Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 5 June 2018 [1] [i]

Case C-167/17

Volkmar Klohn
v
An Bord Pleanála
joined parties:
Sligo County Council,
Maloney and Matthews Animal Collections Ltd

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

(Reference for a preliminary ruling — Environment — Impact assessment — Access to a review procedure — Requirement that review procedure is not prohibitively expensive — Notion of 'not prohibitively expensive' — General principle of law — Temporal application — Direct effect — *res judicata* — Consequences for a decision awarding costs that has become definitive)

I. Introduction

1. On 24 June 2004, Mr Volkmar Klohn requested leave to challenge, before the Irish courts, a decision by An Bord Pleanála (Planning Appeals Board, Ireland) ('the Board') granting planning permission for the construction of a fallen animal inspection facility close to his farm. He was granted leave to commence judicial review proceedings on 31 July 2007. However, his claim was subsequently rejected on the merits in April 2008 and an order against him awarding costs was adopted in May of 2008. In June 2010, the Taxing Master adopted a decision setting those costs at around EUR 86 000.

2. Mr Klohn challenged the decision of the Taxing Master on the basis that it failed to respect the requirement contained in Directive 2003/35/EC [2] that review procedures be 'not prohibitively expensive' ('the NPE rule'). The Taxing Master's decision was upheld by the High Court, Ireland. Mr Klohn appealed before the Supreme Court, Ireland, which is the referring court in this case.

3. It is in this context that the referring court asks whether: (a) the NPE rule is applicable *ratione temporis*; (b) the NPE rule is directly effective or there is an obligation of conform interpretation in relation to it; and (c) the Taxing Master and/or the national court reviewing his decision has an obligation to apply the NPE rule, notwithstanding that the order for costs has become final.

1 Original language: English.

2 Directive 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 — Statement by the Commission (OJ 2003 L 156, p. 17).

II. Legal framework

A. International law

1. Aarhus Convention

4. Article 9 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention') entitled 'Access to Justice', provides that:

'1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

…

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. Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

…'

B. European Union law

1. Directives 85/337 and 2003/35

5. According to the Environmental Impact Assessment Directive 85/337/EEC[3] ('the EIA Directive'), public and private projects likely to have a significant impact on the environment must undergo an assessment of their effects on the environment. The EIA Directive also sets out requirements for public participation and consultation in the decision-making process for authorisation of such projects.

6. Following signature by the European Union (then the European Community) of the Aarhus Convention, the EIA Directive was amended by Directive 2003/35, which inserted Article 10a into the EIA Directive. According to that provision:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: … have access to a review procedure … to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive …

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

3 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).

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

7. The first paragraph of Article 6 of Directive 2003/35 under the heading 'Implementation', sets the transposition deadline for that directive at 25 June 2005.

C. Irish law

8. According to Order 99, rule 1 of the Rules of the Superior Courts, costs follow the event. The applicant who loses must pay the costs of the other party in addition to its own costs. That is the general rule, but the court has discretion to depart from that rule if the particular circumstances of the case justify it.

9. By a judgment of 16 July 2009, *Commission* v *Ireland*[4] the Court ruled that Ireland had not transposed into national law the rule that procedures should not be prohibitively expensive as set out in Article 10a of the EIA Directive. Following that ruling Ireland inserted section 50B in the Planning and Development Act 2000 (as amended), so that in the field of application of that law, each party is obliged to pay its own costs, but judges can depart from the rules for matters of exceptional importance.

III. Facts, procedure and questions referred

10. The facts of the present case date back to 2004 and the grant of planning permission to construct in Achonry, County Sligo, Ireland, a fallen animal inspection unit for cows from across Ireland as part of the response to the bovine spongiform encephalopathy epizootic. Mr Klohn, the applicant in the main proceedings, owns a farm close to the proposed site of the facility.

11. By application dated 24 June 2004, Mr Klohn sought leave to challenge the grant of planning permission by the Board. According to the submissions of the applicant, I understand that the challenge was based on a failure to allow for public participation in the decision-making process and that the environmental impact assessment would only be completed after the facility had actually been constructed.

12. Mr Klohn was granted leave to issue proceedings on 31 July 2007. During the oral hearing before this Court, it was confirmed that the delay of three years in deciding on the application for leave was not due to the action or inaction of any of the parties, but appeared to be attributable to the workload of the national court hearing the request.

13. By judgment dated 23 April 2008, the High Court dismissed Mr Klohn's application on the substance of the case.

14. On 6 May 2008, the High Court issued an order for costs, applying the ordinary rule, according to which 'costs follow the event'. In accordance with that rule, the respondent and the notice party in the main proceedings (the company constructing the facility) were authorised to recover costs against Mr Klohn as the unsuccessful party to the litigation.

4 C-427/07, EU:C:2009:457, paragraphs 92 to 94.

15. Costs were only awarded in relation to the substantive application for judicial review and not the application for leave to seek judicial review. The referring court points out that since Mr Klohn was granted leave on 31 July 2007, the costs were incurred after the expiry of the deadline for the transposition of Directive 2003/35, which inserted Article 10a (the NPE rule) into the EIA Directive.

16. I understand that the costs order itself did not include an indication of the amount of the costs that might be awarded against Mr Klohn. For his part, Mr Klohn states that, in bringing the action for leave and the application for judicial review itself, he incurred costs of around EUR 32 000.

17. Following the granting of the costs order, the calculation of the amount of the costs reasonably incurred was referred to the Taxing Master of the High Court. Before the Taxing Master, Mr Klohn submitted that the level of costs determined should not be 'prohibitively expensive' pursuant to Article 3(8) and Article 9(4) of the Aarhus Convention and Article 10a of the EIA Directive.

18. The Taxing Master's decision on costs was adopted in June 2010. The Board had initially asked for around EUR 98 000. The Taxing Master set the costs payable to the Board at around EUR 86 000.

19. Mr Klohn subsequently requested a review of the decision of the Taxing Master before the High Court. That court upheld the order of the Taxing Master. Mr Klohn then appealed against the judgment of the High Court to the Supreme Court.

20. For the sake of clarity, the timeline for the main events in this case can thus be summarised as follows:

– 25 June 2003: publication and entry into force of Directive 2003/35;[5]

– 30 April 2004: decision of the Board;

– 24 June 2004: proceedings commenced (request for leave to challenge grant of planning permission);

– 25 June 2005: expiry of transposition deadline;

– 31 July 2007: leave granted;

– 23 April 2008: judgment on the substance;

– 6 May 2008: costs order against Mr Klohn;

– 24 June 2010: decision of the Taxing Master on the amount of costs;

– 11 May 2011: appeal against Taxing Master's decision rejected.

21. Having doubts as to the correct interpretation of EU law, the Supreme Court decided to stay the proceedings and refer the following three questions to the Court for a preliminary ruling:

'(1) Can the "not prohibitively expensive" provisions of Article 10a of [Directive 85/337] potentially have any application in a case such as the instant case where the development consent challenged in the proceedings was granted prior to the latest date for transposition of [Directive 2003/35] and where the proceedings challenging the relevant development consent were also commenced prior

5 Article 7 of Directive 2003/35 set its entry into force on the day of its publication in the Official Journal.

to that date? If so have the "not prohibitively expensive" provisions of [Directive 85/337] potential application to all costs incurred in the proceedings or only to costs incurred after the latest date for transposition?

(2) Is a national court which enjoys a discretion concerning the award of costs against an unsuccessful party, in the absence of any specific measure having been adopted by the Member State in question for the purposes of transposing Article 10a of the [Directive 85/337], obliged, when considering an order for costs in proceedings to which that provision applies, to ensure that any order made does not render the proceedings "prohibitively expensive" either because the relevant provisions are directly effective or because the court of the Member State concerned is required to interpret its national procedural law in a manner, to the fullest extent possible, which fulfils the objectives of Article 10a?

(3) Where an order for costs is unqualified and would, by virtue of the absence of any appeal, be regarded as final and conclusive as a matter of national law, does Union law require that either

(a) a Taxing Master charged in accordance with national law with the task of quantifying the amount of costs reasonably incurred by the successful party; or

(b) a court asked to review a decision of such a Taxing Master

nonetheless have an obligation to depart from otherwise applicable measures of national law and determine the amount of costs to be awarded in such a way as ensures that the costs so awarded do not render the proceedings prohibitively expensive?'

22. Written submissions were lodged by Mr Klohn, the Board, Ireland and the European Commission. Those interested parties also presented oral argument at the hearing held on 22 February 2018.

IV. Assessment

A. Introduction

23. The procedure seeking leave to challenge the Board's decision by judicial review commenced in June 2004, a year before the transposition deadline of Directive 2003/35 in June 2005. However, leave to bring the challenge was granted some years later, in July 2007. Judgment on the substance was handed down in April 2008. Throughout that time the NPE rule was not transposed into national law. But a considerable part of the national judicial procedure took place after the transposition deadline.

24. Thus, at first sight, the present case may seem to be an 'EU law classic' of belated transposition of a directive. However, it is the precise nature of the rule in question and the timeline in the main case that renders the issue somewhat more complex, and which led the referring court to ask (a) whether the NPE rule is to be understood as a provision having direct effect or a source for conform interpretation (question 2), (b) about its temporal application (question 1), and (c) by whom it should be applied and how (question 3)?

25. In my view, the NPE rule, or more precisely the fifth subparagraph of Article 10a of the EIA Directive containing that rule, has direct effect (Section B) and can be invoked in relation to costs incurred from the start of the first discrete stage of the procedure following expiry of the transposition deadline of Directive 2003/35 (Section C). Precisely how and by whom it is to be applied in the specific national procedure is, albeit with caveats, a question for national law (Section D).

B. Second question: conform interpretation and direct effect of the NPE rule

26. By its second question, the referring court asks whether the NPE rule either has direct effect or whether an obligation of 'conform interpretation' applies in relation to it.

27. For the sake of completeness, it ought to be acknowledged that the Commission also suggested that the NPE rule may constitute the specific expression of a general principle of EU law. In my Opinion in *North East Pylon Pressure Campaign and Sheehy* (*NEPPC*), I noted that the NPE rule is indeed a specific expression in a directive of a more general principle.[6] In its recent judgment in the *NEPPC* case, the Court also implied that the principles of effectiveness and effective judicial protection generally require that proceedings are not prohibitively expensive.[7]

28. However, those statements are to be properly understood as meaning the NPE rule is to be interpreted in its broader legislative and constitutional context, and not as establishing a general free-standing principle of EU (environmental) law that would be applied independently of its legislative context. To the extent that such a general principle does exist, it will need to be expressed at the legislative level to be applied to specific cases.[8]

29. In the present case, the principle that a review procedure is not to be prohibitively expensive has in fact been given specific expression through the fifth subparagraph of Article 10a of the EIA Directive. It is to the effects of that specific provision that I now turn.

1. Conform interpretation

30. The general obligation of conform interpretation follows clearly from well-established case-law,[9] which holds that the obligation is 'inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law'.[10]

31. That obligation has also been confirmed specifically in relation to the Aarhus Convention.[11] I see no reason that it should not also apply to the NPE rule. Nor indeed have any of the parties to these proceedings contested that point.[12] Moreover, the referring court has stated in its request that national law is capable of being interpreted in conformity with the NPE rule.

32. However, what precisely 'conform interpretation' implies in practice in this specific case is a different question, to which I will return further below.[13]

2. Direct effect

33. Whereas all the parties in principle agreed that there exists an obligation of conform interpretation, only the Applicant argued that the NPE rule has direct effect.

6 C-470/16, EU:C:2017:781, point 33.

7 Judgment of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C-470/16, EU:C:2018:185, paragraphs 55 to 58).

8 See in that sense, judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraphs 18 and 19) in contrast to the judgment of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709, paragraph 76).

9 Judgments of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 26), and of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 111 to 119). See also judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 24), and of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 109).

10 Judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 114).

11 Judgment of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraphs 50 to 52).

12 At least in principle, leaving aside for the moment the more specific issues of the temporal scope of that obligation and the identification of organs/institutions that are competent for its application, addressed below in response to questions 1 and 3 of the referring court.

13 See below, points 72 to 75.

34. Should taxonomy matter in such a context? As recently implied by the Court, application of the two concepts can produce, in specific circumstances, a similar result.[14] Moreover, in practical terms, albeit labelled as two different categories, there is in fact no clear boundary between conform interpretation (indirect effect) and direct effect. The reality seems closer to a continuum between the two concepts. In particular, it will be a matter of subjective perception (or rather self-declaration) as to when a national judge is still 'strongly interpreting' the national rule in order to ensure its conformity with an EU law provision as opposed to directly applying an EU law provision to the case.

35. Nonetheless, direct effect and conform interpretation have been developed by the Court as two distinct categories: the consequences of each in a dispute at the national level, and in particular the rights and obligations of individual parties, will differ.[15] That is also why I understand that the referring court is raising this issue, because whether the fifth subparagraph of Article 10a of the EIA Directive containing the NPE rule has direct effect will be of relevance for treatment of the case at the national level.

(a) Conditions for direct effect

36. Whether or not a provision has direct effect must be examined having regard to the nature, general scheme and wording of the provision in question.[16]

37. A provision will have direct effect whenever, as far as its subject matter is concerned, it is sufficiently clear, precise and unconditional to be relied on against a conflicting national measure or in so far as the provision defines rights which individuals are able to assert against the State.[17] That can be the case, for example, if there is a prohibition expressed in a general manner and in unequivocal terms.[18]

38. Five general observations based on the case-law are called for, before turning to the NPE rule.

39. First, it is obvious from the case-law that 'clear and precise' is a rather elastic term. A provision can be 'clear and precise' whilst containing undefined — or even vague — concepts or indeterminate legal notions. To take a classic example, the Court held in the 1960s in the judgments in *van Gend & Loos*[19] and in *Salgoil*[20] that the prohibition of customs duties and quantitative restrictions, and 'measures having equivalent effect' to customs duties and quantitative restrictions, were sufficiently clear and precise to be directly effective. The Court has spent the last half century interpreting the term 'measures having equivalent effect'.[21]

14 Judgment of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C-470/16, EU:C:2018:185, paragraphs 52 and 58).

15 In detail below, points 67 to 75.

16 See, for example, judgment of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 12).

17 Judgments of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraph 25), and of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 56 and 57).

18 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 60).

19 Judgment of 5 February 1963 (26/62, EU:C:1963:1).

20 Judgment of 19 December 1968 (13/68, EU:C:1968:54).

21 The *van Gend & Loos* and *Salgoil* cases themselves concerned customs duties and quantitative restrictions in the strict sense. It was only later that an explanation of the second notion, 'measures having equivalent effect', became necessary. See, for example, judgments of 1 July 1969, *Commission* v *Italy* (24/68, EU:C:1969:29); of 11 July 1974, *Dassonville* (8/74, EU:C:1974:82); of 5 February 1976, *Conceria Bresciani* (87/75, EU:C:1976:18); and of 24 November 1982, *Commission* v *Ireland* (249/81, EU:C:1982:402).

40. Second, the Court appears to be more inclined to conclude that a provision, notwithstanding its use of vague or indeterminate notions, is directly effective where the provision contains a *prohibition*. Where the provision is being relied on as the source of a standalone right, whose contours must be defined, recourse to vague concepts is generally more problematic.[22] So, for example, in the judgment in *Carbonari and Others*,[23] medical students had a right to 'appropriate remuneration' under the applicable directive. Whilst the obligation to provide remuneration was precise, there was no definition of the term 'appropriate', nor any method of fixing the remuneration. The provision was not therefore directly effective.

41. Third, the existence of direct effect, or lack thereof, is assessed at the level of individual legal propositions, such as an article of a legislative measure, or even a section thereof. Within such an assessment, the system and the internal logic of the legislative measure in question naturally matters. That does not prevent, however, a specific provision from being directly effective even if other (or even most) provisions of the same legislative measure are not.

42. Fourth, in determining whether a rule is directly effective in a given case, the Court does not seek to establish that entire provisions have direct effect and are applicable verbatim. Instead, it proceeds by extraction, that is, it seeks to determine whether a specific, applicable rule of behaviour can be extracted from the (perhaps longer and more complex) EU law provision. Thus, for example, the Court declared the direct effect of the principle of equal pay for equal work[24] (or, effectively, the prohibition on discrimination between men and women in remuneration[25]) from Article 119 of the EEC Treaty (now Article 157 TFEU), which itself imposed a somewhat broader duty on Member States.[26]

43. Fifth, the 'unconditional' criterion of direct effect implies that the EU provision does not require the adoption of any further measure on the part of either the EU institutions or the Member States. Moreover, according to the case-law, Member States should not be left with any discretionary power[27] in relation to their implementation or be allowed to rely on a failure to use that discretion.[28]

44. However, notwithstanding the existence of discretionary power on the part of the Member State, the conditions of direct effect may still be met. That will be the case in particular if the question of whether the national authorities exceeded their discretion *can be judicially reviewed*.[29]

22 In this context, doctrine distinguishes between the concepts of 'invocabilité d'exclusion' (literally, invoking to exclude — that is, an EU law provision which is sufficiently clear to *prevent* conflicting national rules from applying) and 'invocabilité de substitution' (literally invoking to substitute (an EU rule) — that is, an EU law right which is sufficiently fully formed to *replace* the existing national rule). See Prechal, S., 'Member State Liability and Direct Effect: What's the Difference After All?' *European Business Law Review*, Vol. 17, 2006, p. 304. Within that theoretical framework, there is 'invocabilité d'exclusion' where an EU rule that *prohibits* certain actions and is used to disapply national law. In such cases, the threshold of direct effect appears lower. See, in that sense, Opinion of Advocate General Léger in *Linster* (C-287/98, EU:C:2000:3, point 57).

23 Judgment of 25 February 1999 (C-131/97, EU:C:1999:98).

24 Judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraphs 30 to 37).

25 Judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraph 39).

26 See, in this regard, Opinion of Advocate General Trabucchi in *Defrenne* (43/75, EU:C:1976:39, operative part). First the indeterminate notions in that provision were discussed. It was noted that the provision in question is clearly addressed to the Member States. However, the Advocate General came to the conclusion that within that broader provision, there is a narrower proposition. He identified that proposition as: 'pay in the strict sense of the word and with work which is not merely similar but is the same' and found that it is directly applicable.

27 Judgment of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 6).

28 Judgment of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraphs 28 to 30).

29 Judgment of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraphs 7 and 13). See also judgments of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraph 59); of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 64); and of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraphs 29 and 31).

45. That will, in principle, be the case if a 'minimum guarantee', 'minimum rights', or 'minimum protection'[30] can be ascertained and it can be established through judicial review whether that minimum level has been respected by the Member State.[31] Thus, for example, in the judgment in *Faccini Dori* the Court held that the provision was unconditional and sufficiently precise, since the relevant terms could be defined and it was clear what the right entailed. There was some discretion for the Member States with regard to determining the time limit and conditions for the cancellation right provided for in the directive at issue in that case. However, that did not affect its precise and unconditional nature, as it still allowed for the determination of the applicable minimum rights.[32]

46. Put simply, when determining whether a provision imposing a prohibition has direct effect, the basic question is whether the rule is justiciable. Does it provide minimum guarantees that can in practice be applied by the national body in question, potentially notwithstanding some degree of discretion on the part of the Member State? Is there a clear rule of behaviour that can be extracted from the provision and applied in the individual case?

(b) Application to the present case

47. In the light of the above conditions as interpreted by the case-law, I consider that the fifth subparagraph of Article 10a of the EIA Directive containing the NPE rule does indeed have direct effect.

48. The rule that review procedures falling within the scope of the EIA Directive are not to be prohibitively expensive is clearly justiciable, certainly at the moment when the competent national authority is deciding on the costs of such procedures. It does provide minimum guarantees: an applicant cannot be prevented from bringing proceedings for reasons of cost and, a fortiori, should not be made bankrupt as a direct consequence of doing so.

49. The NPE rule contains a clear, precise and unconditional *prohibition*. It is true that the concept of what is 'prohibitive' must be interpreted and applied in the specific context of each case. However, in my view, that does not prevent the NPE rule from being *clear and precise*. As a general point, irrespective of how many guidelines or judgments there could be that interpret the notion of 'prohibitively expensive' by, for example, providing ranges, amounts, or indicative figures, the rule will *always* require some degree of interpretation in individual cases, including taking into account the specific context of the case: *who* is suing for *what* precisely?[33] In other words, at the individual level, there will always be some degree of uncertainty, but that does not mean there will be uncertainty at a general level as to what the rule requires.

30 See respectively, judgments of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 19); of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 17); and of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 35).

31 See, in that sense, judgment of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468, paragraph 37): 'this discretion, which a Member State may exercise when transposing that provision into national law, *does not preclude judicial review* of the question whether it has been exceeded by the national authorities' (emphasis added).

32 Judgment of 14 July 1994 (C-91/92, EU:C:1994:292, paragraph 17). See also Skouris, V., '*Effet Utile* Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives', *European Business Law Review*, Vol. 17, 2006, p. 242, where unconditionality is described as those provisions that do not leave a margin of discretion to the Member States as to whether, when and how to legislate.

33 That is, moreover, clear from the judgment of the Court in *Edwards*. In that judgment, the Court did not seek to put an absolute figure on the concept of 'not prohibitively expensive' and also excluded an approach based on 'average' claimants. Instead, it pointed to a (non-exhaustive) list of the most pertinent elements that should be considered when applying the rule — see judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraphs 40 to 43).

50. That point can be illustrated by, for example, the *Salzburger Flughafen*[34] case where the requirement to carry out an environmental impact assessment for projects having a 'significant effect' on the environment was considered to have direct effect. That was the case notwithstanding the obvious need to conduct an assessment of 'significant effect' on a case-by-case basis.[35]

51. As for the *unconditional* nature of the NPE rule, it is clear that application of the prohibition is not subject to any preconditions. It is correct that the Member States have some discretion as to the exact nature of the review procedures used to challenge decisions subject to the public participation provisions of the EIA Directive. However, leaving aside the temporal element, which is dealt with under question 1 below, none of the parties actually dispute the fact that the judicial review procedure in the main case would constitute such a review procedure, to which the rule would apply.[36]

52. Put differently, with regard to a situation such as that in the present case, which falls squarely within what would have to be covered by a correct transposition of the EIA Directive, as amended by Directive 2003/35, there is no conditionality.

53. It is equally true that Member States enjoy a wide margin of discretion in the way they give effect to the NPE rule. There is a multitude of forms and methods which the Member States could opt for, such as providing for undertakings between the parties; creating a costs capping mechanism or having maximum costs awards; protective costs awards; lowering court fees; imposing restrictions on lawyers' fees; or using a system of legal aid. Such measures might be appropriate at different stages — before proceedings commence, once they have commenced, on an ongoing basis during proceedings, or once proceedings have come to an end.

54. Again, that does not prevent the NPE rule from having direct effect. There is no discretion as to the 'minimum guarantee' foreseen by the NPE rule. In other words, any discretion that may exist is in relation to the 'how' and not the 'what'.[37]

55. I therefore consider that the fifth subparagraph of Article 10a of the EIA Directive containing the NPE rule has direct effect on the basis of this Court's definition and application of that concept in its case-law. Nonetheless, the Court has previously held that the provision of the Aarhus Convention corresponding to Article 10a of that directive lacks direct effect, an issue which will be addressed in the following section.

(c) Case-law on the direct effect of Article 9(4) of the Aarhus Convention

56. The Court has not as of yet considered the question of whether the fifth subparagraph of Article 10a of the EIA Directive is directly effective.

34 Judgment of 21 March 2013 (C-244/12, EU:C:2013:203).

35 See also, for example, judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 105 to 134) with regard to the notion of 'employment conditions'.

36 Thus, in the context of the present case, this is in clear contrast to the judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others* (C-543/14, EU:C:2016:605, paragraph 50), discussed further below at points 57 to 65.

37 In my view that clearly distinguishes the present case from that under consideration in the judgment of the Irish High Court in *Friends of the Curragh Environment Ltd v An Bord Pleanála* [2009] 4 IR 451, cited by the Ireland, in which it was held that Article 10a was not directly effective. I understand that in that case the applicant effectively sought at an early stage in the case to obtain a costs order that said he would not have to pay any of the defendant's costs. I agree with the final conclusion that the NPE rule is not directly effective *in the sense of guaranteeing that a particular procedural tool be used* to ensure that costs are not prohibitively expensive. In other words, there was significant discretion as to the 'how'.

57. In the judgment in *Ordre des barreaux francophones*,[38] to which reference was recently made in the judgment in *NEPPC*,[39] the Court held that the corresponding provision in the Aarhus Convention (Article 9(4)) was not directly effective.

58. However, I do not think that that reasoning can be automatically transposed to Article 10a of the EIA Directive.

59. *Ordre des barreaux francophones* was a case concerning the discontinuation of VAT exemption on services supplied by lawyers in Belgium. The Cour constitutionnelle (Constitutional Court, Belgium), seised by the question of validity of the national law ending the exemption, posed a number of questions to this Court, invoking a range of various legal instruments and provisions. The essential question was about whether or not the ensuing effective increase in lawyers' fees in Belgium (by 21% — the statutory rate of VAT on services by lawyers in Belgium) would impede the right to an effective remedy and in particular the right to the assistance of a lawyer. One of the many issues raised by the referring court was whether Directive 2006/112/EC[40] was compatible with Article 9(4) and (5) of the Aarhus Convention.

60. It was in that context that the Court made concise observations that Article 9(4) of the Aarhus Convention is applicable only to the proceedings referred to in Article 9(1), (2) and (3) of that convention. As the latter provisions are in themselves not directly effective, neither is the provision of Article 9(4), as a result of its cross-reference to them. Thus, the Court concluded that Article 9(4) *cannot be relied on to challenge the validity* of Directive 2006/112.[41]

61. It is clear that *Ordre des barreaux francophones* was a case concerning the Aarhus Convention and not the EIA Directive. The legal question posed concerned the challenge to the validity of an instrument of EU secondary law, and was raised in a very different factual and legal context. Thus there are multiple reasons why that case can be distinguished from the present case.

62. First, the claimant in the *Ordre des barreaux francophones* case sought *judicial review of the VAT Directive* in the light of, amongst other provisions, the NPE rule in the Aarhus Convention. Thus, that case was much broader in scope, with a series of arguments being invoked that aimed at questioning the general charging of VAT on legal services, without particular regard to the existence or type of proceedings. Only one of those arguments concerned the Aarhus Convention. By contrast, the present case involves the invoking of the NPE rule against an individual costs order in proceedings challenging an identified (alleged) breach of the public participation provisions of the EIA Directive. It also relates, significantly, not to the direct effect of an international treaty,[42] but a provision of EU secondary law.

63. Second, it is clear that the NPE rule would, in principle,[43] apply to the specific procedure involved in the present case. That contrasts with the *Ordre des barreaux francophones* case, in which a *general* challenge was brought because of concerns about potential increases in the cost of legal proceedings. It was therefore decisive that the other provisions of Article 9 (that is, Article 9(1)-(3)) of the Aarhus Convention lacked sufficient clarity and precision to the extent it did not identify the complete set of procedures to which the NPE rule applied. No such lack of precision is present in the context of the present case and in relation to the EIA Directive.

38 Judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others* (C-543/14, EU:C:2016:605).

39 Judgment of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C-470/16, EU:C:2018:185, paragraph 52), where the absence of direct effect of Article 9(4) of the Aarhus Convention followed the *Ordre des barreaux francophones* case as precedent for the lack of direct effect without developing that point further.

40 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

41 Judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others* (C-543/14, EU:C:2016:605, paragraphs 50 and 53 to 54).

42 See judgments of 5 February 1976, *Conceria Bresciani* (87/75, EU:C:1976:18); of 30 September 1987, *Demirel* (12/86, EU:C:1987:400); and of 11 May 2000, *Savas* (C-37/98, EU:C:2000:224).

43 Again leaving aside the temporal aspect.

64. Third, in the judgment in *Ordre des barreaux francophones*, the only argument given for the lack of direct effect of Article 9(4) is the fact that it cross-refers to Article 9(1), (2) and (3) of the Aarhus Convention, which are themselves not directly effective.[44] However, the other subparagraphs of Article 10a of the EIA Directive are worded in much simpler and more straightforward terms. More importantly, the cross-reference loses significance in a case like the present judicial review proceedings, where, again, there is no uncertainty as to whether the NPE rule would be applicable. In other words, in relation to a key aspect of the Court's reasoning in the judgment in *Ordre des barreaux francophones*, Article 10a of the EIA Directive is structured and worded differently from Article 9 of the Aarhus Convention.

65. In my view, the *Ordre des barreaux francophones* case therefore clearly can and should be distinguished from the present case.

3. All roads lead to Rome (but some are bumpier than others)

66. As I noted above,[45] all the parties agree that there is a duty of conform interpretation in relation to the NPE rule. I also agree that there is such a duty. The referring court has confirmed that conform interpretation is possible.

67. It might be argued that as the same result can allegedly be achieved through conform interpretation as through direct effect, the above examination of direct effect of the NPE rule was not really necessary.

68. I do not consider that that would be an acceptable conclusion for two reasons, one principled and one practical.

69. On the level of *principle*, it would, in my view, be somewhat self-contradictory to hold that the NPE rule *lacks* the clarity and precision necessary to be directly effective in an individual case, and in the same breath to hold that the NPE rule *is* clear and precise enough to *oblige* national judges to apply it in individual cases via conform interpretation.

70. Direct effect of the NPE rule involves invoking the provision to 'prune back' costs by preventing the national court from awarding them above the 'prohibitively expensive' threshold, but of course while still operating within the other generally applicable national rules on costs. Conform interpretation requires the national court to 'cobble together' bits of national law and find a way to squeeze costs down below the 'prohibitively expensive' threshold. In other words, what is requested in terms of clarity and precision to identify a 'prohibitively expensive' threshold in both cases is the same.

71. That clarity and that precision are either present or they are not; they do not magically disappear with the mention of 'direct effect'. I think it would be confusing to give the impression that different standards of 'clarity and precision' apply in cases of direct effect and conform interpretation.

72. In the context of the present case, the *practical* level is where the choice makes the most significant difference.

73. First, conform interpretation has its limits in that the approach cannot be used to achieve a result '*contra legem*'.[46] What is '*intra*', what is '*praeter*', and what is already '*contra legem*' inevitably depends on a judge's subjective, interpretative assessment of whether a particular result is achievable based on an overall assessment of national law. By contrast, where a provision of a directive is directly effective,

44 Judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others* (C-543/14, EU:C:2016:605, paragraph 50).

45 See above, point 31.

46 See, for example, judgment of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 110).

it makes a more precise 'incision' into the national legal order. At a basic level, the rule is self-contained, identifiable and predictable, in the sense of not being contingent on interpretative goodwill and imagination and the flexibility of each individual national legal system or an individual actor therein.

74. Second, direct effect of a directive can be invoked against the State alone and not against private parties [47] (such as the notice party in the main case). By contrast, conform interpretation finds no such limitation within the principle itself. Conform interpretation is applicable in the context of litigation between private parties. [48] It may be argued whether in the individual case, general principles of law such as legitimate expectations could preclude adverse consequences being imposed on private third parties, [49] although it appears to be generally accepted that conform interpretation may worsen the legal position of an individual. [50]

75. Third, if direct effect is excluded, the situation with regard to possible State liability also becomes more complex and unclear. In cases where there is inadequate transposition and direct effect is not possible, injured parties are forced to seek redress through damages actions against the State. That by definition involves multiplication of legal proceedings. Establishing a 'sufficiently serious breach' of EU law will, moreover, generally be more difficult where the rule breached has been held to lack the clarity and precision necessary to be directly effective. [51]

4. Conclusion

76. In my view, the NPE rule is clear and precise enough to allow a national judge to identify a 'prohibitively expensive' result in an individual case. That rule is also unconditional. I therefore propose to the Court to answer the referring court's second question as follows:

The requirement contained in the fifth subparagraph of Article 10a of the EIA Directive that procedures be 'not prohibitively expensive' has direct effect. A national court which has discretion concerning the award of costs against an unsuccessful party, in the absence of any specific measure having been adopted for the purposes of transposing that provision, is obliged, when considering an order for costs in proceedings to which that provision applies, to ensure that any order made does not render the proceedings 'prohibitively expensive'.

C. First question: temporal application of the NPE rule

77. Can the NPE rule actually be invoked [52] by Mr Klohn in this case, given that his action was brought before the deadline for transposition of that rule? If it can, is that in relation to costs accumulated *after* the date of transposition only, or also 'retroactively' to costs incurred *before* that deadline? Those are the issues at the heart of the referring court's first question.

47 Judgments of 12 July 1990, *Foster and Others* (C-188/89, EU:C:1990:313, paragraphs 18 to 20), and of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraphs 22 to 29).

48 Judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584). I make this point on the understanding that a national court would apply one or the other solution but not both in the same case. In other words, it would not, on the one hand, confirm direct effect of the NPE rule against the Member State and, on the other, deny its horizontal application against another private party whilst effectively imposing precisely the same obligation upon the latter via conform interpretation.

49 See judgment of 26 September 1996, *Arcaro* (C-168/95, EU:C:1996:363, paragraph 42) which nonetheless appears to be limited to the area of criminal law and imposition of criminal liability as the consequence of conform interpretation. See, for example, judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 45). See also the Opinion of Advocate General Kokott in *Kofoed* (C-321/05, EU:C:2007:86, in particular point 65), clearly confirming that: 'It is lawful, by way of national law provisions, that is to say, *indirectly*, to apply Community law to the detriment of an individual.'

50 See also below, point 104 of this Opinion.

51 Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 56).

52 I advisedly use the neutral vocabulary of 'invoke' here. Question 1 focuses only on the temporal dimension. The precise way in which the rule is invoked (direct effect or conform interpretation) is dealt with in the response to question 2.

78. In the present case, the judicial proceedings were commenced before the expiry of the transposition deadline, but continued and led to the accumulation of costs for a significant period of time after that date.

79. To the extent the referring court's first question relates to costs incurred *before* the transposition deadline, I consider that it is somewhat hypothetical. Indeed, the request for a reference clearly indicates that the only costs at issue are those incurred during the substantive phase of the proceedings, which commenced at the earliest on 31 July 2007, after leave was granted and therefore *after* the expiry of the deadline for transposition: 25 June 2005.

80. I consider that the NPE rule can be invoked in relation to the relevant costs in this case, that is the costs incurred by the Board during the *substantive* phase of the main case.

81. I will begin by discussing the possible classification of the NPE rule as substantive or procedural (1). I will go on to consider the alternative approaches to the temporal aspect (2), before applying this to the present case (3).

1. The significance of whether the NPE rule is substantive or procedural

82. According to settled case-law, 'procedural rules are generally held to apply to all proceedings pending at the time when they enter into force', whereas substantive rules are 'usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them'.[53] In principle, substantive rules only apply to situations that come into being after their entry into force or to the future effects of situations that have already come into being.[54]

83. The NPE rule does not fit neatly into a 'procedural' or 'substantive' box.

84. On the one hand, it is true that provisions on costs are often found in national codes or rules of (civil) procedure. Moreover, some of the Court's case-law might be read as implying that rules on costs are procedural. In the judgment in *Altrip*, the Court implicitly distinguished between rules of substance, such as the requirement to conduct an impact assessment, and rules of procedure, such as the right to judicial review.[55] In the judgment in *Edwards*, it was assumed that the NPE rule had immediate application, implying but not explicitly confirming its procedural character.[56] In the *Saldanha* and *Data Delecta* cases, the Court explicitly classified rules on security for costs as procedural.[57]

85. On the other hand, I consider it impossible to maintain the view that the NPE rule is purely or clearly procedural in nature. As a general point, costs are often presented as part of the operative part of judgment and normally follow the event (that is, the decision on the substance). The Court in the judgment in *Altrip* does indeed imply a procedural/substantive distinction, but does not in any way

53 Judgments of 12 November 1981, *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 9); of 6 July 1993, *CT Control (Rotterdam) and JCT Benelux* v *Commission* (C-121/91 and C-122/91, EU:C:1993:285, paragraph 22); and of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 47).

54 Judgments of 6 July 2010, *Monsanto Technology* (C-428/08, EU:C:2010:402, paragraph 66), and of 16 December 2010, *Stichting Natuur en Milieu and Others* (C-266/09, EU:C:2010:779, paragraph 32). See also judgments of 10 July 1986, *Licata* v *ESC* (270/84, EU:C:1986:304, paragraph 31), and of 29 January 2002, *Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 50).

55 Judgment of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712).

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

57 Judgments of 26 September 1996, *Data Delecta and Forsberg* (C-43/95, EU:C:1996:357, paragraph 15), and of 2 October 1997, *Saldanha and MTS* (C-122/96, EU:C:1997:458, paragraphs 16 to 17).

pre-empt into which of those categories a rule on costs such as the NPE rule might fall. The *Edwards* case is simply inconclusive on the issue: the Court did not consider temporal application explicitly at all. The question was simply not raised. Both the *Data Delecta* and *Saldanha* cases concerned only *security* for costs and not the actual award of costs. [58]

86. More importantly, on a closer reading, that case-law is, in my view, more nuanced. [59] Rather than two watertight 'procedural' and 'substantive' boxes, the underlying approach is one of scale: all new rules of EU law are immediately applicable, but then the attention turns to the limits of applying such new rules in individual cases. Such limits, in particular in the form of acquired rights and/or legitimate expectations, will be much stronger where there are clearly substantive rules, banning true retroactivity in the form of new reassessment of past facts and closed legal relationships. Conversely, they will be much weaker or non-existent in case of purely procedural rules. What matters in such a context is the stability and predictability of the law and expectations with regard to the specific type of the rule in question.

87. Reflecting that point, in the written pleadings and at the hearing the discussion focused less on a rigid categorisation of the NPE rule and more on its potential for retroactive effect and the expectations of the parties at the beginning and throughout the course of the proceedings.

88. In that regard, the Board emphasised that the 'rules of engagement' including the potential costs of litigation should not change in the middle of the game. Parties define *at the outset* their strategies based, not only on their legal assessment of the substance and their chances of winning, but also on their risks in terms of cost exposure.

89. That argument does have some merit. It also has obvious limits. Particularly in complex matters such as this one, parties do not have a clear picture of the total costs from day one. The longer a procedure continues, the less predictability there is. First-instance judgments may lead to appeals, to further appeals on points of law, to constitutional complaints and even, in a few rare cases, to references to the Court of Justice. It is rather clear that any claimant acting reasonably is likely to (re)assess the exposure to costs at each of those stages, deciding whether or not to continue litigation. Moreover, judges generally have some degree of discretion (sometimes even significant discretion) in the final analysis and their costs awards.

90. In addition, I disagree with the Board that public and private litigants are in the same position as regards expectations on costs. Whilst a Member State will obviously consider the costs and benefits of defending and continuing to defend a case, there is no risk that an individual court dispute will lead to its bankruptcy. That is not the case for the majority of private litigants.

91. In the light of the above, I do not consider that the issue of temporal application of the NPE rule can be resolved simply by deciding into which box, procedural or substantive, that rule is most likely to fit.

58 That is, security for costs would in principle only be lost if the party lodging the security lost the case on the substance. The issue in those cases was rather one about discrimination on the basis of nationality in the requirement of security for costs.

59 See more generally on temporal application of EU law in new Member States to cases straddling the date of accession, my Opinion in *Nemec* (C-256/15, EU:C:2016:619, at points 27 to 44).

2. Alternative approaches to temporal application

92. If the argument set out above that expectations on costs are fixed at the beginning of the procedure is accepted, the conclusion would be that the rules on costs applicable at that moment, and on the basis of which they built their litigation strategy, should apply for the duration of the procedure. The parties would enter a kind of 'costs tunnel' in which they would stay during all the various stages of the procedure, for example, leave to seek judicial review, judicial review, challenges to a first-instance judgment, to a second-instance judgment, references to other courts, disputes on costs and so on. As I understand it, that is essentially the position of the Board and Ireland.

93. In my view, that approach is highly problematic. It would allow for situations where litigation can go on potentially for decades after the transposition deadline for the NPE rule.

94. An alternative approach is that the NPE rule would be immediately applicable to any costs order adopted after the transposition deadline. That could arguably be on the basis of immediate application of a procedural rule or the application of a substantive rule to the 'future effects' of a prior change in law.

95. In my view, such a solution is also somewhat problematic. As noted above, I do not agree with the proposition that expectations on costs crystallise once and for all at the very beginning of a procedure. On the other hand, there is no denying that there are some expectations at that stage. To take an extreme example, if a directive introduces a new costs rule on 1 January 2018 then, absent any particular circumstances, it seems difficult to justify adopting a decision on costs on 2 January 2018, applying that new NPE rule to proceedings that have been ongoing for several years prior to that date. Although not an issue in the current proceedings, it is entirely possible that such an approach could also involve application of the new rule to costs incurred entirely before the transposition deadline (possibly even the adoption of the directive).

96. A middle way has to be found. Two options might be envisaged.

97. First, the NPE rule might be invoked in relation to all costs incurred after the deadline for transposition even if those proceedings were started before that date. In this way, the costs of each procedure would have to be split into those incurred (invoiced or objectively rendered) before the deadline for the transposition and those incurred after that deadline.

98. Second, the NPE rule could be said to be applicable from the beginning of the first new 'stage' of the procedure following the deadline for transposition. By that I mean the moment when a decision is taken by the authority hearing the case (in this case judicial) that (a) brings an end to that stage, for example a judgment on the merits by an appeal court, or (b) allows the procedure to continue, for example, a decision on admissibility or, on my understanding of the procedure before the Irish courts, a decision granting leave to bring judicial review proceedings.

99. That second option is based on the fact that, at such key points in the procedure, parties are likely to give due consideration to costs and the pros and cons of continuing the dispute. Whilst clearly that will not always be the case, it seems a reasonable assumption and in practice both workable and predictable as an approach.

100. In my view, the second option should be preferred by the Court for a number of reasons. Although the first option is arguably more predictable in the sense that it gives a clearer, single date for invocability of the NPE rule, it is not necessarily the case that all national systems will give that level of granularity of costs. Other practical challenges such as the use of fixed fees (for identifiable tasks or parts of the procedure), which are not date-specific also raise issues of practicality of the first

option. Moreover, the second option pays more deference to the expectations of the parties at the start of the procedure. That is of particular importance if the NPE rule were to be invoked against private parties (typically that would be the case, for example, where the private party having been granted planning permission intervenes in a challenge to that grant).

101. Other more subtle and nuanced approaches, based, for example, on a case-by-case evaluation of parties' actual expectations in specific procedures would, in my view, be significantly more complex and provide significantly less predictability than the two options referred to above.

3. Application to the present case

102. Subject to the final assessment of the referring court, the second option envisaged above — invocability of the NPE rule from the start of the first discrete stage of the procedure following expiry of the transposition deadline — would mean that the NPE rule should be invokable from the moment Mr Klohn was granted leave to bring judicial review proceedings. It would apply to the entire substantive review and the decision on the merits.

103. However, it might be added that, given that costs have not been awarded in relation to the previous stages of the procedure, the first option would also apparently lead to the same practical result in this case.

104. Finally, I understand that the only costs under consideration are the costs of the Board, which is a public entity and treated as part of the Member State.[60] There should thus be no question of Mr Klohn invoking the NPE rule against private parties (in this case the notice party, the company constructing the facility). I will therefore not go into that point in detail here. It is nonetheless worth recalling[61] that, to the extent that the NPE rule is considered to have direct effect, its direct effect could not be invoked against a private party. By contrast, the duty of conform interpretation does apply in relationships between private parties and could potentially lead to other private parties having to share the costs burden.[62] That constitutes another reason for favouring the second option proposed above, which shows greater deference to such parties' expectations.[63] Moreover, as mentioned above at point 74, in the context of the second question, that difference in impact on private parties is another reason to distinguish between direct effect and conform interpretation.

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

In cases such as the one before the referring court, the requirement contained in the fifth subparagraph of Article 10a of the EIA Directive that costs of procedures be 'not prohibitively expensive' can be invoked in relation to costs incurred from the start of the first discrete stage of the procedure following expiry of the transposition deadline, that is, following a decision taken by the judicial authority hearing the case that either (a) brings an end to that stage or (b) allows the procedure to continue.

60 In the sense of the case-law cited in footnote 47 above.

61 See above, point 74 of this Opinion.

62 Also by simply obliging each party, including a notice party, to bear their own costs irrespective of the substantive outcome of the case prior to the adoption of any such clear rule to that effect in national law.

63 I do not exclude that in such a case legitimate expectations are indeed considered by the national court to prevent conform interpretation, in the light of an un-transposed NPE rule, from imposing financial obligations on a private party to litigation.

D. Third question

106. By its third question the referring court asks whether, notwithstanding the fact that Mr Klohn did not challenge the costs order made against him and which thus became final, the Taxing Master, or court reviewing the Taxing Master's decision, has an obligation to apply the NPE rule to the final amount of costs awarded against Mr Klohn.

107. Subject to the final assessment of the referring court, I consider that either the Taxing Master or the court reviewing his decision does have an obligation to apply the NPE rule (either as a directly effective rule or through conform interpretation, in accordance with the Court's decision in relation to the second question).

108. In that regard, I will begin by making some observations in relation to the facts and to the national law as presented by the parties (1). I will then reply to the national court's third question (2).

1. Elements of fact and national law

109. I understand that the order awarding costs against Mr Klohn has become final.

110. The Court's case-law underlines the importance of the principle of *res judicata* for reasons of stability of the law and legal relations, as well as the sound administration of justice, such that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard can no longer be called into question.[64] It is only in very exceptional circumstances that EU law would require a national court to disapply domestic rules of procedure conferring finality on a judgment.[65]

111. In the present case, there seem to be no such exceptional circumstances. There are, however, a number of different points of note.

112. First, whilst the order awarding costs against Mr Klohn may be final, I also understand that that order did not fix a specific amount of costs to be awarded. What seems to be final is the judicial order stating that *costs should follow the event*. By contrast, the specific *amount* of the costs appears very much open, presently challenged in the current proceedings before the national court.

113. Second, if Mr Klohn had wished to challenge the order awarding costs against him, he would have had to obtain permission to do so. Moreover, such permission would only be granted if Mr Klohn could establish an 'exceptional public interest' in the appeal. Those points of national law were confirmed by Ireland at the oral hearing.

114. Third, Mr Klohn confirmed during the oral hearing, without being contradicted by any other party, that he was not aware of his possible or likely exposure to costs prior to the decision of the Taxing Master, or at least the draft decision, which was available *a year after* the court order awarding costs. In that regard, Mr Klohn indicated that the costs of the Board awarded against him by that decision were around three times the costs he had incurred in the procedure. The notice party appears not to have sought to claim their costs.

64 See, for example, judgment of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 38 and the case-law cited).

65 Judgments of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 28), and of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 63). Compare with what could be said to be the general approach in judgments of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraphs 46 and 47), and of 16 March 2006, *Kapferer* (C-234/04, EU:C:2006:178, paragraph 21).

115. Fourth, Mr Klohn indicated that, at the time of the court order awarding costs against him, he believed that the NPE rule would be applied by the Taxing Master. Mr Klohn cited a national precedent from a few months before the costs order was made, which he considers supports that view.[66] That argument is disputed in particular by the Ireland, which asserts that it is 'crystal clear' from the Supreme Court's case-law that the Taxing Master does not have such powers.[67]

116. Fifth, I understand that the Taxing Master has some power to reduce costs awarded as compared with costs claimed. Indeed, the referring court confirms that the Board originally claimed around EUR 98 000 in costs but were awarded only around EUR 86 000. I understand that the justification for that reduction in costs was essentially the reasonableness of legal fees, and that the Taxing Master considers that his powers to reduce costs awarded do not include reductions on the basis that the costs are prohibitively expensive.

2. Application to the present case

117. It is the referring court's task to make the final assessment of the facts and national law in the main case. Bearing that in mind, I set out below the obligations flowing from EU law and how they may be applied based on my understanding of the facts and national law as presented above.

118. The EIA Directive does not designate the court or other body having jurisdiction to ensure application of the NPE rule. Thus, as with other rules of a similar nature, that is primarily a matter for national law.[68] However, that freedom to choose the ways and means of ensuring that the NPE rule is implemented does not affect the obligation imposed on the Member State to adopt all measures necessary to ensure that the NPE rule is fully effective in accordance with the objective which it pursues.[69]

119. The Member State's obligation to achieve the result envisaged by the NPE rule and its duty under Article 4(3) TEU to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on the courts of the Member State[70] and extends to all national authorities, including *a fortiori* those attached to or forming part of national courts.[71]

120. In other words, the principles of primacy and direct effect of EU law and the obligation of conform interpretation are binding on all authorities of the Member States, *both judicial and administrative*. Within that framework, it is really a matter for national law as to which specific entity is ultimately entrusted with ensuring that those obligations are respected, *as long as somebody does so*. It is not the role of this Court to decide on the internal division of Member State competences in that regard and/or on the constitutional classification of national bodies, such as the Taxing Master.

121. What can be generally stated is the following.

66 Judgment of 21 November 2007 of the Irish High Court, *Kavanagh* (HC IEHC (2007) 389 — Record No 2007/1269 P).

67 Moreover, the court order awarding costs against Mr Klohn (2008) predates the judgment of 16 July 2009, *Commission* v *Ireland* (C-427/07, EU:C:2009:457), in which the Court held that Ireland had failed to transpose the NPE rule. (Il)legality of the national rules on costs appears to be an important element that was not confirmed until after expiry of the deadline for challenging the order awarding costs.

68 See, for example, judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 39).

69 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 40).

70 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 98).

71 Judgment of 22 June 1989, *Costanzo* (103/88, EU:C:1989:256, paragraphs 30 to 33).

122. Subject to the temporal limitations set out above, an individual such as Mr Klohn must be able to invoke the NPE rule before national courts and national authorities. Those national courts and authorities are under an obligation to ensure the results of the direct effect of that rule[72] or, should the Court hold that the NPE rule lacks direct effect, those judicial authorities are in any event required to interpret national law in conformity with the NPE rule 'for the matters within their jurisdiction'[73] and national authorities to do so 'within the sphere of their competence'.[74]

123. The question that remains, then, is whether reducing costs awarded so as to respect the NPE rule constitutes a matter within the sphere of 'competence' (or 'jurisdiction') of the Taxing Master or the national court reviewing the Taxing Master's decision. That is a key aspect of the referring court's third question.

124. In that regard, I consider that when this Court's case-law refers to national administrative authorities applying the principles of primacy and direct effect of EU law, and obligation of conform interpretation 'within the sphere of their competence', it should be read as meaning that national authorities must do so where they dispose of the necessary power (in the sense of the *generic type of competence*), without there being an express authorisation to use the extant power for the specific purpose required by EU law. Direct effect and primacy, in my view, however, cannot be pushed so far as to award administrative authorities with a completely new kind of power than they had under national law, potentially breaching the separation of powers.

125. I understand from the request for a reference that the Taxing Master is competent to reduce costs in some circumstances. He would thus appear to have the generic type of competence that allows for the altering of the amount of costs to be awarded. Whether or not the Taxing Master's power to reduce costs can be interpreted as extending to cases such as the present is ultimately a question of national law, which is for the referring court to determine.

126. In any event, to the extent that the referring court concludes that the Taxing Master does *not* have that jurisdiction himself, the court reviewing his decision must.

127. According to established case-law, it is the responsibility of the national courts *in particular* to provide the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective.[75] In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.[76]

128. Those rules must not in particular render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). A failure to comply with that requirement at the EU level is liable to undermine the principle of effective judicial protection.[77]

129. In my opinion, it would be contrary to the principle of effectiveness to hold that neither the Taxing Master nor the national court reviewing his decision have jurisdiction to apply the NPE rule, in a case such as this one.

72 Judgment of 22 June 1989, *Costanzo* (103/88, EU:C:1989:256, paragraph 31).

73 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 99).

74 Judgments of 12 June 1990, *Germany* v *Commission* (C-8/88, EU:C:1990:241, paragraph 13); of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 20); of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78, paragraph 34).

75 Judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 111).

76 Judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188, paragraph 5); of 16 December 1976, *Comet* (45/76, EU:C:1976:191, paragraph 13); of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437, paragraph 12); of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 39); of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraph 28); and of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 44).

77 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 46 and 48).

130. In coming to that conclusion, I take into account the various factual elements listed in the previous section, one of which is in my view decisive, namely that the decision on quantum came long *after* the deadline for challenging the decision awarding costs against Mr Klohn. That would imply that Mr Klohn, in deciding whether or not to challenge the costs award, simply did not have access to what appears to be a key piece of information: how much might be awarded? In that regard, I recall that much of the Board's argumentation in this case is based on the premiss that a decision to litigate involves an *informed cost-benefit analysis*, leading to well-founded expectations. It is therefore somewhat ironic to then argue that a losing party should be required to take a decision on whether to challenge a decision awarding costs without actually knowing how much he might be asked to pay.

131. In the light of the foregoing, I propose to the Court to answer the referring court's third question as follows:

In a case such as the one before the referring court, where an order for costs is unqualified and would, by virtue of the absence of any appeal, be regarded as final and conclusive as a matter of national law, and where prior to the expiry of the deadline to appeal against that order, the costs to be awarded were unquantified, EU law requires that either:

– a Taxing Master charged in accordance with national law with the task of quantifying the amount of costs reasonably incurred by the successful party, or

– a court asked to review a decision of such a Taxing Master

has an obligation to apply the directly effective rule stemming from the fifth subparagraph of Article 10a of the EIA Directive, according to which costs must not render proceedings prohibitively expensive.

V. Conclusion

132. I propose that the Court answer the questions referred by the Supreme Court, Ireland, as follows:

(1) In cases such as the one before the referring court, the requirement contained in the fifth subparagraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003) that costs of procedures be 'not prohibitively expensive' can be invoked in relation to costs incurred from the start of the first discrete stage of the procedure following expiry of the transposition deadline, that is, following a decision taken by the judicial authority hearing the case that either (a) brings an end to that stage, or (b) allows the procedure to continue.

(2) The requirement contained in the fifth subparagraph of Article 10a of Directive 85/337 that procedures be 'not prohibitively expensive' has direct effect. A national court which has discretion concerning the award of costs against an unsuccessful party, in the absence of any specific measure having been adopted for the purposes of transposing that provision, is obliged, when considering an order for costs in proceedings to which that provision applies, to ensure that any order made does not render the proceedings 'prohibitively expensive'.

(3) In a case such as the one before the referring court, where an order for costs is unqualified and would, by virtue of the absence of any appeal, be regarded as final and conclusive as a matter of national law and prior to the expiry of the deadline to appeal against that order, the costs to be awarded were not quantified, EU law requires that either:

– a Taxing Master charged in accordance with national law with the task of quantifying the amount of costs reasonably incurred by the successful party, or

– a court asked to review a decision of such a Taxing Master

has an obligation to apply the directly effective rule stemming from the fifth subparagraph of Article 10a of Directive 85/337, according to which costs must not render proceedings prohibitively expensive.

i — « Le(s) point(s) … [compléter avec les numéros des points concernés] du présent texte a/ont fait l'objet d'une modification d'ordre linguistique, postérieurement à sa première mise en ligne ».