Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 19 October 2017[1]

Case C-470/16

North East Pylon Pressure Campaign Limited
Maura Sheehy
v
An Bord Pleanála
Minister for Communications, Climate Action and Environment, Ireland
Attorney General, Ireland
and
Joined party
EirGrid Plc

(Request for a preliminary ruling from the High Court (Ireland))

(Reference for a preliminary ruling — Article 11(2) and (4) of Directive 2011/92 EU — Decisions, acts or omissions — 'Not prohibitively expensive' cost of judicial proceedings — Dismissal of a claim on grounds that it was premature — EU law and non-EU law elements of a judicial procedure — Direct applicability of Article 9(3) of the Aarhus Convention)

I. Introduction

1. EirGrid Plc ('EirGrid') is an Irish state-owned electric power transmission operator. It plans to build an electricity interconnection development between Northern Ireland and the Republic of Ireland. North East Pylon Pressure Campaign Ltd ('NEPPC') and Ms Maura Sheehy ('the Applicants') consider that the development consent procedure is flawed. They made an application for leave to bring judicial review proceedings, which is the first stage in a two-stage judicial review process. Following several days of hearings, the Irish High Court ruled that the application had been brought prematurely and did not grant leave to bring judicial review proceedings.

2. In costs applications made pursuant to that ruling, the successful parties (An Bord Pleanála, the Minister for Communications, Climate Action and Environment, and the Attorney General) argued that they should be awarded their costs. The unsuccessful parties, the Applicants, argued the same. The Applicants submitted that the rule in Article 11(4) of Directive 2011/92/EU[2] ('the Directive') applies, according to which costs incurred in bringing certain review proceedings should not be prohibitively expensive.

1 Original language: English.

2 Directive 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).

3. The Irish High Court has doubts as to whether the 'not prohibitively expensive' costs rule applies to leave proceedings of the type before it, the granting of which is determined on a case-by-case basis. It seeks clarification on the interpretation of Article 11 of the Directive where that rule is found. It also seeks clarification on the applicability of Article 9(3) of the Aarhus Convention [3] ('the Convention').

II. Legal framework

A. International law

1. The Aarhus Convention

4. According to Article 9 of the Convention:

'…

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 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4 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. EU law

1. Decision on the conclusion of the Aarhus Convention

5. By Article 1 of Decision No 2005/370/EC the European Community approved the Aarhus Convention. [4]

3 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998.

4 Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1).

2. Directive 2011/92 on the environmental assessment of public and private projects

6. Article 11 of Directive 2011/92 regulates access to review procedures:

'1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

…

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

…

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

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

3. Regulation (EU) No 347/2013

7. According to its Article 1, Regulation (EU) No 347/2013 ('the PCI Regulation')[5] lays down 'guidelines for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure'.

8. Article 8, entitled 'Organisation of the permit granting process', requires Member States to designate 'one national competent authority which shall be responsible for facilitating and coordinating the permit granting process for projects of common interest'.

C. Irish law

1. Planning and Development Act, 2000

9. Section 50B of the Planning and Development Act, as amended[6] ('PDA') states:

'(1) This section applies to proceedings of the following kinds:

(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of-

5 Regulation of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009 and (EC) No 714/2009 and (EC) No 715/2009 (OJ 2013 L 115, p. 39).

6 Planning and Development Act, 2000: An act to revise and consolidate the law relating to planning and development by repealing and re-enacting with amendments the Local Government (Planning and Development) Acts, 1963 to 1999; to provide, in the interests of the common good, for proper planning and sustainable development including the provision of housing; to provide for the licensing of events and control of funfairs; to amend the Environmental Protection Agency Act, 1992, the Roads Act, 1993, the Waste Management Act, 1996, and certain other enactments; and to provide for matters connected therewith, 28 August 2000, No 30 of 2000.

(i) any decision or purported decision made or purportedly made,

(ii) any action taken or purportedly taken, or

(iii) any failure to take action, pursuant to a law of the State that gives effect to -

[inter alia] a provision of Directive [85/337/EEC[7]] to which Article 10a … applies…'

10. Section 50B(3) sets out that:

'The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so-

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.'

11. Section 50B(4) of the PDA states:

'Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.'

2. Environment (Miscellaneous Provisions) Act 2011

12. Section 3 of the Environment (Miscellaneous Provisions) Act 2011 ('2011 Environmental Act')[8] provides that:

'(3) A court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so -

(a) where the court considers that a claim or counter-claim by the party is frivolous or vexatious,

(b) by reason of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the court.

(4) Subsection (1) does not affect the court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.'

7 Council Directive 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). See also below at point 31.

8 Environment (Miscellaneous Provisions) Act 2011: An act to amend and extend the Air Pollution Act 1987; the Environmental Protection Agency Act 1992; the Waste Management Act 1996; and the Freedom of Information Act 1997; to make provision for costs of certain proceedings: to give effect to certain articles of the convention on access to information, public participation in decision-making and access to justice in environmental matters done at Aarhus, Denmark on 25 June 1998 and for judicial notice to be taken of the Convention; to amend the Planning and Development Act 2000; the Local Government Act 1998; the Local Government Act 2001 and the Official Languages Act 2003; and to provide for related matters.

13. Section 4 of the 2011 Environmental Act provides:

'(1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3), instituted by a person -

(a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or other consent specified in subsection (4), or

(b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,

and where the failure to ensure such compliance with, or enforcement of such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment.

…'

14. Section 8 of the 2011 Environmental Act requires courts to take 'Judicial notice' of the Convention.

III. Facts, proceedings and the questions referred

15. In 2014 EirGrid proposed a project to connect the electricity grids of Ireland and Northern Ireland ('the Interconnection Project'). The Interconnection Project is a 'project of common interest' under the PCI Regulation.

16. In Ireland, the body that has been designated under Article 8 of the PCI Regulation is An Bord Pleanála, the Irish planning appeals board ('the Board'). As such, the Board is responsible for facilitating and coordinating the permit granting process for the Interconnection Project.

17. In its capacity as the Irish planning appeals board, it is also the body responsible for approving development consent for that project. Following EirGrid's formal application for development consent and submission of an environmental impact assessment, the Board convened an oral hearing on 7 March 2016.

A. Application for 'leave': first stage in a two-stage judicial review procedure

18. NEPPC is a non-governmental organisation promoting environmental protection. It represents a large number of interested parties and local property owners, one of whom is Ms Sheehy.

19. Shortly before the oral hearing, on 4 March 2016, NEPPC and Ms Sheehy ('the Applicants') sought to challenge the procedure for development consent in particular by seeking to prevent the oral hearing. That was done by way of an application for leave to have a judicial review claim heard and for an interlocutory injunction. Sixteen reliefs were sought on 46 grounds and included: invalidity of parts of the development consent process, particularly the application for approval lodged under the PDA, and a declaration that the designation of the Board as a competent authority was irregular.

20. The application for an interlocutory injunction was rejected. The oral hearing before the Board took place on 7 March 2016 as scheduled. The application for leave was continued and heard by the referring court.

21. The judge hearing the claim allowed the Applicants to add the Minister for Communications, Energy and Natural Resources (now the Minister for Communications, Climate Action and Environment) (which had designated the Board as the competent authority under the PCI Regulation) ('the Minister'), and the Attorney General as respondents. They were also allowed to refine and amend their challenge to the designation of the Board as the competent authority. EirGrid intervened in the proceedings as a 'notice party'.

22. According to the referring court, it had been argued by the respondents that the application was premature, but also that it was out of time.

23. On 12 May 2016, after four days of hearings on the application for leave, the referring court refused to grant leave to apply for judicial review on the grounds that the application was premature.

B. Costs applications

24. A further two days of hearings involving four separate legal teams were held in relation to the costs of EUR 513 000. All of the successful parties are seeking their costs against the Applicants. The Applicants, in turn, seek their costs against the other parties and argue that the costs should follow the 'not prohibitively expensive' rule in Article 11 of the Directive ('NPE rule').

25. In the context of the costs application, the Irish High Court decided to suspend the procedure and to refer, by a judgment of 29 July 2016, the following seven questions to the Court:

'(i) in the context of a national legal system where the legislature has not expressly and definitively stated at what stage of the process a decision is to be challenged and where this falls for judicial determination in the context of each specific application on a case-by-case basis in accordance with common law rules, whether the entitlement under art. 11(4) of [Directive 2011/92] to a "not prohibitively expensive" procedure applies to the process before a national court whereby it is determined as to whether the particular application in question has been brought at the correct stage;

(ii) whether the requirement that a procedure be "not prohibitively expensive" pursuant to art. 11(4) of [Directive 2011/92] applies to all elements of a judicial procedure by which the legality (in national or EU law) of a decision, act or omission subject to the public participation provisions of the directive is challenged, or merely to the EU law elements of such a challenge (or in particular, merely to the elements of the challenge related to issues regarding the public participation provisions of the directive);

(iii) whether the phrase "decisions, acts or omissions" in art. 11(1) of [Directive 2011/92] includes administrative decisions in the course of determining an application for development consent, whether or not such administrative decisions irreversibly and finally determine the legal rights of the parties;

(iv) whether a national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, should interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in art. 9(3) of [the Convention] (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under [Regulation No 347/2013], and/or (b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;

(v) whether, if the answer to question (iv)(a) and/or (b) is in the affirmative, the stipulation that applicants must "meet the criteria, if any, laid down in its national law" precludes the Convention being regarded as directly effective, in circumstances where the applicants have not failed to meet any criteria in national law for making an application and/or are clearly entitled to make the application (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under [Regulation No 347/2013], and/or (b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under [Council Directive 92/43];

(vi) whether it is open to a Member State to provide in legislation for exceptions to the rule that environmental proceedings should not be prohibitively expensive, where no such exception is provided for in [Directive 2011/92] or [the Convention]; and

(vii) in particular, whether a requirement in national law for a causative link between the alleged unlawful act or decision and damage to the environment as a condition for the application of national legislation giving effect to art. 9(4) of [the Convention] to ensure that environmental proceedings are not prohibitively expensive is compatible with the Convention.'

26. The Applicants, the Board, the Minister, the Attorney General, EirGrid and the Commission lodged written submissions with the Court and presented their oral submissions at the hearing held on 29 June 2017.

IV. Assessment

27. This Opinion is structured as follows: I will begin by making some general observations on the NPE rule (Section A.1) to show how and why it does indeed apply to the type of proceedings before the Irish High Court. I will then address, in turn, questions 1, 2, 3, 6 and 7 posed by the referring court on the operation of that rule under Directive 2011/92 (Sections A.2 to A.6). I will conclude with remarks on the relevance of Article 9(3) of the Convention to the analysis, further to questions 4 and 5 (Section B).

A. Applicability and scope of the NPE rule — questions 1 to 3 and 6 and 7

1. General observations on the NPE rule

28. Questions 1, 2, 3, 6 and 7 of the referring court all relate to the scope of application of the NPE rule and its conditions of applicability. I will therefore begin by making some general observations about the NPE rule, concerning (i) the nature of the NPE rule; (ii) the objective of wide access to justice in environmental matters; and (iii) predictability of application of the rule.

(i) Nature of the NPE rule

29. Structurally, within Directive 2011/92, the NPE rule is somewhat oddly found in a separate line, unnumbered, at the end of Article 11(4). On the face of it, this positioning makes it unclear whether the NPE rule applies to all the procedures referred to in Article 11 or just the administrative procedures in Article 11(4).

30. However, it is clear from the Court's existing case-law that the rule is applicable to all the procedures referred to in Article 11, including review before a court of law or an independent and impartial body established by law (as referred to in Article 11(1)).[9] That is, moreover, confirmed by the equivalent provision in the Convention (Article 9(4)), which is separately numbered and clearly pertains to the 'procedures referred to in paragraphs 1, 2 and 3 above', namely, whether administrative or before a court.

31. The history of that provision provides further support for that reading. Article 11 of Directive 2011/92 was originally Article 10a of Directive 85/337.[10] By contrast to Article 11 of Directive 2011/92, Article 10a was not split into numbered subparagraphs. It was then clear that the NPE rule applied to the whole article. Since Directive 2011/92 was intended to be a mere codification of Directive 85/337, I consider that in introducing subparagraph numbering there was no intention to modify the scope of application to the NPE rule.

32. Given the above, by virtue of Article 11(1) of Directive 2011/92, the scope of the NPE rule thus includes review procedures before courts 'to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive', namely 'judicial proceedings' in this area of environmental law.

33. Next, it ought to be borne in mind that the NPE rule is a specific expression within Directive 2011/92 of a more general principle of access to justice in EU environmental law as is evident from the Court's case-law,[11] and the Convention (as one of its three pillars).

34. Finally, the NPE rule also reflects the broader EU law requirement that *all* national procedures falling within the scope of EU law are precluded from being 'prohibitively expensive' in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), which enshrines the right to effective judicial protection. Prohibitively expensive justice means no justice.[12]

35. The NPE rule confirms the protection offered by the Charter, but is more extensive: in particular it requires that account is *also* taken of the public interest in ensuring effective judicial control of decisions that could significantly impact the environment, whereas Article 47 of the Charter is focused on individual rights.[13] The rule therefore provides *supplementary* protection.

36. I consider it important to outline this broader context of the origins and the operation of the NPE rule at the outset. The relative, supplementary nature of the NPE rule should indeed be kept in mind when discussing (limits on) its scope of application, which then becomes, arguably, much less 'binary'.[14]

9 In the judgment of 13 February 2014, *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67), the Court examined the transposition of the not prohibitively expensive rule in a case concerning costs in judicial proceedings – in particular paragraphs 64 and 66. See also judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 27) which states that the rule concerns all costs arising from participation in proceedings.

10 Inserted by Article 3 of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003, L 156, p. 17).

11 See judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 33) as a specific example.

12 Prohibitively expensive justice also conflicts with the principle of effectiveness — to the extent that can be distinguished from the right to effective judicial protection under Article 47 of the Charter — since, by definition, it renders the exercise of EU law rights 'impossible or excessively difficult' (judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 33)).

13 See, in that sense, Opinion of Advocate General Kokott in *Edwards and Pallikaropoulos* (C-260/11, EU:C:2012:645).

14 'Binary' in the sense of either (i) the NPE rule applies, or (ii) the sky's the limit as far as costs go.

(ii) Wide access to justice in environmental matters

37. The objective of granting wide access to justice reflects 'the desire of the European Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role'. [15]

38. 'Wide access' to justice means precisely that: access to justice must be extensive, comprehensive, and wide-ranging. The very objective of Article 11 is indeed specifically to ensure the broadest possible access to review. [16] It covers all its elements, such as standing, but also costs. It is stated to apply whenever the Member State is exercising its discretion in setting out detailed procedural rules. In fact, it is termed as a *limitation* to that discretion. [17]

39. High costs of proceedings can in practice easily constitute a barrier to access for litigants without the necessary means. They arguably also represent one of the strongest disincentives to bringing litigation even for those who do have the means. Thus, high costs of litigation are at odds with the objective of wide access to justice.

(iii) Predictability of the application of the NPE rule

40. Predictability constitutes an *integral part* of the assessment of whether costs are prohibitively expensive. That has already been confirmed in the Court's case-law specifically in relation to the NPE rule under the Directive. [18] The importance of predictability has also been recognised by the Court more generally in relation to the costs of (non-environmental) legal proceedings. [19]

41. Predictability is relevant in particular to two aspects of this case: predictability of 'what' and of 'when'.

42. One of the issues that arises in relation to the scope of the NPE rule concerns what challenges it covers: can they be divided up to identify specific parts that are 'subject to the public participation provisions of this Directive' and those that are not? I will discuss the viability of such separating out under question 2 (Section A.3). At this stage suffice it to say that, if falling on one side or the other of that line means the difference between modest costs and probable bankruptcy, *the unpredictability in itself* in that regard is clearly likely to constitute a powerful disincentive to challenges. [20] That fact also highlights the importance of the relative nature of the NPE rule as already discussed above in point 36.

43. This case also raises issues about predictability in relation to the *stage* at which challenges can be brought.

44. Article 11(2) of the Directive requires that the Member State 'shall determine at what stage the decisions, acts or omissions may be challenged'.

15 Judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 32).

16 Judgment of 15 October 2015, *Commission* v *Germany* (C-137/14, EU:C:2015:683, paragraph 80).

17 Judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 58). See also judgment of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraph 39).

18 Judgment of 13 February 2014, *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraph 58).

19 Judgment of 11 December 2003, *AMOK* (C-289/02, EU:C:2003:669, paragraph 30). See also De Baere, G., and Nowak, J.T., 'The right to "not prohibitively expensive" judicial proceedings under the Aarhus Convention and the ECJ as an international (environmental) law court: Edwards and Pallikaropoulos', *Common Market Law Review*, Vol. 53, 2016, pp. 1735 and 1736.

20 The Commission has also highlighted that judicial review costs are a potential major deterrent to access, especially in environmental law cases, and that an overly wide discretion may undermine costs predictability which is particularly important where high lawyers' fees are payable: Communication from the Commission, Commission Notice on Access to Justice in Environmental Matters of 28 April 2017, C(2017) 2616 final, pp. 51 and 55.

45. In Ireland, no explicit statutory rule has been laid down to transpose that provision. Rather, parties are subject to general common law rules of administrative law. Whether the challenge to a decision, act or omission is premature or out of time is decided on a case-by-case basis.

46. I wish to stress that on a general level, there is no objection in principle to the transposition of EU law obligations through case-law on the national level. Flexibility inherent in case-law is not in itself problematic.[21] However, it is also clear that irrespective of the means of transposition opted for, the overall goal of the Member State remains the same: to ensure the full application of the Directive in a way that it provides sufficient clarity, precision and predictability.[22] There must be an understandable and clear line of case-law, which allows the rules to be clearly deduced, and satisfies the requirements of legal certainty through a result that is of unquestionable binding force.[23] Predictability is key.[24]

47. However, in the context of the present case, the referring court has highlighted uncertainties in the case-law in relation to the question of *when* (at what stage) a challenge must be brought. In its questions submitted to this Court, the referring court has not directly raised an issue about the sufficiency of Ireland's transposition of Article 11(2) of the Directive. Nonetheless, the referring court clearly stated in its order for reference that the rules are not completely clear and that they are problematic for applicants in terms of legal certainty.

48. This Court is bound by the interpretation of national law provided by the referring court. Whilst acknowledging that the degree of uncertainty of the Irish rules has been disputed by the parties before this Court, I shall proceed with the evaluation of the effects of the national law as provided by the referring court as the starting point. As a result the issue of predictability of costs is highly relevant.

49. Bearing the above points in mind, I now turn to the referring court's concrete questions.

2. Question 1

50. For the purposes of analysis, the question can be broken down into two issues. First, does the NPE rule apply in the same way to applications for leave to bring judicial review challenges as it does to the judicial review challenges themselves? Second, would a positive answer to the first question change if the application for leave is rejected because it was brought too early?

51. In my view, the answer to the first issue is straightforward: yes, the NPE rule does apply in the same way to applications for leave.

52. Where judicial review is split into two stages, the first stage also constitutes 'judicial proceedings' and can certainly be defined as a 'review before a court'. Applying for leave for judicial review requires consideration, even if it may not be extensive, of the substance, written pleadings and oral submissions of the parties. In the case at hand, that consideration was carried out in four days of hearings. Moreover, I understand that there is some scope for applications for leave to be treated as applications for judicial review, thus 'telescoping' the two stages of the judicial review application into one hearing.

21 Judgment of 13 February 2014, *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraph 36).

22 Judgmentsof 16 July 2009, *Commission* v *Ireland* (C-427/07, EU:C:2009:457, paragraph 54), and of 13 February 2014, *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraph 33).

23 Judgments of 16 July 2009, *Commission* v *Ireland* (C-427/07, EU:C:2009:457, paragraph 55); of 11 September 2014, *Commission* v *Portugal* (C-277/13, EU:C:2014:2208, paragraph 43); and of 15 October 2015, *Commission* v *Germany* (C-137/14, EU:C:2015:683, paragraph 51).

24 It might be added that also in the standard case-law of the European Court of Human Rights (ECtHR) the term 'prescribed for by law' is interpreted as including established case-law. See, from the more recent examples, judgment of the Court of Human Rights of 11 April 2013, *Firoz Muneer v. Belgium* (CE:ECHR:2013:0411JUD005600510, §§ 54, 59 and 60).

53. Furthermore, if the procedure were to proceed to a full judicial review, then the rule would certainly also apply to the leave stage. In this regard, the Court has already confirmed that 'all the costs arising from participation in the judicial proceedings' should be taken into account, that is, that it should be 'assessed as a whole'.[25] The Court has also explicitly stated there should be no distinction between the stages of proceedings — first instance, appeal or second appeal — when deciding on whether costs are prohibitively expensive as: 'no such distinction is envisaged in Directives 85/337 and 96/61, nor, moreover, would such an interpretation be likely to comply fully with the objective of the EU legislature, which is to ensure wide access to justice and to contribute to the improvement of environmental protection'.[26]

54. The structure of the judicial review system in this field is certainly for the Member State to determine, but if an extra and compulsory judicial layer is added to proceedings in order to reach the stage for the full challenge to the decision, act or omission in this area to be heard, then the first as well as all subsequent stages must be covered by the NPE rule.

55. Put metaphorically, it is up to me to decide how one can access my house. There might only be a front door. There might also be a back door, a mosquito door net, a porch, or a foyer. But however the entrance is structured, it will always be part of my house and the rules on entrance will apply to the entire structure.

56. That brings us to the second issue. Does the above answer change if the application for leave is rejected because it was brought too early?

57. In the present case, the answer to that question is, in my view, clearly 'no', that does not alter the fact that the NPE rule applies.

58. Article 11(2) of the Directive requires Member States to specify the stage at which challenges referred to under Article 11(1) can be brought. In cases where the Member State has transposed Article 11(2) in a clear and precise way, such that it is patently obvious that the action brought by an applicant is premature, that might then be taken into consideration.[27] I recall that when determining what amounts to 'prohibitively expensive' costs in this context, the national court may certainly take into account factors including the applicant's prospect of success and the potentially frivolous nature of its application.[28]

59. However, given the uncertainties outlined above in point 47 in relation to the stage at which challenges should be brought, that is not the case here.

60. I agree with the Commission's submission that the fundamental objective of Article 11 would be undermined if an applicant would only know whether or not the action was taken at a correct stage, and whether or not he or she would be exposed to prohibitive costs, *after* the case was instituted and the costs incurred, as a result of a failure by the Member State to determine, in advance, clearly and unambiguously the stage at which a procedure may be initiated. Any potential shortcomings in the transposition of Article 11 must not be used to the detriment of applicants.

25 Judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraphs 27 and 28).

26 Judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 44).

27 See above in points 44 to 48 of this Opinion.

28 Judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 42).

61. In the light of the above, I propose that the Court reply to the referring court's first question as follows:

In the context of a national legal system where the legislature has not expressly and definitively stated at what stage of the process a decision is to be challenged and where this falls for judicial determination in the context of each specific application on a case-by-case basis in accordance with common law rules, the entitlement under Article 11(4) of Directive 2011/92 to a 'not prohibitively expensive' procedure applies to the process before a national court whereby it is determined as to whether the particular application in question has been brought at the correct stage.

3. Question 2

62. The referring court's second question asks whether the NPE rule applies:

(1) to *all* 'elements' of a judicial procedure by which the legality of a decision, act or omission is challenged; or

(2) *only* to the EU law elements of a judicial procedure; or

(3) *only* to the issues regarding the public participation provisions.

63. I understand the reference to 'elements' of a 'challenge' in the national court's question to be the various individual grounds, pleas or arguments advanced in an application challenging a decision, act or omission under Article 11 of Directive 2011/92.[29]

64. For the reasons set out below, in my view the NPE rule applies to all grounds, pleas or arguments (elements) based on substantive or procedural infringements of Directive 2011/92 or other instruments of EU law and raised in the context of a challenge to a decision, act or omission subject to the public participation provisions of that directive. Where such a challenge involves grounds, pleas or arguments alleging infringements of both EU and national law, the NPE rule will generally apply to the challenge and the outcome of the case as a whole.

(i) Challenges within Article 11(1) of Directive 2011/92

65. Article 11(1) refers to challenges to the substantive or procedural legality of decisions, acts or omissions 'subject to the public participation provisions of this Directive'.

66. Articles 6 and 8 of Directive 2011/92 in particular[30] contain requirements creating rights and obligations *specifically* to ensure public participation in the narrow sense (in particular, to ensure the public is informed (information) and has the possibility to effectively express comments and opinions (contribution) and to have due consideration taken of those comments (consideration)).

67. Article 11(1) therefore certainly applies to challenges brought against decisions, for example, refusing access to information or preventing submission of comments (scenario (3) referred to above in point 62).

29 As alluded to by the representative for the Minister and the Attorney General in the oral hearing, it might also refer to the identity of the defendant and whether there is any plea concerning an infringement of the rights guaranteed under the Directive against that individual defendant. I will deal with that possible reading below in points 96 to 98.

30 That is the key 'public participation provision' in the Directive, although provisions specifically relating to public participation also appear in a number of other articles (for example, Article 7(3) and Article 9(1) and (2)).

68. However, in my view, the scope of Article 11(1) (and the NPE rule) is clearly broader than scenario (3). Such a narrow reading would indeed make little practical sense and is clearly not supported by existing case-law.[31] For example, one can easily think of situations where public participation in a procedure is seemingly respected but there are nonetheless deficiencies in that procedure and the environmental impact assessment.

69. Moreover, a closer reading of the text of Article 11(1) confirms that the correct reading is not as narrow as scenario (3) above.

70. The words 'subject to' in Article 11(1) are translated in various ways but generally convey the idea that the relevant challenges do not necessarily need to be aimed at protecting a specific right of participation in the process but rather must concern *the process in relation to which participation is guaranteed*. Thus, by way of example, other language versions translate 'subject to' as 'relevant de' (covered by); 'dentro del ámbito' (within the scope of); 'vallend onder' and 'podléhající' (falling under); 'gelten' (pertaining to) the public participation provisions.

71. The key public participation provision, Article 6(2) and (3), itself requires that participation is guaranteed in relation to 'procedures referred to in Article 2(2)'. In turn, Article 2(2) refers to (a) the environmental impact assessment and (b) the national procedure into which it is integrated (development consent or other).

72. Based on that reading of Directive 2011/92, Article 11(1) therefore creates a right to challenge decisions, acts or omissions that are part of the environmental impact assessment and the national procedure into which that assessment is integrated.

73. That reading, moreover, reflects the text of the Convention itself. Article 9(2) of the Convention requires that there is access to review procedures to challenge 'any decision, act or omission subject to the provisions of Article 6 [on public participation] …'. Article 6(1) of the Convention requires parties to apply the provisions of Article 6 'with respect to decisions on whether to permit proposed activities …' (proposed activities essentially being those listed explicitly or those that significantly affect the environment). A combined reading of those provisions requires access to courts to challenge *decisions to permit proposed activities which substantially affect the environment*. The right of challenge is thus linked to decision-making processes capable of impacting the environment rather than specifically to alleged infringements of the right of participation only.

(ii) Distinguishing between different pleas

74. Following the above logic, what is decisive in determining whether the NPE rule applies is the *subject matter* of the individual procedure leading to the decision, act or omission being challenged. If the nature of that subject triggers the public participation rights and obligations under the Directive, then the *challenge as a whole* is covered by the NPE rule. The NPE rule applies generally to the 'review procedures' referred to in Article 11, not to specific grounds raised in the context of those procedures.

31 See, for example, judgment of 7 November 2013, Gemeinde Altrip *and Others* (C-72/12, EU:C:2013:712, paragraph 37). See also, by analogy, the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7)), and judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 56). That case law confirms that Article 9(2) of the Convention, which is incorporated into the Directive by its Article 11(1), covers a range of issues relating to the environmental impact assessment procedure.

75. No distinction is made between grounds based on infringements of the right to public participation and those alleging other illegalities affecting the environmental impact assessment or indeed alleging other illegalities affecting the decision-making process into which the environmental impact assessment has been integrated (for example, development consent). Nor is any distinction made between grounds based on infringements of EU law or national law. Moreover, as the Court has previously held, Article 11 'in no way restricted the pleas that may be put forward in support of the actions covered by that provision'. [32]

76. However, it has been argued by the Minister and the Attorney General, the Board and EirGrid that Article 11(1), and hence the NPE rule, cannot be read as applying broadly to all elements of a challenge whatever their basis. In particular, all of those parties focus on and concur on the fact that the NPE rule *cannot* relate to elements of challenges based on national law alone.

77. The Board explicitly acknowledges that all challenges and individual grounds based on breaches of Directive 2011/92 are covered, even if they do not specifically concern the public participation provisions. That reasoning is based on the objective of Article 11 of the Directive to ensure participation in the environmental impact assessment process. However, the Board insists that the environmental impact assessment is *only part* of the development process and rejects the idea that the NPE rule might extend to challenges based on concerns relating to other aspects of that process.

78. I agree that the interpretation of Article 11 of the Directive envisaged above in point 64 may be intuitively seen as raising some conceptual difficulties. That interpretation might appear too broad and overinclusive. In particular, it implies that the NPE rule could apply where the legality of planning decisions (which at some stage require public participation) might in theory be contested on the grounds of (a) an alleged breach of EU environmental law other than a breach of the Directive; (b) an alleged breach of EU law 'unrelated' to the environment; and/or (c) an alleged breach of purely national law, be it environmental or non-environmental.

79. However, at least in the light of the circumstances of the present case, I consider that the NPE rule must apply to the action as a whole. There are four main reasons for that position.

80. First, for the sake of argument, let us accept for the moment the proposition that a challenge to a decision (act or omission) might be separated out into different grounds, pleas or arguments with the NPE rule applying to some of them but not to others. In relation to those grounds covered by the NPE rule, costs must remain modest. In relation to others, they might be significant. [33] Any unpredictability as to which side of the line a ground falls will inevitably act as a disincentive to allege that ground. As already mentioned above, [34] such a disincentive is in itself in conflict with the NPE rule.

81. Second, as regards the distinction between the Directive and other grounds based on alleged infringements of EU law, existing case-law already confirms that other EU environmental legislation and rules on access to justice at national level to challenge the conformity of Member State actions with such legislation must be interpreted in the light of Article 9 of the Convention (which includes the NPE rule). [35] That approach is, moreover, in accordance with the objective of wide access to justice in environmental matters as expressed in the Court's case-law. [36]

32 Judgment of 15 October 2015, *Commission* v *Germany* (C-137/14, EU:C:2015:683, paragraph 47 and the case-law cited) for actions brought in the interest of the public. Note however that the Court in paragraphs 32 and 33 states that where claims brought by individuals are concerned, even if any ground can be presented, legislative limits can be placed on those grounds by the Member State.

33 However, as underlined above in point 34, Article 47 of the Charter and the principle of effectiveness preclude any EU law-based actions being 'prohibitively expensive' in the sense of making actions impossible or excessively difficult due to costs.

34 See above in point 39 of this Opinion.

35 See judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838) where the Convention applied to the Habitats Directive.

36 See above in points 37 to 39 of this Opinion.

82. Third, as regards further distinctions between elements based on alleged breaches of EU law [37] and others based on national law alone — which is the main concern of the Minister, the Attorney General, EirGrid and the Board — there are further significant issues of practicality and, above all, predictability.

83. From a practical perspective: the billing of costs for public law proceedings already takes into account a number of factors, including: the amount of time (used to calculate the costs) spent on task A, B or C; the grade of the lawyer who spent that time on the case and also further based on the year he or she qualified; whether the task conducted by that lawyer was an administrative or substantive legal matter; how reasonable it was to spend time on one task or the other; the way in which the parties conducted the proceedings; the recoverability of expenses depending on the type of expense involved; and any special rates set by policy for public law lawyers. To add to that a division of whether the grounds were based on national 'elements' or EU 'elements' is certainly not an impossible exercise, but rather one that may be artificial and extremely complex to carry out.

84. What is in my view decisive is the fact that, even if such a separation could be carried out somehow, it introduces a significant degree of *unpredictability* for claimants. That unpredictability is further compounded by the possibility that the judge deciding the case may well have discretion as to which particular elements are used to decide the case and whether others might be ignored.

85. For example, in case of 'mixed claims' (combining pleas based on national and EU law), I might argue that a proposed project will decrease the value of my land *and* that the environmental assessment was not carried out properly. In its defence, the other party disputes that I even own the land, which is likely to be purely a question of national law. The judge might: (i) focus on the purely national ground; (ii) concentrate on the EU law ground; (iii) decide that the complaints about ownership and the assessment process should be treated separately; (iv) narrow or throw out some of the pleas; or (v) conclude that it is simply not possible (factually or due to complexity) to separate the issue of ownership and assessment.

86. Now let us assume that the judge in question does not proceed in any of the ways listed under (iii) to (v), which is in itself naturally difficult to predict, and instead looks into my claim and its two grounds: one of those is classed as having elements of EU law (the failure to carry out the environmental impact assessment), and the other is classed as having national law elements (ownership of the land). Let us say that the national judge rejects the claim on the basis of the 'national' ground because it is so obvious, namely that the claimant simply does not own the land that is purportedly affected. As a result the judge does not even examine any of the other grounds.

87. Furthermore, in a number of legal systems, it may also be that even if 'elements' based on EU law are not explicitly argued by the claimant or identified by any party to the proceedings, the judge hearing the case might, for example, consider that an EU law issue is in fact being raised or might raise an EU law point *ex officio*.

88. These and other scenarios illustrate the level of unpredictability that separating out costs in the way proposed implies. [38] For these reasons, I have great difficulty seeing how such practice could be compatible with the requirements of predictability imposed by the case-law of the Court. [39]

37 Including those enacted through national rules and leaving aside the sometimes complex issue of deciding which specific national rules would in fact be covered for that purpose.

38 Focusing entirely on the objective operation of such a system and leaving completely aside any hypothetical scenarios of how the same rules could be used in cases of ill will, circumvention or abuse of such rules by any actor in the proceedings.

39 Above in points 40 to 48.

89. Fourth, it may be the case that the whole procedure will progress and NEPPC will end up bringing three or four or more separate actions against separate decisions, some of which will be covered by the NPE rule and other(s) not. If Ireland had been clearer in its implementation of Article 11(2), the grounds might naturally have separated out into distinct challenges, that is, as an administrative law, property law or other non-environmental law claim which may also be subject to different substantive and procedural requirements. This point brings me back to the original problem that permeates this entire case: if even the referring court qualifies its own system as unpredictable in this regard, this fact simply cannot be used to the detriment of claimants. [40]

90. In conclusion, the separation or dividing up being proposed is to my mind conceptually odd. It would not only be additionally laborious for national judges to deal with costs applications, but, above all, it would generate unpredictability for litigants, thus potentially discouraging them from bringing any environmental claim at all. There is indeed the (I understand originally German) saying that 'in court and on the high seas, one is in the hands of God'. [41] But I would assume that the effort of this Court, as, for that matter, of any other court, is to prove that saying wrong, not to confirm it.

91. Finally, it is readily acknowledged that the solution proposed here, tying the applicability of the NPE rule to the challenge as a whole and its outcome and not the dissection of individual grounds invoked, might result in an overinclusion of an EU law-derived protection in relation to costs of litigation in matters where EU law is not strictly speaking relevant. However, all things considered, as a matter of policy, I fail to see what great dangers would be presented by 'accidentally' rendering some elements of an environmental challenge not prohibitively expensive. I do see, however, genuine problems in the reverse scenario, that is, circumvention or effective crippling of the operation of the NPE rule in the ways described in this section, bearing in mind yet again the overall context and purpose of that rule: litigation in environmental matters should be accessible and inexpensive, in keeping with the objective of wide access to justice in this area. [42]

(iii) Exceptions to the broad application of the NPE rule

92. The fact that the NPE rule and its application are broad naturally does not mean that it is limitless. Two potential limits to its application have been raised in the context of the present case: hypothetical abuse of the benefit of the rule and its overreach in terms of the parties against which EU law elements of the claim could be brought.

– Potential abuses

93. In their written pleadings, the Minister and the Attorney General raised concerns that a broad application of the NPE rule to challenges without distinction between various grounds could lead to abuse. Thus, an applicant may wish to challenge a decision on the basis of alleged infringements of national law alone, but 'sneak in' a (presumably spurious) EU law-based claim to benefit from the NPE rule.

94. In that regard, I would underline above all that such a scenario seems hypothetical to the extent that there is apparently no allegation of such 'abuse' in the present case. However, even if such a case were to arise, it could certainly be dealt with by, for example, application of the EU principle of abuse of law, which would require in particular a demonstration that the EU law-based claim was in reality not brought to enforce an EU law right but rather to artificially create the conditions to benefit from the NPE rule.

40 Above in points 44 to 48 and 58 to 60.

41 'Vor Gericht und auf hoher See ist man in Gottes Hand.'

42 See above in points 37 to 39.

95. Alternatively, as the sixth question of the referring court also foreshadows, it is fair to assume that the national rules of the Member States provide for the possibility of the national courts when deciding on costs to take into account the conduct of the individual parties and the purpose and the way in which those parties participated in the proceedings. Thus, vexatious, frivolous, or spurious elements of a claim could certainly play a role in an overall decision on costs.[43]

– Division of 'elements' based on status of parties

96. At the oral hearing, it was also suggested that challenges to decisions, acts or omissions might be 'split' for the purposes of applying the NPE rule by *defendant* rather than on the basis of the specific grounds. Thus, where there are multiple defendants and by definition only pleas based on purely national law can be brought against one of them, then the NPE rule should not apply to costs incurred to the extent the action was brought against that defendant.

97. That proposition in my opinion raises issues about the structure of decision-making and the related scope of review. I understand that, in the present case, the challenge to the appointment of the Board might have been brought in separate proceedings or, as it was, be 'tacked on' to the application (for leave) to bring judicial review proceedings. If that is correct, then conceivably there could have been two separate applications, one directed against the Board and the other against the Minister and the Attorney General.

98. *If* the latter were based on purely national law, I can see why it might not be covered by the NPE rule and its exclusion justified. However, that is simply not the state of the case referred before this Court. In the present case, there is only one challenge before the national court.[44] In such circumstances, I see no reason to split the challenge by defendant for the purposes of application of the NPE rule.

99. In the light of the above, I propose that the Court reply to the referring court's second question as follows:

The requirement that a procedure be 'not prohibitively expensive' pursuant to Article 11(4) of Directive 2011/92 applies to all grounds, pleas or arguments based on substantive or procedural infringements of that directive or other instruments of EU law and raised in the context of a challenge to a decision, act or omission subject to the public participation provisions of that directive. Where such a challenge involves grounds, pleas or arguments alleging infringements of both EU and national law, the requirement that a procedure be 'not prohibitively expensive' pursuant to Article 11(4) of the aforementioned directive will generally apply to the challenge as a whole.

4. Question 3

100. The action which is the subject of costs proceedings before the referring court was brought before a final decision was taken on the procedure for development consent. By its third question, the national court asks essentially whether the notion of 'decisions, acts or omissions' under Article 11(1) covers 'interim' or 'provisional' as well as 'final' acts.

101. Article 11 of the Directive requires Member States to provide access to review procedures. How that result is achieved procedurally is, however, left largely to the Member States.

43 As also discussed below in section A.5, points 110 to 117 of this Opinion.

44 It might be again recalled that if there had been a more explicit transposition of Article 11(2) of the Directive, stating clearly at what stage a challenge should be brought the Applicants might have been obliged to bring separate actions (for example, an early action against the Minister (to try to pre-empt a decision by a biased entity), and a later challenge against the planning decision itself — all would depend on the structure of decision-making and review procedures and, critically, also the precise transposition of Article 11(2) of the Directive).

102. In practice, there is a significant diversity of decision-making processes [45] between Member States and even within single Member States. [46] Review procedures also differ considerably. [47]

103. For example, the processes for development consent and environmental assessment may be combined, resulting in a single decision, or separated, resulting in two or more separate decisions. [48] There may be procedural distinctions in decision-making relating to smaller, more straightforward and limited projects as compared with larger, more complex projects that may have a greater impact on the environment.

104. Differences in decision-making structures and outcomes will then naturally impact on review mechanisms. Other fundamental differences also exist between review procedures. For example, before an action can be introduced before national courts, Member States may (or may not) require an administrative challenge to be brought. Institutional differences also exist in relation to such challenges (appeal to ministry, competent authority, or specific appeals board and so on).

105. The Directive does not generally require or prohibit challenges being brought against 'non-final' decisions. That flexibility is entirely to be expected in the light of the potentially large range of different decision-making and review structures that exist. [49]

106. However, as explained above, [50] Member States must clearly state *the stage at which* a challenge may be brought. That in itself implies that national law makes it clear for potential applicants when a particular act constitutes a challengeable decision and whether an applicant can and/or must bring an action against a 'non-final' decision or act.

107. In the absence of EU law rules, it is for national law to lay down the detailed rules on when an application for leave to challenge can be brought, but it must be possible for all the relevant decisions, acts or omissions to be reviewable at that given time. [51]

108. In addition, the same *golden thread* or *leitmotif* which has already been identified [52] is again present in the answer to the referring court's third question: the fact that a Member State apparently did not set clearly any such moment cannot be turned around and used against the potential claimants as a tool for the exclusion of judicial review as a result of prohibitively expensive costs or the serious risk thereof.

45 See the comparative reports to the 20th Colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union in Rüdiger, R., Silbermann., E.I., Road planning in Europe — A Case Study, Leipzig, 2006, in particular pp. 23 to 32 of the general report.

46 For example Belgian regions have their own planning legislation. See, for a more detailed exploration of environmental law in Belgium, Delnoy, M., 'Implementation of the Aarhus Convention in Belgium: Some Elements' and Macrory, R., and Westaway, N., 'Access to Environmental Justice – A United Kingdom Perspective' in Pallemaerts, M., (ed) The Aarhus Convention at Ten, Interactions and Tensions between Conventional International Law and EU Environmental Law, Europa Law Publishing, 2011, p. 341 et seq.

47 See the following comparative reports: Rüdiger, R., Silbermann, E.I., *op cit supra*, footnote 45, pp. 34 and 35; the Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters by Milieu Ltd for the Commission's DG Environment, September 2007, pp. 4 to 6; Darpö, J., Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union (European Commission), 2013.10.11/Final, pp. 11 and 12. See also Pallemaerts, M., (ed), *The Aarhus Convention at Ten, Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law Publishing, 2011, pp. 322, 343 and 349.

48 See also judgment of 16 February 2012, Solvay *and Others* (C-182/10, EU:C:2012:82, paragraph 38).

49 For similar issues arising in a different area of law — public procurement, see judgment of 5 April 2017, Marina del Mediterráneo *and Others* (C-391/15, EU:C:2017:268, paragraphs 26 and 27).

50 See points 44 to 46 of this Opinion.

51 See, again by analogy, judgment of 5 April 2017, Marina del Mediterráneo *and Others* (C-391/15, EU:C:2017:268, paragraphs 26 to 32).

52 See above in points 44 to 48, 58 to 60, and 89.

109. In the light of the above, I propose that the Court answer the referring court's third question as follows:

The words 'decisions, acts or omissions' in Article 11(1) of Directive 2011/92 may include administrative decisions taken in the course of determining an application for development consent which themselves do not irreversibly and finally determine the legal rights of the parties.

5. Question 6

110. By its sixth question, the referring court asks if Member States may provide for exceptions to the NPE rule, where these are not provided for in the Directive or the Convention.

111. From the order for reference, I understand that the exception alluded to is for frivolous or vexatious litigation. In that regard, it is not entirely clear why that question is relevant in the light of the main proceedings. The referring court does not state that the claim is either frivolous or vexatious. According to the referring court, the possibility was raised by the notice party, EirGrid, in the proceedings before the national court. On the other hand, the Board as respondent confirmed at the oral hearing before this Court that it did not allege any abuse on the part of the Applicants.

112. However, in the spirit of cooperation governing the preliminary rulings procedures, to the extent that it may assist the national court, I note the following.

113. As the national court points out, neither the Directive nor the Convention contains a specific basis for an exception to the NPE rule in cases of frivolous or vexatious actions.

114. Nonetheless, the Court has already confirmed that the NPE rule does not require national courts to disapply national rules on costs completely. Moreover, the 'frivolous' (and a fortiori vexatious) character of litigation can be taken into account when determining costs subject to the NPE rule.[53] Therefore, modifying the application of the NPE rule to take into account abusive or manifestly unfounded claims does not constitute an exception as such.

115. Thus, instead of putting it in terms of exceptions or even necessity for disapplication, I would rather understand the operation of the NPE rule in more harmonious terms: within the overarching umbrella of the NPE rule, the normal national default rules on costs still remain applicable, with the judge taking into account how (un)successful each party was in its challenge and any other relevant elements of procedure provided for under national law.

116. Whilst it is in theory correct that even basic rules on access to justice may not apply in cases of vexatious litigation,[54] which could also extend to the NPE rule leading for all practical purposes to its 'disapplication', such situations are truly exceptional. On the basis of the information provided by the referring court, the type of action in the present case is very far from falling into that exceptional category.

117. In the light of the above, I propose that the Court reply to the referring court's sixth question as follows:

When applying the rule provided for in Article 11(4) of Directive 2011/92 that costs should not be prohibitively expensive, that directive does not oppose the taking into account by national courts of the frivolous or vexatious nature of the challenge to which the rule is being applied.

53 As also referred to in point 58, see judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 42).
54 Judgment of 17 July 1998, *ITT Promedia* v *Commission* (T-111/96, EU:T:1998:183).

6. Question 7

118. By its seventh question, the referring court asks whether a requirement in national law for a causal link between the alleged unlawful act or decision and damage to the environment as a condition for the application of national legislation giving effect to the NPE rule is compatible with the Convention.

119. I understand that the requirement for a causal link appears in national legislation in relation to costs of challenges that are in principle *not within* the scope of Article 11(1) of the Directive (sections 3 and 4 of the 2011 Environmental Act). Moreover, the referring court has held that those provisions of national law *do not apply* in the present case.

120. As a result, I have difficulty understanding how the question raised by the national court is relevant in the context of the present case. I am therefore of the opinion that the seventh question of the referring court must be considered as either outside the scope of EU law or purely hypothetical and as a result, should be dismissed as inadmissible.

121. In the light of the above, I propose that the Court reject the referring court's seventh question as inadmissible.

B. Relevance of the Aarhus Convention — Questions 4 and 5

122. By its fourth and fifth questions the referring court enquires about the potential impact of Article 9(3) of the Convention on its national legislation, be it directly (direct effect of that provision) or indirectly (via conform interpretation).

123. At the hearing, there was an extensive but inconclusive discussion as to whether, on the facts of this case and in view of the applicable Irish legislation, it was not in fact Article 9(2) that applied rather than Article 9(3).

124. I understand that, from the *point of view of national law*, which of those provisions of the Convention applies makes a difference in terms of the specific national rules on costs which apply to the case. However, to interpret and evaluate the national law and facts which then lead to their classification under the relevant provision of the Convention is indeed a matter for the national court.

125. Even if starting from the assumption that it is indeed Article 9(3) of the Convention that is applicable to the case before the national court, from the *point of view of EU law*, the answers to the referring court's questions have already been provided on the basis of the Directive that implemented the pertinent provisions of the Aarhus Convention into EU law. The additional (freestanding or not) application of Article 9(3) would change very little if anything at all in that regard.

126. I acknowledge that one can debate at length the extent to which EU law transposes Article 9(3) of the Convention, when considering that the EU's Declaration on approval of the Convention has stated that Article 9(3) will not be fully implemented by the EU[55] and the lack of equivalent wording to implement Article 9(3) in Article 11 of the Directive.[56]

55 United Nations Treaty Collection, Declarations and Reservations of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters – declarations formulated by the European Union upon approval (available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec).

56 Which then potentially opens up another layer of complexity, intriguing but yet again beyond the scope of the present case: if indeed an application were to be brought which falls under Article 9(3) of the Convention and outside of what the Union could have implemented into the EU legal order by adopting the Directive, then the potential applicability of the Convention for those questions within the Irish legal order would not be governed by EU law, but by the Irish constitutional rules on the legal effects of international treaties in that national legal order. If that were the case, then the Court would in any case have no jurisdiction to answer the two questions referred.

127. Nonetheless, whatever the outcome of that discussion, to the extent that a challenge falls within the scope of Article 11(1) of the Directive, it is in any event subject to the NPE rule contained in Article 11(4) thereof.

128. For the reasons set out in response to the referring court's second question, I do not consider that a challenge can be split up into different elements in the way proposed. Either the challenge falls within Article 11(1) of the Directive and is subject to the NPE rule *in its entirety*, or it does not. In the main case, everything in the request for a reference indicates that it does.

129. As a result, there is no need to reply to the referring court's fourth and fifth questions.

V. Conclusion

130. In the light of the foregoing, I propose that the Court reply to the questions of the High Court (Ireland) as follows:

(1) In the context of a national legal system where the legislature has not expressly and definitively stated at what stage of the process a decision is to be challenged and where this falls for judicial determination in the context of each specific application on a case-by-case basis in accordance with common law rules, the entitlement under Article 11(4) of 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 to a 'not prohibitively expensive' procedure applies to the process before a national court whereby it is determined as to whether the particular application in question has been brought at the correct stage.

(2) The requirement that a procedure be 'not prohibitively expensive' pursuant to Article 11(4) of Directive 2011/92 applies to all grounds, pleas or arguments based on substantive or procedural infringements of that directive or other instruments of EU law and raised in the context of a challenge to a decision, act or omission subject to the public participation provisions of that directive. Where such a challenge involves grounds, pleas or arguments alleging infringements of both EU and national law, the requirement that a procedure be 'not prohibitively expensive' pursuant to Article 11(4) of the aforementioned directive will generally apply to the challenge as a whole.

(3) The words 'decisions, acts or omissions' in Article 11(1) of Directive 2011/92 may include administrative decisions taken in the course of determining an application for development consent which themselves do not irreversibly and finally determine the legal rights of the parties.

(4) In the light of the answers to the referring court's first and second questions, there is no need to reply to the fourth question.

(5) In the light of the answers to the referring court's first and second questions, there is no need to reply to the fifth question.

(6) When applying the rule provided for in Article 11(4) of Directive 2011/92 that costs should not be prohibitively expensive, that directive does not oppose the taking into account by national courts of the frivolous or vexatious nature of the challenge to which the rule is applied.

(7) The referring court's seventh question is inadmissible.