Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 February 2014*

(Failure of a Member State to fulfil obligations — Public participation in decision-making and access to justice in environmental matters — Concept of 'not prohibitively expensive' judicial proceedings)

In Case C-530/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 18 October 2011,

European Commission, represented by P. Oliver and L. Armati, acting as Agents,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by C. Murrell, and subsequently by M. Holt, acting as Agents, and by J. Maurici, Barrister,

defendant,

supported by

Kingdom of Denmark, represented by C.H. Vang, acting as Agent,

Ireland, represented by E. Creedon and A. Joyce, acting as Agents, and by E. Barrington and G. Gilmore, Barristers,

interveners,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 July 2013,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2013,

gives the following

* Language of the case: English.

Judgment

1 By its application, the European Commission asks the Court to declare that, by failing to transpose fully and apply correctly Articles 3(7) and 4(4) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive.

Legal context

Aarhus Convention

2 The Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed at Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention'), states in its preamble:

'...

Recognising also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

...

Concerned that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced,

...'

3 Article 1 of the Aarhus Convention, which is headed 'Objective', provides:

'In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.'

4 Article 3 of the Aarhus Convention, headed 'General provisions', states in paragraph 8:

'Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.'

5 Article 9 of the Aarhus Convention, headed ‘Access to justice’, states:

‘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.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

...

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

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

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.

...

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. ...

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.’

European Union law

6 In order to contribute to implementation of the obligations arising under the Aarhus Convention, Articles 3(7) and 4(4) of Directive 2003/35 inserted, respectively, Article 10a in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) and Article 15a in Council Directive 96/61/EC of

24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), which has been codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8).

7 Article 10a of Directive 85/337 and Article 15a of Directive 96/61 have the following identical wording:

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

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

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.

...

What constitutes a sufficient interest and impairment of a right shall be determined by Member States, consistently with the objective of giving the public concerned wide access to justice. ...

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 …

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

...'

Pre-litigation procedure

8 The Commission received a complaint alleging that the United Kingdom had not complied with its obligations under Articles 3(7) and 4(4) of Directive 2003/35 inasmuch as those provisions require judicial proceedings not to be prohibitively expensive. On 23 October 2007 the Commission requested the United Kingdom to submit its observations in that regard.

9 Since the Commission was not satisfied with the responses provided, on 22 March 2010 it sent the United Kingdom a reasoned opinion in which it contended that those obligations had been infringed and called upon the United Kingdom to remedy the infringement within a period of two months.

10 Since the Commission considered the response provided by the United Kingdom on 19 July 2010 to be equally unsatisfactory, it brought the present action.

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

The action

12 By its various arguments, the Commission puts forward a single complaint alleging that Articles 3(7) and 4(4) of Directive 2003/35 have not been transposed or, in any event, have been transposed incorrectly inasmuch as they provide that the judicial proceedings referred to must not be prohibitively expensive ('the requirement that proceedings not be prohibitively expensive').

Arguments of the parties

13 In its application, the Commission submits that a directive cannot be transposed by case-law (Case C-427/07 *Commission* v *Ireland* [2009] ECR I-6277, paragraphs 93 and 94) and that in any event the case-law relied upon by the United Kingdom does not comply with the requirement that proceedings not be prohibitively expensive.

14 The Commission contends that the plea of inadmissibility raised by the United Kingdom so far as concerns its arguments relating to the definition of and criteria for appraising that requirement cannot be upheld as those issues were necessarily addressed in the pre-litigation procedure, given the very subject-matter of the complaint set out. The same is true of its arguments relating to the taking into account of the high level of the lawyers' fees.

15 The Commission submits next that the requirement that proceedings not be prohibitively expensive covers both the court fees and the fees of the claimant's lawyers, the other costs to which the claimant may be exposed and all the costs arising from any earlier proceedings before lower courts, and that the requirement means that those various costs must be reasonably predictable as regards whether they are payable and their amount.

16 As to the costs regime and, more specifically, the possibility for the national courts to grant 'protective costs orders' enabling the amount of the costs that may be payable to be limited at an early stage of the proceedings, the Commission considers that in England and Wales, despite the criteria laid down by the judgment of the Court of Appeal in *R (on the application of Corner House Research)* v *Secretary of State for Trade & Industry* [2005] 1 WLR 2600, the case-law remains contradictory and gives rise to legal uncertainty. Furthermore, the courts grant such orders only rarely. The Commission considers that the Court of Appeal's judgment of 29 July 2010 in *R (on the application of Garner)* v *Elmbridge Borough Council and Others* [2010] EWCA Civ 1006, which was, however, delivered after expiry of the period laid down in the reasoned opinion mentioned in paragraph 9 of the present judgment, is a favourable but still insufficient development. Any cost caps obtained are in practice set at very high amounts and they generate satellite litigation that increases the overall cost of the dispute.

17 The ability of the parties to take out insurance does not resolve all these difficulties. The Commission also contends that a claimant who has concluded a conditional fee agreement may all the same be required, if his action is successful, to pay lawyers' fees if the defendant is granted a 'reciprocal cap on costs'. Furthermore, a protective costs order is in any event granted only for the instant proceedings.

18 The Commission submits finally that the infringement of the requirement that proceedings not be prohibitively expensive is further exacerbated by the regime governing interim relief, because of the courts' practice of requiring claimants to give 'cross-undertakings', which may result in high financial costs. The Commission considers that, whilst this financial compensation is not, in itself, contrary to Directive 2003/35, its cost must nevertheless be taken into account in the analysis.

19 The United Kingdom contests the Commission's contentions.

20 As a preliminary point, it pleads that the Commission's arguments relating to the definition of and criteria for appraising the concept of 'prohibitively expensive' are inadmissible on the ground that they were not mentioned during the pre-litigation procedure. That is also so in the case of the Commission's arguments relating to the lawyers' fees of the claimant.

21 The United Kingdom contends that a directive can be transposed by case-law. In *Commission* v *Ireland*, upon which the Commission relies, the Court found a failure to fulfil the obligation to transpose solely on the ground that the requirement that proceedings not be prohibitively expensive, which was also at issue in that case, was not sufficiently safeguarded solely by the court's discretion not to order the unsuccessful party to pay the costs. The situation is different in the United Kingdom, given that the court can adopt protective measures, such as protective costs orders. The United Kingdom also considers that account should be taken of the specific nature of its common-law legal system, which is founded essentially on case-law and the rule of precedent.

22 As regards the costs regime, the United Kingdom observes that, in England and Wales, the Civil Procedure Rules require the court to deal with a case 'justly', taking account of the various circumstances of the case and the need to safeguard the public authority's finances.

23 It adds that, in practice, the rule that the unsuccessful party is necessarily required to pay the other party's costs is applied less than in the past, in particular in cases falling within environmental law, and that the decision in that regard would be made by the court in the light of all the factors of the case. In addition, frequently the claimant may be legally aided in those cases, and is then generally not ordered to pay costs.

24 The United Kingdom submits that very often the public authorities and bodies which win a case do not ask for costs against the claimant. Furthermore, from time to time leave to appeal to the higher courts is granted to a public body only on condition that it will pay both sides' costs.

25 The Court of Appeal's judgments have in any event 'codified' the principles governing the grant of a protective costs order, removing any uncertainty on the part of the claimant in that regard.

26 Finally, the discretion enjoyed by national courts when dealing with an application for a protective costs order is not only inevitable but also desirable in that it enables them to adapt their decision to the circumstances of the case.

27 The United Kingdom further submits that the high amount of lawyers' fees results from the nature of the legal system, which is adversarial and in which oral argument plays a predominant role. In any event, account must be taken of the fact that the provision of legal services is a free and competitive market, and that a number of means of limiting the level of that cost exist, such as conditional fee agreements which in practice are very common.

28 As regards cross-undertakings in respect of the grant of interim relief, the United Kingdom contends that in a high proportion of environmental cases the very fact of a challenge to the grant of consent suspends, in practice, the commencement of works or of other activities until the dispute has been decided. The claimant might, moreover, obtain interim relief without a cross-undertaking where his resources are slender. The possibility of cross-undertakings being requested is in any event consistent with European Union law, by reference to Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 32, and their grant also contributes to compliance with Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1959, a provision relating to protection of the right to property.

29 Ireland points out that the Member States have a broad discretion when transposing a directive and dwells on the need to take account of the specific features of a common law system. It thus considers that the Commission's contention that courts have 'discretion' when they rule on costs fails to take sufficient account of the rule of precedent, which enables a degree of legal predictability to be ensured.

30 As to the costs regime, Article 9(5) of the Aarhus Convention does not require all financial costs to be eliminated. Moreover, the possibility of awarding costs against the unsuccessful party has a disciplinary effect necessary to prevent judicial proceedings that constitute an abuse from being brought.

31 As regards cross-undertakings, this issue does not fall within Directive 2003/35 because a cost that is linked to the judicial procedure in the strict sense is not involved. Moreover, such measures have been expressly accepted by the Court, and Ireland also refers in this connection to *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*. In their absence, the national court might refuse to grant an application for interim relief necessary for environmental protection.

32 The Kingdom of Denmark submits that the Member States have competence to determine the form and methods of implementation of the requirement that proceedings not be prohibitively expensive. Furthermore, that requirement applies only at first instance, since the Aarhus Convention provides no indication regarding appeals or the number of judicial stages necessary. Moreover, only costs directly linked to the handling of the case are concerned, which excludes the fees of the lawyer whom the claimant decides to consult. Finally, that requirement is unconnected to the question of the predictability of the cost of the proceedings for the claimant from the time when he brings his action, but means only that, when the case has been concluded, the financial cost borne, on an overall assessment, must not be prohibitive.

Findings of the Court

33 According to settled case-law, the transposition of a directive does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, to this effect, inter alia, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23, and *Commission* v *Ireland*, paragraph 54).

34 In particular, where the relevant provision is designed to create rights for individuals, the legal situation must be sufficiently precise and clear, and the persons concerned must be put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts (see, to this effect, inter alia, Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 76).

35 The Court has thus ruled that a judicial practice under which the courts simply have the power to decline to order an unsuccessful party to pay the costs and can order expenditure incurred by the unsuccessful party to be borne by the other party is, by definition, uncertain and cannot meet the requirements of clarity and precision necessary in order to be regarded as valid implementation of the obligations arising from Articles 3(7) and 4(4) of Directive 2003/35 (see, to this effect, *Commission* v *Ireland*, paragraph 94).

36 However, it cannot be considered that every judicial practice is uncertain and inherently incapable of meeting those requirements.

37 As regards whether the national case-law relied upon by the United Kingdom permits the conclusion that the United Kingdom has complied with the requirement laid down by Directive 2003/35 that proceedings not be prohibitively expensive, the Commission's arguments concerning the costs regime and the regime governing interim relief should be examined in turn.

Costs regime

38 In the case of the costs regime, the plea of inadmissibility raised by the United Kingdom should be ruled upon at the outset.

39 According to settled case-law, whilst the letter of formal notice from the Commission and the reasoned opinion delimit the subject-matter of the proceedings, so that it cannot thereafter be extended, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered (see, to this effect, inter alia, Case C-358/01 *Commission* v *Spain* [2003] ECR I-13145, paragraphs 27 and 28).

40 The Court has also held that, although the reasoned opinion must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the FEU Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice (see, to this effect, *Commission* v *Spain*, paragraph 29).

41 In the present case, it is clear that the issue of the content of the requirement that proceedings not be prohibitively expensive was addressed during the pre-litigation procedure, given the very subject-matter of the complaint, as set out from the time of the letter of formal notice. The same is true, as the Commission states, of the taking into account, in that context, of the cost of lawyers' fees, which indeed account for the bulk of the financial cost of judicial proceedings in the United Kingdom.

42 Moreover, with regard to those fees, it is not apparent from the complaint that the Commission contends that they in themselves render proceedings prohibitively expensive, as the United Kingdom submits in paragraph 108 of its defence.

43 It follows that the plea of inadmissibility raised by the United Kingdom must be dismissed as unfounded.

44 As to the merits of the Commission's arguments, it should be recalled that the requirement that proceedings not be prohibitively expensive does not prevent the national courts from making an order for costs in judicial proceedings provided that they are reasonable in amount and that the costs borne by the party concerned taken as a whole are not prohibitive (see, to this effect, Case C-260/11 *Edwards and Pallikaropoulos* [2013] ECR, paragraphs 25, 26 and 28).

45 Where a court makes an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must, however, satisfy itself that the requirement that proceedings not be prohibitively expensive has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment (see, to this effect, *Edwards and Pallikaropoulos*, paragraph 35).

46 As regards the relevant assessment criteria, the Court has held that, where European Union law lacks precision, it is for the Member States, when they transpose a directive, to ensure that it is fully effective and they retain a broad discretion as to the choice of methods (see, to this effect, inter alia, *Edwards and Pallikaropoulos*, paragraph 37 and the case-law cited). It follows that, as regards the methods likely to achieve the objective of ensuring effective judicial protection without excessive cost in the field of environmental law, account must be taken of all the relevant provisions of national law and, in particular, of a national legal aid scheme as well as of a costs protection regime such as that applied in the United Kingdom (see, to this effect, *Edwards and Pallikaropoulos*, paragraph 38).

47 However, the court cannot limit its assessment to the financial situation of the person concerned, but must also conduct an objective analysis of the amount of the costs, particularly since members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of the proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable (see, to this effect, *Edwards and Pallikaropoulos*, paragraph 40).

48 The analysis of the financial situation of the person concerned cannot be based exclusively on the estimated financial resources of an 'average' claimant, since such information may have little connection with the situation of the person concerned (see, to this effect, *Edwards and Pallikaropoulos*, paragraph 41).

49 Furthermore, the court may take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the law and the applicable procedure and the potentially frivolous nature of the claim at its various stages (see, to this effect, *Edwards and Pallikaropoulos*, paragraph 42 and the case-law cited), but also, where appropriate, costs already incurred at earlier levels in the same dispute.

50 The fact that the claimant has not been deterred in practice from bringing his action is not in itself sufficient to establish that the proceedings are not prohibitively expensive for him (see, to this effect, *Edwards and Pallikaropoulos*, paragraph 43).

51 Finally, that assessment cannot differ depending on whether the national court is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal (see, to this effect, *Edwards and Pallikaropoulos*, paragraph 45).

52 According both to the documents submitted to the Court and to the discussion at the hearing, in England and Wales section 51 of the Senior Courts Act 1981 provides that the court concerned is to determine by whom and to what extent the costs are to be paid. This power is stated to be exercised in accordance with the detailed provisions laid down in Rule 44.3 of the Civil Procedure Rules. The decision on costs is accordingly generally made by the court concerned at the conclusion of the proceedings, but the claimant may also apply for a 'protective costs order', which enables him to obtain, at an early stage of the proceedings, a cap on the amount of costs that may be payable.

53 The detailed rules for grant of such an order are specified in the judgment of the Court of Appeal in *R (on the application of Corner House Research)* v *Secretary of State for Trade & Industry*, according to which a court may make a protective costs order at any stage of the proceedings, if it is satisfied as to the general public importance of the issues raised, that the public interest requires, moreover, that those issues should be resolved, that the claimant has no private interest in the outcome of the case, as to the level of his financial resources and of those of the defendant, as to the amount of costs that are likely to be involved and as to whether the claimant will discontinue the proceedings if such an order is not made. Similar rules are also said to apply in Gibraltar, Scotland and Northern Ireland.

54 Having regard to the foregoing, it should be stated first of all that the discretion available to the court when applying the national costs regime in a specific case cannot in itself be considered incompatible with the requirement that proceedings not be prohibitively expensive. Furthermore, the possibility for the court hearing a case of granting a protective costs order ensures greater predictability as to the cost of the proceedings and contributes to compliance with that requirement.

55 However, it is not apparent from the various factors put forward by the United Kingdom and discussed, in particular, at the hearing that national courts are obliged by a rule of law to ensure that the proceedings are not prohibitively expensive for the claimant, which alone would permit the conclusion that Directive 2003/35 has been transposed correctly.

56 In that regard, the mere fact that, in order to determine whether national law meets the objectives of Directive 2003/35, the Court is obliged to analyse and assess the effect – which is moreover subject to debate – of various decisions of the national courts, and therefore of a body of case-law, whereas European Union law confers on individuals specific rights which would need unequivocal rules in order to be effective, leads to the view that the transposition relied upon by the United Kingdom is in any event not sufficiently clear and precise.

57 Thus, the very conditions under which the national courts rule on applications for costs protection do not ensure that national law complies with the requirement laid down by Directive 2003/35 in several respects. First, the condition, laid down by the national case-law, that the issues to be resolved must be of public interest is not appropriate and, even should it be accepted, as the United Kingdom pleads, that this condition was removed by the judgment of the Court of Appeal in *R (on the application of Garner)* v *Elmbridge Borough Council and Others*, that judgment, which was delivered after the period laid down in the reasoned opinion expired, could not be taken into account by the Court in the present case. Second, in any event, the courts do not appear to be obliged to grant protection where the cost of the proceedings is objectively unreasonable. Nor, finally, does protection appear to be granted where only the particular interest of the claimant is involved. These various factors lead to the conclusion that in practice the rules of case-law applied do not satisfy the requirement that proceedings not be prohibitively expensive within its meaning as defined in *Edwards and Pallikaropoulos*.

58 It is also apparent from the foregoing that that regime laid down by case-law does not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees.

59 The United Kingdom expressly concedes, moreover, in paragraph 70 of its defence that until the judgment of the Court of Appeal in *R (on the application of Garner)* v *Elmbridge Borough Council and Others* the principles governing protective costs orders did not comply in every respect with European Union law.

60 As regards the argument raised by the Commission that the costs protection regime also does not comply with European Union law in so far as protective costs orders involve a 'reciprocal cap on costs' enabling the defendant public authority to limit its financial liability if it loses the case, which indirectly reduces the protection conferred by a fee agreement, it is to be recalled that in proceedings brought under Article 258 TFEU for failure to fulfil obligations it is for the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information required to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (see, inter alia, the judgment of 22 November 2012 in Case C-600/10 *Commission* v *Germany*, paragraph 13 and the case-law cited).

61 In the present case, the Commission merely stated in its reasoned opinion that, if the national court grants such a reciprocal costs order, the claimant may be obliged to pay part of his lawyer's fees, but without also giving details concerning the conditions for application of that practice or its financial consequences.

62 It must therefore be held that the Commission's argument appears insufficiently supported to be capable of examination.

63 Subject to this reservation, it must accordingly be held that the Commission's arguments on the costs regime in the United Kingdom are essentially well founded.

Cross-undertakings in respect of the grant of interim relief

64 As regards the system of cross-undertakings imposed by the court in respect of the grant of interim relief, which, as is apparent from the documents submitted to the Court, principally involves requiring the claimant to undertake to compensate for the damage which could result from interim relief if the right which the relief was intended to protect is not finally recognised as being well founded, it is to be recalled that the prohibitive expense of proceedings, within the meaning of Articles 3(7) and 4(4) of Directive 2003/35, concerns all the financial costs resulting from participation in the judicial proceedings, so that their prohibitiveness must be assessed as a whole, taking into account all the costs borne by the party concerned (see *Edwards and Pallikaropoulos*, paragraphs 27 and 28), subject to the abuse of rights.

65 In addition, it is apparent from settled case-law that a national court seised of a dispute governed by European Union law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law (see, to this effect, Case C-416/00 *Križan and Others* [2013], paragraph 107 and the case-law cited), including in the area of environmental law (see *Križan and Others*, paragraph 109).

66 Consequently, the requirement that proceedings not be prohibitively expensive applies also to the financial costs resulting from measures which the national court might impose as a condition for the grant of interim measures in the context of disputes falling within Articles 3(7) and 4(4) of Directive 2003/35.

67 Subject to this reservation, the conditions under which the national court grants such interim relief are, in principle, a matter for national law alone, provided that the principles of equivalence and effectiveness are observed. The requirement that proceedings not be prohibitively expensive cannot be interpreted as immediately precluding the application of a financial guarantee such as that of the cross-undertakings where that guarantee is provided for by national law. The same is true of the financial consequences which might, as the case may be, result under national law from an action that constitutes an abuse.

68 On the other hand, it is incumbent upon the court which rules on this issue to make sure that the resulting financial risk for the claimant is also included in the various costs generated by the case when it assesses whether or not the proceedings are prohibitively expensive.

69 It must, accordingly, be found that it is not clear from the documents submitted to the Court that the requirement that proceedings not be prohibitively expensive is imposed on the national courts in this area with all the requisite clarity and precision. The United Kingdom merely asserts that, in practice, cross-undertakings are not always imposed in disputes relating to environmental law and that they are not demanded from impecunious claimants.

70 As to the United Kingdom's argument that the limiting of cross-undertakings could result in infringement of the right to property, the Court consistently acknowledges that the right to property is not an absolute right, but must be viewed in relation to its social function. Its exercise may therefore be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed (see, to this effect, *Križan and Others*, paragraph 113 and the case-law cited). Protection of the environment is one of those objectives and is therefore capable of justifying a restriction on the exercise of the right to property (see, also, to this effect, *Križan and Others*, paragraph 114 and the case-law cited).

71 Consequently, it is also necessary to uphold the Commission's argument that the system of cross-undertakings in respect of the grant of interim relief constitutes an additional element of uncertainty and imprecision so far as concerns compliance with the requirement that proceedings not be prohibitively expensive.

72 In light of all the foregoing, it must be held that, by failing to transpose correctly Articles 3(7) and 4(4) of Directive 2003/35, inasmuch as they provide that the judicial proceedings referred to must not be prohibitively expensive, the United Kingdom has failed to fulfil its obligations under that directive.

Costs

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

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by failing to transpose correctly Articles 3(7) and 4(4) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, inasmuch as they provide that the judicial proceedings referred to must not be prohibitively expensive, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;**

2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs and the Kingdom of Denmark and Ireland to bear their own costs.**

[Signatures]