will be borne by the opposing party.

27. Although the United Kingdom appears to regard the costs arising in this system as justified, the risk in terms of costs may dissuade persons from bringing or pursuing an action specified in Article 10a of the EIA Directive and Article 15a of the IPPC Directive. Those proceedings may therefore be excessively or prohibitively expensive for the purpose of those provisions. Consequently, adequate costs protection must be ensured.

28. The United Kingdom identifies various mechanisms to cover, or at least limit, the risks in terms of litigation costs. The Commission does not criticise those mechanisms as such but considers them, in my view correctly, inadequate for the purposes of transposing Article 10a of the EIA Directive and Article 15a of the IPPC Directive.

29. For example, the United Kingdom has a legal aid scheme but does not deny the fact that associations cannot apply for legal aid¹³ and that legal aid is means tested. As associations and individuals with the capacity to pay¹⁴ must also be protected against prohibitive costs, this instrument is inadequate to ensure costs protection.

30. Further, the United Kingdom stresses that the risk involved in *applying* for judicial review is in costs terms minimal. Such applications are permitted to proceed only if a summary permission hearing determines that there is merit in the application. According to the United Kingdom, only limited costs may be awarded in conjunction with that procedure.

31. Admittedly, this permission procedure limits the risks in terms of costs in cases with very little chance of success, as they are dismissed at an early stage before generating further costs. However, the Aarhus Convention and its implementation in the European Union are not focused primarily on actions with particularly slim chances of success.¹⁵ The public interest in the protection of the environment is considerably better served if actions with some merit but whose success is uncertain are furthered. In general, those cases are based on a legitimate interest in the protection of the environment but as their outcome is uncertain the risks in terms of cost are particularly substantial.

13 — On the possibility of more extensive rights under the third paragraph of Article 47 of the Charter of Fundamental Rights, see my Opinion in *Edwards*, cited above in footnote 4, point 38, and Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 60 and 61.

14 — *Edwards*, cited in footnote 4, paragraph 40.

15 — Cf. *Edwards*, cited in footnote 4, paragraph 42, and my Opinion in that case, point 47.

32. Finally, the United Kingdom also mentions the possibility of taking out insurance against litigation costs known as ‘after the event insurance’. However, it is uncontested that that device too does not cover all cases. It is clear that precisely in cases where the outcome is uncertain, that is to say, where considerable risks in terms of costs are at stake, insurance undertakings will demand premiums that may also be prohibitive.

33. Although the Commission emphasises the need for costs to be predictable, it is unnecessary in the present case to determine the extent to which costs must actually be known at an early stage of the proceedings. United Kingdom law has a mechanism, the protective costs order, by which the maximum risk in terms of costs may be determined at an early stage.

34. Although the Commission criticises certain consequences of, and criteria for, the application of that instrument, it does not consider the instrument as such inadequate. To the extent that it criticises the uncertainty in relation to the amount of costs involved, its complaint, in fact, is that United Kingdom law does not provide in a sufficiently clear and precise manner for costs protection. I will analyse this problem below.

B – *Transposition*

35. The Commission criticises the absence of legal provisions transposing the concept of costs protection into United Kingdom law. In that connection, it relies on a judgment concerning the legal position in Ireland. The courts in Ireland had a discretion not to order an unsuccessful party to pay the costs and, in addition, to order expenditure incurred by the unsuccessful party to be borne by the other party. As that was mere judicial practice, the Court did not recognise it as transposition.¹⁶

36. The United Kingdom counters that argument with national case-law. It relies on the fact that, according to the wording of the third paragraph of Article 288 TFEU, a directive, while being binding, as to the result to be achieved, upon each Member State to which it is addressed, leaves to the national authorities the choice of form and methods.¹⁷

37. Indeed, the Court has held that the transposition of European Union legislation into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision. A general legal context may be sufficient for the purpose if it actually ensures the full application of the provisions of European Union law in a sufficiently clear and precise manner.¹⁸

38. It is true that it has not yet been determined whether binding judicial precedents, in other words, the case-law that characterises the common law system in the United Kingdom, are accordingly sufficient to transpose a directive. However, the Court has already acknowledged that, also when assessing the transposition of a directive, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts.¹⁹

16 — Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, paragraphs 93 and 94.

17 — Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, paragraph 157, and Case C-535/07 *Commission v Austria* [2010] ECR I-9483, paragraph 60.

18 — Case 252/85 *Commission v France* [1988] ECR 2243, paragraph 5; Case C-507/04 *Commission v Austria* [2007] ECR I-5939, paragraph 89; and judgment of 27 October 2011 in Case C-311/10 *Commission v Poland*, paragraph 40.

19 — Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, paragraph 39; Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, paragraph 36; Case C-129/00 *Commission v Italy* [2003] ECR I-14637, paragraph 30; and *Commission v Ireland*, cited in footnote 17, paragraph 166.

39. Nevertheless, it cannot suffice for the transposition of a directive that the courts have the power to comply with the directive's requirements and possibly also do so: it is settled case-law that a discretion which may be exercised in accordance with a directive is not sufficient to implement provisions of a directive since such a practice can be changed at any time.²⁰ That is precisely what was found in the case cited by the Commission. Although the Irish courts had a discretion allowing costs protection, they were not obliged to ensure this. Nor did criteria exist specifying the circumstances in which costs protection was to be afforded. Moreover, relevant judicial precedents establishing an obligation of that kind were not adduced in argument in that case.

40. Therefore, what matters is whether the relevant national case-law actually ensures with sufficient clarity and precision and in a binding manner the full application of the costs protection required.²¹ If those conditions are satisfied, precedent could ensure transposition.²²

41. In the present case, the parties refer to various judgments of the United Kingdom courts. Although the Commission criticises these as a failure to apply the provisions adequately in practice, in light of the above considerations they are also crucial for the transposition of the provisions.

42. In this connection, I shall examine, first, the fact that the courts have a discretion in the issue of a protective costs order (on this point, see section 1 below), then the possible capping of the costs that an applicant may recover if he is successful (on this point, see section 2 below) and, finally, interim relief (on this point, see section 3 below).

1. The court's discretion in the issue of a protective costs order

43. The concept of a protective costs order was developed by the Court of Appeal of England and Wales in the case of *Corner House*.²³ The courts in Scotland and Northern Ireland have adopted the practice. In exceptional circumstances, an order of that kind may establish a cap on the costs that the applicant may be ordered to pay in respect of the proceedings before the relevant court in the event that he is unsuccessful. An order of that kind may be made at any stage of the proceedings provided the court is satisfied that:

- the issues raised are of general public importance;
- the public interest requires that those issues should be resolved;
- the applicant has no private interest in the outcome of the case;
- having regard to the financial resources of the applicant and respondents and to the amount of costs that are likely to be involved it is fair and just to make the order;
- if the order is not made the applicant will probably discontinue the proceedings.

44. A consequence of this restrictive approach is that the decision itself whether to cap costs involves considerable time and effort and entails additional costs without furthering the resolution of environmental law issues.

20 — My Opinion in *Commission v Ireland*, cited in footnote 16, point 99 and the case-law referred to.

21 — Cf. Case C-456/08 *Commission v Ireland* [2010] ECR I-859, paragraph 65, and my Opinion in that case, point 60 et seq.

22 — Cf. the Opinion of Advocate General Mengozzi in Case C-127/05 *Commission v United Kingdom* [2007] ECR I-4619, point 130 et seq.

23 — *R (on the application of Corner House Research) v Secretary of State for Trade & Industry* [2005] 1 WLR 2600, paragraphs 72 and 74.

45. This instrument allows the relevant courts, first, a discretion to determine whether the various conditions for the issue of a protective costs order are satisfied and, if so, a discretion concerning the degree of protection to be afforded in the specific case. The latter discretion relates both to the level of costs permissible and the question whether, and if so, to what extent, the risk in terms of costs facing the opposing party should also be limited.

46. Neither of these discretions as such may be criticised. Given the considerable differences between the Member States in their rules on access to justice, there remains a broad discretion with a view to ensuring costs protection.²⁴ In addition, the Court itself has recognised the need for discretion in the area of costs protection.²⁵ However, national courts must be placed under an unambiguous obligation to exercise their discretion with the objective of ensuring adequate costs protection in the proceedings at issue.²⁶

47. The discretion afforded to the courts in the United Kingdom in issuing a protective costs order does not meet those requirements. Its exercise is intended to determine whether *by way of exception*²⁷ in an individual case it would be inequitable or unfair to adhere to the general principle that no protection exists in relation to costs. A fundamental obligation to observe the objective of ensuring costs protection in the proceedings concerned is, on the other hand, not apparent.

48. The cases subsequent to *Corner House* to which reference has been made do not alter that assessment. Instead, it is stated in the judgment in *Morgan* delivered in 2009 that the courts' existing discretion as to costs may be incompatible with the requirement to ensure costs protection.²⁸

49. Also the 2010 ruling in *Garner*, not delivered until after the expiry of the time-limit laid down in the reasoned opinion, does not suggest that the discretion now focuses on ensuring costs protection.²⁹

50. In addition, the criteria applied in the United Kingdom are incompatible with the findings of the Court in *Edwards*.

51. Although the United Kingdom argues that the criteria for granting the necessary costs protection are not the subject-matter of the present case, I am not convinced by that argument. Rather, the criteria for the grant of costs protection go to the very heart of the Commission's allegation that the requirement to ensure costs protection has not been adequately transposed. For that reason, they require examination here.

52. The problems with the criteria applied in the United Kingdom begin with the consideration given to the public and private interest in pursuing the litigation. The Court too requires consideration to be given to those interests,³⁰ but the United Kingdom concedes that prior to the judgment in *Garner* they were not taken into consideration in the manner required.³¹ The United Kingdom Government thus accepts that prior to that judgment the public interest in enforcing environmental law in the procedures specified in Article 10a of the EIA Directive and Article 15a of the IPPC Directive was not accorded sufficient weight and recognition. As that judgment was not delivered until after the expiry of the time-limit laid down in the reasoned opinion, the United Kingdom did not remedy the infringement within the period prescribed.

24 — *Edwards*, cited in footnote 4, paragraphs 30, 37 and 38, and my Opinion in that case, points 19 et seq. and 45 et seq.

25 — Cf. *Edwards*, cited in footnote 4, in particular paragraph 40, and my Opinion in that case, in particular point 36.

26 — *Edwards*, cited in footnote 4, in particular paragraphs 35 and 40, and my Opinion in that case, in particular point 24.

27 — *Corner House*, cited in footnote 23, paragraph 72.

28 — Judgment of the Court of Appeal in *Morgan and Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, paragraph 47(ii).

29 — Judgment of the Court of Appeal in *R (on the application of Garner) v Elmbridge Borough Council and Others* [2010] EWCA Civ 1006, paragraph 50.

30 — *Edwards*, cited in footnote 4, paragraphs 35 and 39.

31 — Defence, paragraph 70, which makes reference to *Garner*, cited in footnote 29, paragraph 39. See also paragraph 44 of the defence.

53. A further incompatibility with the requirement for costs protection is the fact that the very existence of a private interest in the outcome of the case precludes the issue of protective costs order. Although the Court also requires consideration of an interest of that kind, costs protection is not to be precluded by it. Instead, an individual is to be protected also when enforcing his own rights conferred by European Union law.³²

54. Although the judgment in *Morgan* – seemingly in an *obiter dictum* – indicates that this criterion should be applied flexibly,³³ it is clear that, in this respect, at least considerable uncertainty prevails.

55. The requirement of costs protection is also infringed if an applicant's capacity to pay, in other words, the lack of proof of inadequate financial resources, operates to preclude protection. Instead, the correct position is that litigation costs may not exceed the personal financial resources of the person concerned and that, in objective terms, that is to say, regardless of the person's own financial capacity, they must not be unreasonable.³⁴ In other words, even applicants with the capacity to pay may not be exposed to the risk of excessive or prohibitive costs and, in the case of applicants with limited financial means, objectively reasonable risks in terms of costs must in certain circumstances be reduced further.

56. Finally, the Court has rejected the ruling out of costs protection on the ground that an applicant will probably not be deterred by the risk in terms of costs.³⁵ However, according to *Corner House*, such a risk that he will be deterred is a further condition for the issue of a protective costs order.

57. Consequently, the United Kingdom has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that the courts' discretion to grant costs protection is not tied to the objective of costs protection and the criteria to be applied in that connection are incompatible with those provisions.

2. Capping of both parties' liability for costs

58. The Commission also criticises the fact that protective costs orders often cap the risk in terms of costs also for the opposing party. This problem concerns all three jurisdictions in the United Kingdom.

Admissibility

59. The United Kingdom considers this complaint inadmissible as it was not raised in the pre-litigation procedure. In fact, it was only in the reasoned opinion that the Commission first expressly criticised the practice whereby both parties' liability for costs may be capped.³⁶

60. The United Kingdom's objection is based on the argument that the letter of formal notice sent by the Commission to the Member State concerned and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to be able to submit its observations constitutes an

32 — *Edwards*, cited in footnote 4, paragraph 33.

33 — Judgment cited in footnote 28, paragraph 35 et seq.

34 — *Edwards*, cited in footnote 4, paragraph 40.

35 — *Edwards*, cited in footnote 4, paragraph 43.

36 — P. 12 (p. 111 of the annexes to the Commission's application).

essential guarantee adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure.³⁷

61. However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered.³⁸

62. In particular, the letter of formal notice cannot be subject to requirements of precision as strict as those applied to the reasoned opinion, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice.³⁹

63. That is what happened in the present case. The Commission is correct in arguing that the costs of a party's own representation are also included within the litigation costs which Member States are under an obligation to limit.⁴⁰ Consequently, the complaint that the risk in relation to those costs is not sufficiently limited was included in the allegation that in the United Kingdom the risk in terms of litigation costs as a whole is not sufficiently limited.

64. This view is confirmed by the United Kingdom's reply to the letter of formal notice, that is to say, the first letter sent by that Member State in the pre-litigation procedure. That letter mentions the possibility for a party of concluding a conditional fee agreement with his lawyer, under which fees are paid only if an action is successful, as a means of limiting the risk in terms of costs.⁴¹ Thus, the Commission's submission set out in the reasoned opinion that protective costs orders undermine the effectiveness of such agreements as they cap the costs that the applicant can recover in the event of being successful is simply a counterargument to refute that position. As a result, this point became included within the subject-matter of the case.

65. Thus, this submission is admissible and requires examination.

Substance

66. The Commission criticises the fact that in certain cases protective costs orders may be structured on a reciprocal basis such that, in addition to capping the applicant's risk in relation to the costs of the opposing party in the event that he is unsuccessful, they also cap the risk for the opposing party, in the event that the action is successful, of an order to pay the applicant's costs.

67. A *one-way* protective costs order which benefits simply the applicant, capping his liability for the costs of the opposing party, may contribute significantly to the prevention of excessive or prohibitive litigation costs. However, simply the costs of a party's *own* representation may dissuade the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles.

37 — Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 55; Case C-358/01 *Commission v Spain* [2003] ECR I-13145, paragraph 27; and Case C-186/06 *Commission v Spain* [2007] ECR I-12093, paragraph 15.

38 — *Commission v Germany*, cited in footnote 37, paragraph 56; Case C-358/01 *Commission v Spain*, cited in footnote 37, paragraph 28; and Case C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 24.

39 — *Commission v Germany*, cited in footnote 37, paragraph 54; Case C-358/01 *Commission v Spain*, cited in footnote 37, paragraph 29; and Case C-20/09 *Commission v Portugal* [2011] ECR I-2637, paragraph 20.

40 — *Edwards*, cited in footnote 4, paragraphs 27 and 28.

41 — Reply of 20 December 2007, paragraph 31 (p. 83 of the annexes to the application).

68. Consequently, as regards the costs of a party's own representation, both the United Kingdom and Ireland refer to the possibility that the lawyer agrees to waive his fees. However, only in exceptional cases can a waiver of that kind reduce the risk in terms of costs, as in general lawyers need to earn income. To call for the representation of applicants in the legal procedures specified in Article 10a of the EIA Directive and in Article 15a of the IPPC Directive to be provided, as a rule, free of charge would destroy the economic basis on which lawyers can develop the necessary specialisation in these areas.

69. Conditional fee agreements provide lawyers an opportunity of earning the necessary income in the case of applicants with limited financial resources who are not in receipt of legal aid. In England and Wales and in Scotland, conditional fee agreements are allowed under which the applicant's lawyer is paid a fee only if the action is successful. In both systems, the unsuccessful opposing party must normally bear the costs that would have been payable in the absence of such an agreement. In England and Wales an additional success payment for the applicant's lawyer is also borne by that party, whereas in Scotland such payment would be borne by the applicant. In Northern Ireland conditional fee agreements do not exist. Although such agreements are also not free from criticism, in particular in so far as they involve a premium over standard fees,⁴² according to the United Kingdom's submissions in many of the cases covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive they appear necessary in order to ensure the required protection in terms of costs in that legal system.

70. However, a reciprocal protective costs order caps the costs that an opposing party is required to bear in the event that the action is successful. Where there is such a cap, the applicant will in all probability have to be responsible for part of the costs of his own representation. In the case of conditional fee agreements the success fee that the unsuccessful opposing party would have to bear is capped. Either the applicant's lawyers agree to accept this capped level of fees or, in the event that the applicant's action is successful, he must top-up these fees at his own expense. Such additional costs may also have a dissuasive effect. Consequently, reciprocal protective costs orders have the potential to undermine the objective of costs protection.

71. However, in assessing reciprocal protective costs orders a distinction must though be made between private and public parties.

72. In the case of private parties, in certain circumstances the reciprocal cap on costs may be justified in the name of procedural equality of arms, one of the elements of the fundamental right to a fair hearing,⁴³ a right explicitly mentioned as a procedural principle in Article 9(4) of the Aarhus Convention. One may have doubts as to that equality of arms⁴⁴ if one party has been largely exempted from the risk of having to bear the costs of the opposing party, whereas the other party must always bear most of his own costs and, in the event that he is unsuccessful, must bear the entire costs of the proceedings. It is conceivable even that where the risk in terms of costs is distributed so unevenly this may influence the parties' litigation strategies. A party who is largely exempt from risks in terms of costs could be tempted to widen the subject-matter of the dispute unnecessarily in order to increase the costs of the opposing party and, thus, his willingness to agree to a compromise.

42 — On the possible threat to the freedom of the press as a result of excessive success fees, see the judgment of the European Court of Human Rights in *MGN Limited v. United Kingdom*, no. 39401/04, § 192 et seq.

43 — Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraphs 29 to 31.

44 — Cf., on the exemption of the prosecuting authorities from the liability to pay litigation costs, the judgment of the European Court of Human Rights in *Stankiewicz v. Poland*, no. 46917/99, § 60 et seq., ECHR 2006-VI.

73. However, the Commission is correct to emphasise that the present case only concerns the actions covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive. By their very nature, these are challenges to decisions taken by public bodies, that is so say, development consents given to projects following an environmental impact assessment or permits for certain industrial activities granted under the integrated approach.

74. In actions brought against public bodies, no true equality exists from the outset as those bodies generally have much greater resources at their disposal than the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive. To that extent, therefore, a one-way protective costs order is simply an initial step towards establishing equality of arms.

75. Furthermore, actions of that kind ultimately involve an interest common to both parties, namely, ensuring that the law is upheld. A public body which is unsuccessful in proceedings before a court because its decision under challenge proves to be unlawful does not deserve protection in relation to litigation costs comparable to that afforded to an applicant. It was, of course, the public body's own unlawful act that prompted the action to be brought.

76. Finally, under the Aarhus Convention particular emphasis is placed on the public interest in upholding the law.⁴⁵ That interest prohibits, at least in the proceedings covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive, detriment to an instrument such as the conditional fee agreement which can help an applicant to avoid prohibitive costs for his own representation.

77. Moreover, that objective of the Aarhus Convention serves to refute the argument of the United Kingdom in relation to the limited resources of the relevant authorities. It is admittedly the case that funds spent by the authorities on legal proceedings cannot be used to fulfil their primary tasks. However, the Convention accepts this. That is also appropriate since the judicial enforcement of environmental law or the risk of a legal challenge forces the authorities to exercise particular care in applying the law in this area.

78. This of course does not mean that public bodies should be afforded no costs protection. There is no reason to impose an obligation on those bodies to pay success-related fees of the opposing party's lawyers that considerably exceed the standard fees payable where no conditional fee agreement applies. Thus, in the name of procedural equality of arms, in actions against public bodies too the possibility of making an 'asymmetrical' reciprocal protective costs order that caps the risk in terms of costs for both parties but allows all the same for a reasonable success fee cannot be entirely rejected.

79. However, the order must not provide an incentive to the public body – which is endowed with greater financial resources – to widen unnecessarily the subject-matter of the dispute such as to increase the applicant's own legal costs to the point that they exceed considerably the level at which costs have been capped.⁴⁶ Therefore, what constitutes a reasonable success fee can only be determined in the circumstances of an individual case.

80. Consequently, the United Kingdom has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that in proceedings covered by those provisions the courts may order reciprocal costs protection which prevents the costs of a reasonable success fee for the representation of the persons and associations covered by those provisions from being imposed upon the opposing party if the action is successful.

45 — Cf. my Opinion in *Edwards*, cited in footnote 4, point 40 et seq.

46 — It appears from paragraph 26 of the Commission's reply that a strategy of that kind may have been pursued in *R (on the application of Birch) v Barnsley MBC*.

3. Interim relief

81. Finally, the Commission complains that in England and Wales as well as Gibraltar and in Northern Ireland interim relief is usually granted only if the applicant for relief undertakes to pay any damages resulting from the order.

82. It is not clear from the case-file what this undertaking to pay damages includes. I presume that it does not relate to loss and damage caused by culpable unlawful conduct. No specific undertaking in damages would be necessary in that case, as the general law of tort would apply.

83. Instead, I assume that this undertaking has effect if the claim protected by means of the interim injunction proves in the course of the subsequent proceedings to be unfounded. It would appear that in this case the applicant for relief must compensate for the loss and damage caused by the interim injunction.⁴⁷ Thus, in the kinds of proceedings at issue in the present case, the applicant risks having to pay the costs resulting from project delays.

84. The parties' first point of disagreement is whether this risk in terms of costs even falls within the scope of the costs protection required by the fifth paragraph of Article 10a of the EIA Directive and the fifth paragraph of Article 15a of the IPPC Directive. According to the wording of those provisions, it is simply the judicial procedure that must not be prohibitively expensive. On a strict interpretation, an obligation to compensate for delays resulting from interim relief is not included within the notion of litigation costs.

85. The Court has, however, already held that the guarantee of effectiveness of the right to bring an action provided for in Article 10a of the EIA Directive and Article 15a of the IPPC Directive requires that the members of the public concerned should have the right to apply for interim measures.⁴⁸ Correspondingly, the document 'The Aarhus Convention: An Implementation Guide', published in 2000 by the United Nations Economic Commission for Europe, also includes interlocutory relief ('preliminary injunctive relief') within the judicial decisions⁴⁹ that are specified in Article 9(4) of the Convention as part of review procedures.⁵⁰

86. Moreover, it is to be remembered that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings. The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned.⁵¹ In addition, the Court has held that the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result.⁵²

87. As an application for interim relief also constitutes such a legal remedy and as any damages claims would increase the resulting financial burden, they, too, must be included within the principle of costs protection. Otherwise, persons might be prevented from applying for relief of that kind by reason of the risk that they will have to pay damages.

47 — In German law of civil procedure, Paragraph 945 of the Zivilprozessordnung (Code of Civil Procedure) establishes a right to damages of that kind. However, following the judgment of the Bundesgerichtshof (Federal Court of Justice) of 23 September 1980 (Case VI ZR 165/78, *Neue Juristische Wochenschrift* 1981, p. 349) that right does not apply to loss and damage caused to third party interveners in the procedure under administrative law.

48 — Case C-416/10 *Križan and Others* [2013] ECR, paragraph 109.

49 — The German version of the Convention, which under Article 22 of the Convention is not an authentic text, misleadingly refers in this regard to 'vorläufige[r] Rechtsschutz'. The authentic versions in English and French use the terms 'injunctive relief' and 'redressement par injonction'.

50 — P. 133 of the English version and p. 170 of the French version (both available at <http://www.unece.org/index.php?id=21437>). According to Case C-182/10 *Solvay and Others* [2012] ECR, paragraph 27, the implementation guide can be taken into consideration but is not binding.

51 — *Edwards*, cited in footnote 4, paragraphs 27 and 28.

52 — *Edwards*, cited in footnote 4, paragraph 35.

88. Admittedly, the United Kingdom contends in response to the Commission that, even in the absence of interim relief, projects covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive are generally not advanced further while legal proceedings are pending. Expensive works are often not carried out if there is a chance that the consent will be overturned.

89. This argument mitigates the practical significance of the Commission's criticism but in the cases in which interim relief is necessary does not invalidate it.

90. Furthermore, the United Kingdom contends that in public law cases the courts generally exercise their discretion in such a way that no undertaking in damages is required. Here too, however, the mere possibility that discretion may be exercised in accordance with the requirement for costs protection is not sufficient to implement the fifth paragraph of Article 10a of the EIA Directive and the fifth paragraph of Article 15a of the IPPC Directive.

91. Of greater significance is the United Kingdom's argument that the obligation to pay damages is compatible with the principle of effectiveness, that is to say, it does not render excessively difficult or impossible in practice the exercise of rights conferred by European Union law.

92. That argument is based on the valid premiss that, subject to compliance with the principles of equivalence and effectiveness, the Member States have discretion in implementing Article 10a of the EIA Directive and Article 15a of the IPPC Directive.⁵³ Moreover, that discretion is also not called into question by the principle of effective legal protection – to which the principle of effectiveness is related – set out in the first paragraph of Article 47 of the Charter of Fundamental Rights.⁵⁴

93. For that reason, the possibility cannot be excluded that, in principle, the Member States may provide for an obligation to pay damages in connection with interim relief measures which pertains also to the exercise of rights conferred by European Union law. This applies in particular in proceedings between private parties as a measure of that kind necessarily interferes with the rights of the opposing party.

94. In that regard, the United Kingdom refers correctly to the protection of the property rights of the beneficiary of the contested approval.

95. I should like to point out that an approval that may still be challenged before the courts does not establish property rights.⁵⁵ Prior to that, what is involved is simply the prospect of being able to exploit the approval. Mere prospects, however, are not protected as property rights,⁵⁶ at any rate when their realisation is contested.⁵⁷ On the other hand, the obligations imposed as a result of the court proceedings may limit the exercise of certain property rights,⁵⁸ for example, by preventing land from being used in a certain manner for the implementation of a project.

53 — See *Križan and Others*, cited in footnote 48, paragraph 106.

54 — *DEB*, cited in footnote 13, paragraphs 28 and 29, and Case C-93/12 *Agrokonstulting* [2013] ECR, paragraphs 59 and 60.

55 — See my Opinion in *Križan and Others*, cited in footnote 48, point 181.

56 — Cf. Case 4/73 *Nold v Commission* [1974] ECR 491, paragraph 14; Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraphs 79 and 80; and the judgment of the European Court of Human Rights in *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 51, Series A no. 222.

57 — Judgment of the European Court of Human Rights in *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, §§ 64 and 65, ECHR 2007-I.

58 — *Križan and Others*, cited in footnote 48, paragraph 112.

96. However, protection of the environment is capable of justifying a restriction on the use of the right to property.⁵⁹ This applies also to interim measures to preserve the status quo whilst a court reviews an environmental law permit. The restriction on the right to property and other freedoms is founded primarily on the fact that the projects which it is sought to pursue require approval on grounds of environmental protection. If the requirement for approval is justified, that justification extends in principle also to interim relief with a view to preventing the *de facto* pre-emption of the main proceedings while the approval is subject to ongoing judicial review.

97. Moreover, it is likely that similar considerations underlie the judicial practice mentioned by the United Kingdom not to require an undertaking in damages in most public law cases.

98. In the proceedings covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive, additional weight is attached to those considerations as the public interest in the enforcement of environmental law is given *special* recognition there. Consequently, applicants in those proceedings deserve protection against excessive or prohibitive costs which goes further than the protection afforded by the principle of effectiveness and the right to effective legal protection.⁶⁰

99. This conclusion is not called into question by the judgment in *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*,⁶¹ which the United Kingdom cites. Admittedly, in that judgment, the Court called for a guarantee to be provided in the event that interim relief involves a financial risk for the European Union. However, that decision cannot be applied to proceedings covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive.

100. The action in that case did not seek to pursue the public interest in the enforcement of environmental law but was directed – in pursuit simply of the applicant's own private interest – against a levy payable to the then Community. Moreover, the guarantee in question was intended primarily to ensure payment of the contested levy itself and not to compensate for any losses arising from the delay caused by the interim relief. Losses of that kind would most probably have been covered by the default interest ordinarily payable.

101. None the less, the possibility of taking action against the misuse of interim relief is not precluded. However, the need to prevent or punish misuse does not require the grant of interim relief to be conditional on an undertaking to pay damages. Instead, in cases of that kind, it would suffice to refuse the interim relief or, where the misuse is discovered only subsequently, to grant damages on the normal basis.

102. Consequently, the United Kingdom has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that the courts in England and Wales, as well as Gibraltar, and in Northern Ireland may make necessary measures granting interim relief in proceedings covered by those provisions conditional on an undertaking to pay damages.

C – Application

103. In addition to its allegation of a failure to transpose Articles 3(7) and 4(4) of Directive 2003/35, the Commission contests the application of those provisions by the courts of the United Kingdom.

59 — *Križan and Others*, cited in footnote 48, paragraph 114.

60 — See my Opinion in *Edwards*, cited in footnote 4, point 39 et seq.

61 — Joined Cases C-143/88 and C-92/89 [1991] ECR I-415, paragraph 32.

104. This plea cannot be interpreted to mean that the Commission challenges certain individual court decisions as infringing Articles 3(7) and 4(4) of Directive 2003/35. The information provided by the Commission in relation to each case is inadequate to assess whether, in fact, those provisions have been infringed.

105. However, one could understand the Commission to mean that by this plea it criticises a practice of the United Kingdom courts that is, to some degree, of a consistent and general nature.⁶² For this it would have to adduce sufficient evidence to show that in the Member State concerned a repeated and persistent practice has developed.⁶³

106. At first sight, the findings concerning the inadequate transposition of Articles 3(7) and 4(4) of Directive 2003/35 through case-law appear to indicate that the United Kingdom courts consistently infringe those provisions.

107. However, that conclusion does not bear closer examination. The findings at issue rest on the fact that the case-law does not ensure the necessary costs protection with sufficient clarity and precision. On the other hand, a consistent practice would presuppose that the judgments also ultimately infringe the requirement for costs protection.

108. The Commission has not proved this. Although it mentions numerous individual court decisions, what that argument shows, above all, is that these decisions do not yet adequately transpose costs protection under Articles 3(7) and 4(4) of Directive 2003/35 in the United Kingdom. As I set out above, the central problem in that connection is the discretion afforded to the courts in the relevant matters and the resulting uncertainty in relation to costs.

109. On the other hand, the Commission has not attempted to prove on the basis of the various individual decisions certain consistent practices that are incompatible with specific requirements of costs protection.

110. The Commission comes closest to attempting such proof when it criticises four of the judgments cited on the ground that the applicants were ordered to bear certain costs by the United Kingdom courts.⁶⁴

111. However, that argument is inadequate to prove that it is a consistent practice of the United Kingdom courts to order the applicants covered by Articles 3(7) and 4(4) of Directive 2003/35 to bear excessive or prohibitive costs.

112. First, four decisions from two jurisdictions of the United Kingdom are insufficient to prove a consistent practice. Second, the Commission also does not describe those cases precisely enough to assess whether the costs awarded in each case were in fact too high.

113. If, by its allegation that Articles 3(7) and 4(4) of Directive 2003/35 are not properly applied, the Commission wishes to challenge a consistent and general practice of the United Kingdom courts, that plea must be rejected.

114. I presume, however, that this plea simply contests the inadequate transposition of Articles 3(7) and 4(4) of Directive 2003/35 by a system of judicial precedent.⁶⁵ For that reason, a separate rejection of the plea is unnecessary.

62 — See Case C-387/99 *Commission v Germany* [2004] ECR I-3751, paragraph 42; Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, paragraph 28; and Case C-88/07 *Commission v Spain* [2009] ECR I-1353, paragraph 54.

63 — *Commission v Ireland*, cited in footnote 62, paragraph 47.

64 — Paragraphs 122 and 123 of the Commission's application.

65 — See above, point 41.

V – Costs

115. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for the United Kingdom to be ordered to pay the costs and the United Kingdom has essentially been unsuccessful, the latter must be ordered to pay the costs. Under Article 140(1) of the Rules of Procedure, Ireland and the Kingdom of Denmark, which have intervened in the case, must bear their own costs.

VI – Conclusion

116. I propose that the Court should:

- (1) declare that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, by reason of the fact that:
 - the courts' discretion to grant costs protection is not tied to the objective of costs protection and the criteria to be applied in that connection are incompatible with those provisions,
 - in proceedings covered by those provisions the courts may order reciprocal costs protection which prevents the costs of a reasonable success fee for the representation of the persons and associations covered by those provisions from being imposed upon the opposing party if the action is successful, and
 - the courts in England and Wales, as well as Gibraltar, and in Northern Ireland may make necessary measures granting interim relief in proceedings covered by those provisions conditional on an undertaking to pay damages;
- (2) order the United Kingdom to pay the Commission's costs and order the Kingdom of Denmark and Ireland each to bear their own costs.