Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

15 March 2018*

(Reference for a preliminary ruling — Assessment of the effects of certain projects on the environment — Directive 2011/92/EU — Right of members of the public concerned to a review procedure — Premature challenge — Concepts of a not prohibitively expensive procedure and of decisions, acts or omissions subject to the public participation provisions of the directive — Applicability of the Aarhus Convention)

In Case C-470/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 29 July 2016, received at the Court on 22 August 2016, in the proceedings

North East Pylon Pressure Campaign Ltd,

Maura Sheehy

v

An Bord Pleanála

The Minister for Communications, Energy and Natural Resources,

Ireland,

The Attorney General,

notice party:

EirGrid plc,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.-C. Bonichot (Rapporteur), A. Arabadjiev and E. Regan, Judges,

Advocate General: M. Bobek,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 June 2017,

after considering the observations submitted on behalf of

* Language of the case: English.

– North East Pylon Pressure Campaign Ltd and Ms Sheehy, by D. Courtney and B. Sawey, Solicitors, and by M. O'Donnell, Barrister, C. Hughes, Barrister, E. Keane SC, and C. Bradley SC,

– An Bord Pleanála, by A. Doyle, Solicitor, and B. Foley, Barrister, and by N. Butler SC,

– the Attorney General and the Minister for Communications, Climate Action and Environment (formerly Minister for Communications, Energy and Natural Resources), by E. Creedon and by E. McKenna, acting as Agents, and by M. McDowell, Barrister,

– Ireland, by R. Mulcahy SC, and G. Gilmore, Barrister,

– EirGrid plc, by D. Nagle, Solicitor, and by S. Dodd, Barrister, M. Cush SC, and E. Cassidy, Solicitor,

– the European Commission, by C. Zadra, G. Gattinara and J. Tomkin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of (i) Article 11 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1) and (ii) the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in 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').

2 The request has been made in proceedings between North East Pylon Pressure Campaign Limited and Maura Sheehy, on the one hand, and An Bord Pleanála, the Minister for Communications, Energy and Natural Resources ('the Minister'), Ireland and the Attorney General, on the other, concerning the determination of costs associated with the rejection of an application for judicial review of the development consent process for the installation of an electricity interconnector.

Legal context

International law

3 Article 1 of the Aarhus Convention, entitled '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 that 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 As regards the right of the public to participate in decision-making in environmental matters, Article 6 of that Convention sets out detailed rules for the activities listed in its Annex I, whereas Articles 7 and 8 relate more specifically, as regards the former, to plans, programmes and policies relating to the environment and, as regards the latter, to the preparation of executive regulations and/or generally applicable legally binding normative instruments.

6 In accordance with Article 9 of the Aarhus Convention, entitled 'Access to justice':

'...

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

...

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

...

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

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

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

EU law

7 Article 11 of Directive 2011/92 provides:

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

...

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

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

...

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

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

...'

8 Article 1 of Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulation (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ 2013 L 115, p. 39) lays down 'guidelines for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure'.

9 Article 8 of that regulation, entitled 'Organisation of the permit granting process', provides that 'each Member State shall designate one national competent authority which shall be responsible for facilitating and coordinating the permit granting process for projects of common interest'.

Irish law

10 It appears from the information provided by the referring court that the 'not prohibitively expensive' requirement laid down in Article 11 of Directive 2011/92 is contained in Section 50b of the Planning and Development Act, 2000, as amended ('the 2000 Act'), which provides:

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

(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of -
(i) any decision or purported decision made or purportedly made,
(ii) any action taken or purportedly taken, or
(iii) any failure to take action, pursuant to a law of the State that gives effect to -

[inter alia] a provision of Directive [2011/92] to which Article 10a ... applies ...'

11 Section 50b(3) of that Act provides as follows:

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

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

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

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

12 Under Section 50b(4) of that Act:

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

13 Section 3 of the Environment (Miscellaneous Provisions) Act 2011 ('the 2011 Act') provides:

'...

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

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

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

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

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

...'

14 Section 4(1) of the 2011 Act provides:

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

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

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

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

...'

15 Section 8 of the 2011 Act provides that the courts are to take notice of the Aarhus Convention, if necessary of their own motion.

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 In 2015, EirGrid plc, an Irish state-owned electric power transmission operator, requested authorisation to erect approximately 300 pylons carrying high-voltage cables over a distance of 138 km, with a view to connecting the electricity grids of Ireland and Northern Ireland and ensuring reliable electricity supply throughout the island.

17 That project, which is one of the 'projects of common interest' designated by the European Commission under Regulation No 347/2013, is challenged by a lobby group composed of a large number of potentially concerned landowners and residents, called North East Pylon Pressure

Campaign ('NEPP'). An Bord Pleanála, the Irish planning appeals board, is designated under Article 8 of that regulation as the national authority responsible for facilitating and coordinating the permit granting process for that interconnection project.

18 An Bord Pleanála is also responsible for granting development consent for that project. Following the formal application for development consent and the submission of an environmental impact assessment, An Bord Pleanála convened an oral hearing on 7 March 2016.

19 On 4 March 2016, NEPP and Ms Sheehy sought to challenge the development consent process, in particular by attempting to prevent the oral hearing being held. To that end, they made an application for leave to seek judicial review and for an interlocutory injunction.

20 It is apparent from the file submitted to the Court that 16 reliefs were sought on approximately 40 grounds, alleging, inter alia, that EirGrid had amended the information initially included in the environmental impact assessment report it was required to issue under Directive 2011/92, that the environmental impact statements and the Natura 2000 impact statements were defective, that parts of the development consent process were unlawful, that EirGrid's application for approval did not comply with national law, that the requirements of a fair trial were infringed in the organisation of the hearing by An Bord Pleanála, and objective bias on the latter's part because of its designation by the Minister.

21 The application for an interlocutory injunction was refused, and the hearing before An Bord Pleanála was held on the scheduled date.

22 The consent process has continued and the referring court has allowed the applicants to add the Minister, who had designated An Bord Pleanála, and the Attorney General as respondents, and to supplement their challenge to the designation of An Bord Pleanála as the competent authority. EirGrid has intervened in those proceedings.

23 On 12 May 2016, after four days of hearing, the referring court refused to grant the application for leave to apply for judicial review, on the ground that Irish law appeared to require the applicants to wait until An Bord Pleanála had adopted a final decision before bringing a challenge, and that therefore the action for which leave was sought would be premature.

24 In the proceedings which led to this reference for a preliminary ruling, the parties disagree on the allocation of the costs incurred in the procedure concerning the application for leave to apply for judicial review, which amount to more than EUR 500 000.

25 It has in particular been argued that NEPP and Ms Sheehy cannot rely on Article 11 of Directive 2011/92, since the application for leave to apply for judicial review did not merely allege shortcomings in the environmental impact assessment process as such.

26 The referring court is uncertain as to the compatibility of Irish law with the provisions of Directive 2011/92 and the provisions of the Aarhus Convention laying down the requirement that certain judicial procedures not be prohibitively expensive.

27 The referring court notes, in that respect, that Ireland has not adopted any provision transposing Article 11(2) of Directive 2011/92. Accordingly, since the stage at which a challenge provided for in that directive may be brought has not been determined, it is for each Irish court to assess, on a case-by-case basis, whether the challenge before it was brought at the appropriate stage, or whether it is premature or out of time. The referring court states, moreover, that the 2011 Act is narrower than the Aarhus Convention since the applicability of that act as regards costs is conditional upon the existence of a link between the alleged non-compliance and damage to the environment.

28 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

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

(iv) whether a national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, should interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in art. 9(3) of [the Aarhus Convention]
(a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under [Regulation (EU) No 347/2013], and/or
(b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [(OJ 1992, L 206, p. 7)];

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

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

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

Consideration of the questions referred

The first and third questions

29 By its first and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 11(4) of Directive 2011/92 must be interpreted as meaning that the requirement that certain judicial procedures not be prohibitively expensive applies to a procedure before a court of a Member State, such as that in the main proceedings, in which it is determined whether leave may be granted to bring a challenge in the course of a development consent process, where that Member State has not established at what stage a challenge may be brought.

30 As the Court has already held, the requirement laid down in Article 11(4) of Directive 2011/92 concerns all the costs arising from participation in the judicial proceedings. The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned (see, to that effect, judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraphs 27 and 28).

31 It follows that, where national procedural law provides that leave must be sought before bringing a challenge covered by the requirement laid down by Article 11(4) of Directive 2011/92, the costs incurred in a procedure for obtaining that leave must also be covered.

32 That is a fortiori the case where, as in the main proceedings, since the applicable national legislation has not determined the stage at which a challenge may be brought, as required by Article 11(2) of Directive 2011/92, that procedure is intended to assess whether the challenge was brought at the appropriate stage.

33 It is irrelevant, in that regard, that the application for leave to apply for judicial review was submitted in the course of a process which may lead to the grant of development consent, and not against a final decision closing that process. As pointed out by the Advocate General in points 101 to 108 of his Opinion, Directive 2011/92 neither requires nor prohibits that challenges covered by the guarantee against prohibitive expense be brought against decisions definitively closing a consent process, given the wide range of different environmental decision-making processes, but only stipulates that Member States must determine the stage at which a challenge may be brought.

34 Accordingly, the answer to the first and third questions is that Article 11(4) of Directive 2011/92 must be interpreted as meaning that the requirement that certain judicial procedures not be prohibitively expensive applies to a procedure before a court of a Member State, such as that in the main proceedings, in which it is determined whether leave may be granted to bring a challenge in the course of a development consent process, a fortiori where that Member State has not determined at what stage a challenge may be brought.

The second question

35 By its second question, the referring court asks, in essence, whether, where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that certain judicial procedures not be prohibitively expensive laid down in Article 11(4) of Directive 2011/92 applies to the costs relating to the challenge in its entirety or only to the costs relating to the part of the challenge concerning the rules on public participation.

36 In that regard, it should be noted that it is clear from the very wording of Article 11(1) of Directive 2011/92 that the challenges covered by the protection against prohibitive expense are those directed against the decisions, acts or omissions 'subject to the public participation provisions of this Directive'. A literal interpretation of that provision thus indicates that its scope is limited to costs relating only to the aspects of a dispute which concern the public's right to participate in decision-making in accordance with the detailed rules laid down by the directive.

37 That conclusion is confirmed by a contextual reading of Article 11(1) of Directive 2011/92.

38 That directive not only contains rules relating to information, public participation in decision-making and access to justice, but also, more generally, rules harmonising the assessment of the effects of certain public and private projects on the environment.

39 Thus, by making, in Article 11(1) of Directive 2011/92, an express reference solely to the public participation provisions of that directive, the EU legislature must be regarded as having intended to exclude from the guarantee against prohibitive expense challenges based on any other rules set out in that directive and, a foritori, on any other legislation, whether of the European Union or the Member States.

40 That interpretation is also not called into question by the objective of Directive 2011/92, which consists, inter alia, as is apparent from recitals 19 to 21 thereto, in transposing the provisions of Article 9(2) and (4) of the Aarhus Convention into secondary legislation.

41 Indeed, these provisions themselves refer, in order to define the scope of the challenges which should not be prohibitively expensive, to challenges directed against any decision, act or omission 'subject to the provisions of Article 6' of that Convention, that is to say, subject to certain rules on public participation in decision-making in environmental matters, without prejudice to the possibility for national law to provide otherwise by extending that guarantee to other relevant provisions of that Convention.

42 Thus, since the EU legislature intended simply to transpose into EU law the requirement that certain challenges not be prohibitively expensive, as defined in Article 9(2) and (4) of the Aarhus Convention, any interpretation of that requirement, within the meaning of Directive 2011/92, which extended its application beyond challenges brought against decisions, acts or omissions relating to the public participation process defined by that directive would exceed the legislature's intent.

43 Where, as is the case of the leave application which led to the main proceedings concerning the determination of costs, a challenge brought against a process covered by Directive 2011/92 combines legal submissions concerning the rules on public participation with arguments of a different nature, it is for the national court to distinguish — on a fair and equitable basis and in accordance with the applicable national procedural rules — between the costs relating to each of the two types of arguments, so as to ensure that the requirement that costs not be prohibitive is applied to the part of the challenge based on the rules on public participation.

44 It follows from the foregoing that the answer to the second question is that, where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that certain judicial procedures not be prohibitively expensive laid down in Article 11(4) of Directive 2011/92 applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation.

The fourth and fifth questions

45 By its fourth and fifth questions, which it is appropriate to examine together, the referring court asks, in essence, whether and to what extent Article 9(3) and (4) of the Aarhus Convention should be interpreted as meaning that the requirement that, in order to ensure effective judicial protection in the fields covered by EU environmental law, certain judicial procedures not be prohibitively expensive applies to aspects of a dispute which would not be covered by that requirement as it results, under Directive 2011/92, from the answer given to the second question, and, if so, what inferences must be drawn from this by the national court in a dispute such as that in the main proceedings.

46 It should be borne in mind that the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Aarhus Convention, which was signed by the Community and subsequently approved by Decision 2005/370, and the provisions of which therefore form an integral part of the EU legal order (judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 30).

47 Whereas paragraph 2 of Article 9 of the Aarhus Convention lays down the right to a review procedure to uphold the public's right to participate in decision-making in environmental matters, paragraph 3 of the same article concerns, more broadly, the right of the public concerned to procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment.

48 Paragraph 4 of that article, which specifies the characteristics that those procedures must have, in particular that they should not be prohibitively expensive, applies expressly both to the procedures referred to in paragraph 3 and to those referred, inter alia, in paragraph 2.

49 Consequently, the requirement that certain judicial procedures not be prohibitively expensive laid down in the Aarhus Convention must be regarded as applying to a procedure such as that at issue in the main proceedings, in that it is intended to contest, on the basis of national environmental law, a development consent process.

50 Moreover, as the Court has repeatedly held, where a provision of EU law can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the European Union's interest that, in order to forestall future differences of interpretation, that provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied (judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 42 and the case-law cited).

51 It follows that the interpretation given in the answer to the first question — concerning the applicability of the requirement that judicial procedures not be prohibitively expensive to a procedure before a national court in which it is determined whether leave may be granted to bring a challenge — can be transposed to Article 9(3) and (4) of the Aarhus Convention.

52 As regards the inferences that the national court should draw from that conclusion, it should be borne in mind that neither paragraph 3 nor paragraph 4 of Article 9 of the Aarhus Convention contains any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals (see, to that effect, judgments of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 45, and of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others*, C-543/14, EU:C:2016:605, paragraph 50).

53 However, it must be noted that those provisions, although they do not have direct effect, are intended to ensure effective environmental protection.

54 In the absence of EU legislation on the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, it is for the domestic legal system of each Member State to lay down those rules and to ensure that those rights are effectively protected in each case (see, inter alia, by analogy, judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 47).

55 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (see, inter alia, judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 46).

56 Therefore, if the effective protection of EU environmental law, in this case Directive 2011/92 and Regulation No 347/2013, is not to be undermined, it is inconceivable that Article 9(3) and (4) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law (see, by analogy, judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 49).

57 Consequently, where the application of national environmental law — particularly in the implementation of a project of common interest, within the meaning of Regulation No 347/2013 — is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive.

58 It follows from the foregoing that the answer to the fourth and fifth questions is that Article 9(3) and (4) of the Aarhus Convention must be interpreted as meaning that, in order to ensure effective judicial protection in the fields covered by EU environmental law, the requirement that certain judicial procedures not be prohibitively expensive applies to the part of a challenge that would not be covered by that requirement, as it results, under Directive 2011/92, from the answer given to the second question, in so far as the applicant seeks, by that challenge, to ensure that national environmental law is complied with. Those provisions do not have direct effect, but it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with them.

The sixth and seventh questions

59 By its sixth and seventh questions, which it is appropriate to examine together, the referring court asks, in essence, whether a Member State may derogate from the requirement that certain judicial procedures not be prohibitively expensive, laid down by the Aarhus Convention and Directive 2011/92, where a challenge is deemed frivolous or vexatious, or where there is no link between the alleged breach of national environmental law and damage to the environment.

60 It must, in that regard, be recalled that the requirement that certain judicial procedures not be prohibitively expensive laid down in both Article 11(4) of Directive 2011/92 and Article 9(4) of the Aarhus Convention in no way prevents national courts from ordering an applicant to pay costs. That follows expressly from the Aarhus Convention, with which EU legislation must be properly aligned, since Article 3(8) of that Convention states that the powers of national courts to award reasonable costs in judicial proceedings are not to be affected (see, by analogy, judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraphs 25 and 26).

61 It is therefore open to the national court to take account of factors such as, in particular, whether the challenge has a reasonable chance of success, or whether it is frivolous or vexatious, provided that the amount of the costs imposed on the applicant is not unreasonably high.

62 As to whether national legislation transposing the Aarhus Convention in relation to procedural costs, such as the 2011 Act, may make the application of the requirement that certain judicial procedures not be prohibitively expensive conditional upon the existence of a sufficient connection between the alleged non-compliance with national environmental law and damage to the environment, it is necessary to refer to the wording of that Convention.

63 The requirement in question applies, according to the combined provisions of paragraphs 3 and 4 of Article 9 of that Convention, to procedures to challenge acts and omissions by private persons and public authorities which 'contravene provisions of its national law relating to the environment'.

64 Thus, the contracting parties to that Convention clearly sought to apply the protection against prohibitive expense to challenges aimed at enforcing environmental law in the abstract, without making such protection subject to the demonstration of any link with existing or, a fortiori, potential damage to the environment.

65 Accordingly, the answer to the sixth and seventh questions is that a Member State cannot derogate from the requirement that certain judicial procedures not be prohibitively expensive, laid down by Article 9(4) of the Aarhus Convention and Article 11(4) of Directive 2011/92, where a challenge is deemed frivolous or vexatious, or where there is no link between the alleged breach of national environmental law and damage to the environment.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 11(4) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment must be interpreted as meaning that the requirement that certain judicial procedures not be prohibitively expensive applies to a procedure before a court of a Member State, such as that in the main proceedings, in which it is determined whether leave may be granted to bring a challenge in the course of a development consent process, a fortiori where that Member State has not determined at what stage a challenge may be brought.**

2. **Where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that certain judicial procedures not be prohibitively expensive laid down in Article 11(4) of Directive 2011/92 applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation.**

3. **Article 9(3) and (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, must be interpreted as meaning that, in order to ensure effective judicial protection in the fields covered by EU environmental law, the requirement that certain judicial procedures not be prohibitively expensive applies to the part of a challenge that would not be covered by that requirement, as it results, under Directive 2011/92, from the answer given in point 2 of the present operative part, in so far as the applicant seeks, by that**

challenge, to ensure that national environmental law is complied with. Those provisions do not have direct effect, but it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with them.

4. **A Member State cannot derogate from the requirement that certain judicial procedures not be prohibitively expensive, laid down by Article 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 11(4) of Directive 2011/92, where a challenge is deemed frivolous or vexatious, or where there is no link between the alleged breach of national environmental law and damage to the environment.**

Silva de Lapuerta Fernlund Bonichot

Arabadjiev Regan

Delivered in open court in Luxembourg on 15 March 2018.

A. Calot Escobar
Registrar

R. Silva de Lapuerta
President of the First Chamber