Court of Justice of the European Union

*Regina (Edwards and another) *v* Environment Agency and others (No 2)

(Case C-260/11)

2012 Sept 13; Oct 18;
2013 April 11

Acting President of Chamber L Bay Larsen, Judges J-C Bonichot, C Toader, A Prechal, E Jarašiūnas
Advocate General J Kokott

European Union — Environment — Costs — Member states required to ensure public access to review procedure of environmental decisions "not prohibitively expensive" — Member of public seeking judicial review of public authority's decision to issue permit for cement works without environmental impact assessment — Claim dismissed — Claimant appealing to House of Lords and applying for protective costs order — House refusing protective costs order, dismissing appeal and ordering claimant to pay costs — Costs which would reasonably prevent ordinary member of public embarking on proceedings to be disallowed on detailed assessment — Defendants applying for review — Criteria for assessing whether judicial proceedings brought by members of public in environmental disputes "prohibitively expensive" — Council Directive 85/337/EEC, art 10a (as inserted by Council Directive 2003/35/EC, art 3(7)) — Council Directive 96/61/EC, art 15a (as inserted by Council Directive 2003/35/EC, art 4(4))

The first claimant, a legally aided member of the public, sought judicial review of the decision of the first defendant to issue a permit for the operation of a cement works without the proposal having been subjected to an environmental impact assessment. The claim was dismissed. He appealed but on the last day of the hearing before the Court of Appeal he withdrew his instructions from his solicitors and counsel. The second claimant, also a member of the public, was added to the proceedings with her liability for costs capped at £2,000, since she did not qualify for legal aid. The appeal was dismissed and costs of £2,000 were awarded against her. On receiving leave to appeal to the House of Lords, the second claimant applied for a protective costs order, limiting her liability for costs. She relied on article 10a of Council Directive 85/337/EEC[1], as inserted, and article 15a of Council Directive 96/61/EC[2], as inserted, both of which implemented the requirement in article 9.4 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998)[3] that the public should be able to challenge environmental decisions in proceedings which were not "prohibitively expensive". The application was refused, the appeal was dismissed and the second claimant was ordered to pay the costs of the appeal. Following the transfer of the jurisdiction of the House of Lords to the Supreme Court, the detailed assessment of the defendants' costs fell to be carried out by two costs officers who, applying the Directives, decided that they would disallow any costs which they considered to be prohibitively expensive, which they held to mean costs which would reasonably prevent an ordinary member of the public from embarking on the proceedings. On the defendants' application for a review of that decision, the Supreme Court referred to the Court of Justice of the European Union for a preliminary ruling questions on the meaning of the requirement that judicial

[1] Council Directive 85/337/EEC, art 10a, as inserted: see post, judgment, para 7.
[2] Council Directive 96/61/EC, art 15a, as inserted: see post, judgment, para 7.
[3] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), art 9: see post, judgment, post para 6.

A proceedings covered by article 10a and 15a should not be "prohibitively expensive" and on the relevant criteria for assessing that requirement.

On the reference—

Held, (1) that the assessment of whether the costs of judicial proceedings were "prohibitively expensive" within the meaning of article 10a of Council Directive 85/337/EEC and article 15a of Council Directive 96/61/EC was not a matter for national law alone; that account should be taken of the objective of European Union
B law to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public played an active role and had wide access to justice; that members of the public covered by the requirement that judicial proceedings should not be prohibitively expensive should not be prevented from seeking, or pursuing a claim for, a review by the courts of an environmental decision by reason of the financial burden which might arise as a result; that where a national court was called upon to make a costs order against a member of the public who was an unsuccessful
C claimant in an environmental dispute or, more generally, where it was required to state its views, at an earlier stage of proceedings, on the possible capping of the costs for which the unsuccessful party might be liable, it had to satisfy itself that that requirement had 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 (post, judgment, paras 30–32, 35, 39, operative part).

Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Case C-240/09) [2012] QB 606, ECJ and *Flachglas Torgau*
D *GmbH v Federal Republic of Germany* (Case C-204/09) [2013] QB 212, ECJ considered.

(2) That, where the national court was required to determine whether judicial proceedings in environmental matters were prohibitively expensive for a claimant within the meaning of article 10a of Council Directive 85/337/EEC and article 15a of Council Directive 96/61/EC, it could not act solely on the basis of that claimant's financial situation but had also to carry out an objective analysis of the amount of
E costs, particularly since members of the public and associations were required to play an active role in protecting the environment; that, therefore, the costs of proceedings had neither to exceed the financial resources of the claimant nor to appear to be objectively unreasonable; that the court could also take into account the situation of the parties concerned, whether the claimant had a reasonable prospect of success, the importance of what was at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially
F frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime; that, moreover, the fact that the claimant had not been deterred, in practice, from asserting his claim was not in itself sufficient to establish that the proceedings were not prohibitively expensive for him; and that the assessment could not be conducted according to different criteria depending on whether it was carried out at the conclusion of first instance proceedings, an appeal or a second appeal (post, judgment, paras 38, 40–48, operative part).

G The following cases are referred to in the judgment:

Commission of the European Communities v Ireland (Case C-216/05) [2006] ECR I-10787, ECJ

Commission of the European Communities v Ireland (Case C-427/07) [2010] Env LR 123; [2009] ECR I-6277, ECJ

DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik
H *Deutschland* (Case C-279/09) [2011] 2 CMLR 529; [2010] ECR I-13849, ECJ

Flachglas Torgau GmbH v Federal Republic of Germany (Case C-204/09) [2013] QB 212; [2013] 2 WLR 105, ECJ

Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Case C-240/09) [2012] QB 606; [2012] 3 WLR 278; [2012] PTSR 822; [2012] All ER (EC) 1; [2011] ECR I-1255, ECJ

The following additional cases are referred to in the opinion of the Advocate General:

Boxus v Region Wallonne (Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09) [2012] Env LR 320, ECJ

Brussels Hoofstedelijk Gewest v Vlaams Gewest (The Brussels Airport Co NV intervening) (Case C-275/09) [2011] PTSR D37; [2011] Env LR 497; [2011] ECR I-1753, ECJ

Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfallen eV v Bezirksregierung Arnsberg (Case C-115/09) [2011] Env LR 585; [2011] ECR I-3673, ECJ

Commission of the European Communities v Federal Republic of Germany (Case 29/84) [1985] ECR 1661, ECJ

Commission of the European Communities v Federal Republic of Germany (Case C-217/97) [1999] ECR I-5087, ECJ

Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd (Case C-263/08) [2009] ECR I-9967, ECJ

Ekro BV Vee-en Vleeshandel v Produktschap voor Vee en Vlees (Case 327/82) [1984] ECR 107, ECJ

European Parliament v Council of the European Union (Case C-540/03) [2007] All ER (EC) 193; [2006] ECR I-5769, ECJ

GREP GmbH v Freistaat Bayern (Case C-156/12) (unreported) 13 June 2012, ECJ

Impact v Ministry of Agriculture and Food (Case C-268/06) [2009] All ER (EC) 306; [2008] ECR I-2483, ECJ

Kreuz v Poland (2001) 11 BHRC 456

Ministero dell'Economia e delle Finanze et Agenzia delle Entrate v Speranza (Case C-35/09) [2010] ECR I-6597, ECJ

Ordre des barreaux francophones et germanophone v Conseil des ministres (Conseil des Barreaux de l'Union Européene intervening) (Case C-305/05) [2007] All ER (EC) 953; [2007] ECR I-5305, ECJ

Pie Optiek SPRL v Bureau Gevers SA (Case C-376/11) [2012] ETMR 855, ECJ

Podbielski v Poland (Application No 39199/98) (unreported) given 26 July 2005, ECtHR

Telntronic-CATV v Poland (Application No 48140/99) (unreported) given 10 January 2006, ECtHR

REFERENCE by the Supreme Court

The defendants, the Environment Agency, the Secretary of State for the Environment, Food and Rural Affairs and the First Secretary of State, applied, pursuant to rule 53(1) of the Supreme Court Rules 2009 (SI 2009/1603), for a review of the decision on 15 January 2010 of two costs officers (Mrs Registrar di Mambro and Master O'Hare), appointed by Lord Phillips of Worth Matravers PSC under rule 49(1) of the 2009 Rules, on preliminary issues arising in the detailed assessment of bills of costs lodged by them following an unsuccessful appeal by the second claimant, Lilian Pallikaropoulos, to the House of Lords [2008] UKHL 22; [2008] Env LR 705, the first claimant, David Edwards, having withdrawn from the proceedings and the jurisdiction of the House having been transferred to the Supreme Court on 1 October 2009 pursuant to Part 3 of the Constitutional Reform Act 2005. The single justice pursuant to rule 53(2) referred the application to a panel of five justices to be decided with an oral hearing. By a judgment dated 15 December 2010 the Supreme Court [2010] UKSC 57; [2011] 1 WLR 79 (Lord Hope of Craighead DPSC, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood, Lord Mance and Lord Dyson JJSC) held, inter alia, that it was not clear what the correct test was for determining whether proceedings were "prohibitively expensive"

within the meaning of article 10a of Council Directive 85/337/EEC and article 15a of Council Directive 96/61/EC (as inserted) and, accordingly, decided that the issue would be referred to the Court of Justice of the European Union for a preliminary ruling. By an order dated 17 May 2011, the Supreme Court referred to the Court of Justice for a preliminary ruling a number of questions, post, judgment, para 23, concerning the interpretation of the phrase "not prohibitively expensive" within articles 10a and 15a.

The judge rapporteur was Judge Bonichot.

The facts are stated in the Advocate General's opinion and the judgment.

David Wolfe QC (instructed by *Richard Buxton, Cambridge*) for the second claimant.

C Murrell, agent, *James Maurici* and *Robert Palmer* (instructed by *Environment Agency Legal Services, Bristol* and the *Treasury Solicitor*) for the United Kingdom Government.

S Juul Jørgensen and *V Pasternak Jørgensen*, agents, for the Danish Government.

E Creedon and *D O'Hagan*, agents, and *N Hyland*, for Ireland.

G Karipsiades, agent, for the Greek Government.

P Oliver and *L Armati*, agents, for the Commission of the European Union.

18 October 2012. **ADVOCATE GENERAL J KOKOTT** delivered the following opinion.

I—Introduction

1 How much may judicial proceedings in an environmental matter cost? This question is the subject of the present reference for a preliminary ruling. Under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L124, p 1) ("the Aarhus Convention") and the provisions implementing it 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 L175, p 40) (as amended by Parliament and Council Directive 2003/35/EC 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 (OJ 2003 L156, p 17) and codified by Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L26, p 1)) ("the EIA Directive") and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L257, p 26) (as amended by Directive 2003/35; codified by Parliament and Council Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L24, p 8) and replaced by Parliament and Council Directive 2010/75/EU of 24 November 2010 on industrial emissions (integrated

pollution prevention and control) (OJ 2010 L334, p 17)) ("the IPPC Directive") judicial proceedings in environmental disputes may not be prohibitively expensive.

2 However, in England and Wales there are considerable risks before courts in terms of costs, in particular because of the fees which are normally payable for lawyers there. The Supreme Court is therefore asking, following the conclusion of environmental proceedings, how it should apply the Convention and the corresponding provisions of the directives in connection with a dispute concerning the order for costs.

II—Legal framework

A—International law

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

4 Access to justice is addressed in the seventh, eighth and eighteenth recitals in the Preamble to the Convention:

> "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 . . ."

5 The fundamental objective of the Convention is laid down in article 1:

> "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."

6 Article 3(8) of the Convention mentions costs in judicial proceedings:

> "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."

7 Article 9 of the Convention regulates access to justice in environmental matters. Article 9.4 and 9.5 includes mention of costs:

> "4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide

A adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive . . .

"5. . . . each party . . . shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

B 8 Lastly, reference should be made to the decision-making practice of the Aarhus Convention Compliance Committee. The Compliance Committee, which is composed of experts, was established by the parties in order to contribute to the review, provided for in article 15 of the Convention, of compliance with its provisions. It examines primarily complaints by individuals. It concludes its investigations with "findings and recommendations".

C

B—European Union law

9 In order to implement the Aarhus Convention, Directive 2003/35/EC inserted article 10a into the EIA Directive and article 15a into the IPPC Directive. Both provisions govern access to justice in certain environmental disputes and each provide, in the fifth paragraph[1*]: "Any such procedure shall be fair, equitable, timely and not prohibitively expensive."

D

III—Facts and reference for a preliminary ruling

10 The present proceedings have their origin in an application by David Edwards for judicial review of a decision by the Environment Agency to issue a permit for the operation of a cement works. As far as can be seen, the undertaking concerned did not participate in those E proceedings.

11 The application was dismissed at first instance in 2005. Mr Edwards then appealed against that decision to the Court of Appeal. Before the Court of Appeal, Ms Pallikaropoulos was added as an appellant for the remainder of the proceedings after Mr Edwards withdrew. Her liability for costs in the Court of Appeal was capped in advance at £2,000. The Court of Appeal F dismissed the appeal and in 2006 made an order for costs by which the respondents' costs, capped at the above-mentioned amount, were awarded against Ms Pallikaropoulos.

12 Ms Pallikaropoulos then appealed to the House of Lords. At the outset of the proceedings she applied for a protective costs order, by which she sought a cap on her liability for costs in that appeal. However, the House of Lords refused her application, inter alia because she had not G provided information about her means or about the identity and means of those persons whom she represented.

13 On 16 April 2008 the House of Lords [2008] UKHL 22; [2008] 1 WLR 1587 affirmed the decision of the Court of Appeal dismissing Ms Pallikaropoulos' appeal. On 18 July 2008 the House of Lords pronounced an order for costs, in which Ms Pallikaropoulos was ordered to H pay the entire costs of the appeal to the House of Lords.

14 The order for costs is now the matter of dispute before the Supreme Court, which has taken the place of the House of Lords. In those

* *Reporter's note*. The superior figures in the text refer to notes which can be found at the end of the opinion, on pages 2928–2929.

proceedings, the Supreme Court has referred the following questions to the Court of Justice of European Union:

"1. How should a national court approach the question of awards of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of article 9.4 of the Aarhus Convention, as implemented by article 10a of the EIA Directive and article 15a of the IPPC Directive?

"2. Should the question whether the cost of the litigation is or is not 'prohibitively expensive' within the meaning of article 9.4 of the Aarhus Convention as implemented by the Directives be decided on an objective basis (by reference, for example, to the ability of an 'ordinary' member of the public to meet the potential liability for costs), or should it be decided on a subjective basis (by reference to the means of the particular claimant) or upon some combination of these two bases?

"3. Is this entirely a matter for the national law of the member state subject only to achieving the result laid down by the directives, namely that the proceedings in question are not 'prohibitively expensive'?

"4. In considering whether proceedings are, or are not, 'prohibitively expensive', is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings?

"5. Is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance?"

15 Ms Pallikaropoulos, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Denmark, Ireland, the Hellenic Republic and the Commission of the European Union submitted written observations and presented oral argument at the hearing on 13 September 2012.

IV—Legal assessment

16 The first and third questions asked by Supreme Court should be answered together, since they abstractly address the discretion enjoyed by the member states in implementing the provisions in question: see under A. On the basis of the answer to these two questions the other questions concerning specific aspects can then be answered in turn: see under B, C and D.

A—The first and third questions: discretion for domestic measures

17 The first and third questions essentially ask whether the court may decide how a national court should approach the question of the award of costs against a member of the public who is an unsuccessful claimant in an environmental claim with regard to the requirement of preventing prohibitively expensive judicial proceedings, or whether this is entirely a matter for the national law of the member state, provided only that the proceedings in question do not become "prohibitively expensive".

18 Article 9.4 of the Aarhus Convention, the fifth paragraph of article 10a of the EIA Directive and the fifth paragraph of article 15a of the IPPC Directive each provide that environmental proceedings must be fair, equitable, timely and not prohibitively expensive.

A **19** As Ireland points out, under the third paragraph of article 288FEU of the FEU Treaty a Directive is binding, as to the result to be achieved, upon each member state to which it is addressed, but is to leave to the national authorities the choice of form and methods. This fundamental freedom of choice enjoyed by the member states is not called into question because the Directives also implement an essentially identical provision of an international convention entered into by the European Union.

B **20** In the present case, the discretion thus granted is particularly broad because the above-mentioned provisions do not contain any further rules on how prohibitive costs are specifically to be prevented.

21 The great diversity of cost regimes in the member states underlines the need for that discretion. Neither article 9.4 of the Convention nor the provisions of the directives are intended to effect a comprehensive C harmonisation of those cost regimes. They require only the necessary selective adaptations.

22 It can therefore be stated by way of an interim conclusion that it is in principle for the member states to determine how the result provided for in article 9.4 of the Aarhus Convention, article 10a of the EIA Directive and article 15a of the IPPC Directive, namely that the judicial proceedings D covered are not prohibitively expensive, is achieved.

23 Nevertheless, the discretion enjoyed by the member states is not unlimited. The court has already pointed out in connection with the Convention that in the absence of European Union ("EU") rules governing the matter, it is for the domestic legal system of each member state to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The member states are, however, E responsible for ensuring that those rights are effectively protected in each case: see *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Case C-240/09) [2012] QB 606; [2011] ECR I-1255, para 47; see also *Impact v Ministry of Agriculture and Food* (Case C-268/06) [2008] ECR I-2483; [2009] All ER (EC) 306, para 44 et seq.

F **24** Consequently, the member states' rules must actually prevent in each individual case the judicial proceedings covered from being prohibitively expensive.

25 The way in which the concept of "prohibitively expensive" is to be interpreted, that is to say the way in which the result provided for in article 9.4 of the Convention and in the Directives is to be determined, G cannot be left to the member states. The need for the uniform application of EU law requires that the terms of a provision of EU law that makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question; the court relies additionally upon the principle of H equality in this regard: see *Ekro BV Vee-en Vleeshandel v Produktschap voor Vee en Vlees* (Case 327/82) [1984] ECR 107, para 11; *Flachglas Torgau GmbH v Federal Republic of Germany* (Case C-204/09) [2012] QB 212, para 37 and *Pie Optiek SPRL v Bureau Gevers SA* (Case C-376/11) [2012] ETMR 855, para 33. And in contrast, for example, to the case of the

concepts of "sufficient interest" and "impairment of a right", for the concept of "prohibitively expensive" the Directives do not refer to national law.

26 Indications as to what is meant by the prevention of prohibitively expensive judicial proceedings can be derived from the wording of the provision, but also from its context (see *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (Case C-263/08) [2009] ECR I-9967, para 45, on the recognition of non-governmental organisations) that is to say, in the absence of further indications in Directive 2003/35, above all from the Aarhus Convention. Furthermore, the general requirements governing the transposition and implementation of EU law are important, in particular the need for sufficiently clear transposition (see *Commission of the European Communities v Federal Republic of Germany* (Case 29/84) [1985] ECR 1661, para 23 and *Commission of the European Communities v Ireland* (Case C-427/07) [2009] ECR I-6277, para 55 and the case law cited); the principles of effectiveness and equivalence (see the *Lesoochranárske zoskupenie* case [2012] QB 606, paras 47, 48; *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfallen eV v Bezirksregierung Arnsberg* (Case C-115/09) [2011] ECR I-3673, para 43 and *Boxus v Region Wallonne* (Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09) [2012] Env LR 320, para 52); and respect for fundamental rights under EU law: see *European Parliament v Council of the European Union* (Case C-540/03) [2006] ECR I-5769; [2007] All ER (EC) 193, para 105; *Ordre des barreaux francophones et germanophone v Conseil des ministres (Conseil des Barreaux de l'Union européene intervening)* (Case C-305/05) [2007] ECR I-5305; [2007] All ER (EC) 953, para 68 and *Ministero dell'Economia e delle Finanze et Agenzia delle Entrate v Speranza* (Case C-35/09) [2010] ECR I-6597, para 28.

27 The concept of "excessive" highlighted by the commission, which describes the costs to be prevented in some language versions of the directives and in the corresponding translations of the Convention, could refer to the principle of proportionality. (In addition to the German version, this seems to be true of the Czech, Spanish, Hungarian, Italian, Lithuanian, Latvian, Dutch, Polish and Portuguese versions of the relevant provisions.) That principle must be observed in any event when interpreting and implementing Directives (see the *Ministero dell'Economia* case, paras 28, 29) and naturally precludes excessive costs for the access to justice provided for in the Aarhus Convention and the Directives.

28 However, reducing costs protection to the principle of proportionality would fall short. In the three binding language versions of the Convention the concept of "excessive" is not used. According to the French version, costs of procedures may not be prohibitive[2] and according to the English version the procedures are not to be prohibitively expensive[3]. The Russian version does not use the concept of "prohibitive", but also seeks to ensure that procedures are not inaccessible on account of high costs.

29 Consequently, it is not only a question of preventing costs which are excessive, that is to say disproportionate to the proceedings, but above all the proceedings may not be so expensive that the costs threaten to prevent them from being conducted. Reasonable but prohibitive costs are a possibility in particular in environmental proceedings relating to large-scale projects, since these may be very burdensome in every respect, for example

A with regard to the legal, scientific and technical questions raised and the number of parties.

30 It is therefore now possible to give a helpful answer to the first and third questions: under article 9.4 of the Aarhus Convention, article 10a of the EIA Directive and article 15a of the IPPC Directive, it is in principle for the member states to determine how to avoid the judicial proceedings covered not being conducted on account of their costs. However, those B measures must ensure in a sufficiently clear and binding manner that the objectives of the Aarhus Convention are satisfied in each individual case and, at the same time, observe the principles of effectiveness and equivalence and the fundamental rights under EU law.

B—The second question: the relevant criteria

C 31 Secondly, the Supreme Court wishes to know if the question whether the cost of the litigation is or is not "prohibitively expensive" should be decided on an objective or a subjective basis or using a combination of both. It mentions, by way of example, the ability to pay of an "ordinary" member of the public and the means of the particular claimant.

32 Ultimately, this question asks, in essence, how a national court D should decide whether the costs of a case are still or are no longer compatible with article 9.4 of the Aarhus Convention and the implementing provisions contained in the directives.

33 The court is not able to give a comprehensive and definitive answer to this question if only because of the discretion enjoyed by the member states, but also on account of the many possible scenarios. However, the context of article 9.4 of the Aarhus Convention makes it possible to identify E aspects which may be useful in determining permissible costs.

34 It should be stated, first, that article 3(8) of the Aarhus Convention expressly permits reasonable costs. Article 9.4 and the provisions of the directives accordingly do not preclude an order for costs unless the amount is prohibitive: see *Commission of the European Communities v Ireland* (Case C-427/07), para 92.

F 35 There are no simple criteria governing when a cost claim is prohibitive. When the court ruled that fees amounting to €20 and €45 did not constitute an obstacle to the exercise of the rights of participation in an environmental impact assessment, it did not indicate any ground on which that finding was based: see *Commission of the European Communities v Ireland* (Case C-216/05) [2006] ECR I-10787, para 45. Nor did it state grounds why the direct costs for supplying information on the environment, G up to an amount of around €5,000, should not dissuade persons from exercising the right to such information, whilst indirect costs, such as a contribution to the authority's fixed costs, should: see *Commission of the European Communities v Federal Republic of Germany* (Case C-217/97) [1999] ECR I-5087, para 47 et seq.

36 The Compliance Committee (with regard to the Aarhus Convention Compliance Committee) has already given its view on the issue of H prohibitive costs on several occasions, indeed mainly in relation to the United Kingdom[4]. In each case it conducts a comprehensive assessment of the circumstances of the individual case and of the national system. This approach is necessary because article 9.4 of the Convention—just like the provisions of the directives—does not contain any specific criteria.

37 The commission also refers to *Kreuz v Poland* (2001) 11 BHRC 456, paras 61 et seq, before the European Court of Human Rights. However, that case did not concern the total costs of the judicial proceedings, but only a large advance of court fees which was payable by the applicant. In this context, the Court of Human Rights mentioned that the amount was equal to the *average* annual salary in the state in question. In the view of the commission, this is an indication supporting an objective standard. However, this idea cannot be discerned in the remainder of the grounds of the judgment. As the United Kingdom has noted, the primary issue was rather the individual capacity to pay of the person concerned, which is a subjective standard: see also the judgments of the Court of Human Rights in *Podbielski v Poland* (Application No 39199/98) (unreported) given 26 July 2005, para 67, and in *Telntronic-CATV v Poland* (Application No 48140/99) (unreported) given 10 January 2006, in particular paras 50 et seq, which concerned much lower advances.

38 Individual capacity to pay is also relevant with respect to the principle of effective legal protection for the purposes of article 47 of the Charter of Fundamental Rights of the European Union (OJ 2010 C83, p 389) ("the Charter"). Under the third paragraph of article 47, legal aid must be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. Admittedly, the Convention does not absolutely require, under article 9(5), the introduction of assistance mechanisms such as legal aid[5], but only consideration of the "establishment of appropriate assistance mechanisms". However, legal aid makes it possible to prevent risks in terms of prohibitive costs in certain cases[6]. In so far as the enforcement of provisions of EU law is concerned, legal aid may even be absolutely necessary if the risks in terms of costs, which are acceptable in principle, constitute an insurmountable obstacle to access to justice on account of the limited capacity to pay of the person concerned: see *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (Case C-279/09) [2010] ECR I-13849, paras 60, 61, and the order in *GREP GmbH v Freistaat Bayern* (Case C-156/12) (unreported) 13 June 2012, para 40 et seq.

39 Nevertheless, legal protection under the Aarhus Convention goes further than effective legal protection under article 47 of the Charter, as the commission rightly points out. Article 47 expressly relates to the protection of *individual* rights. The basis for the assessment of the need to grant aid for effective legal protection is therefore the actual person whose rights and freedoms as guaranteed by the European Union have been violated, rather than the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid: see the *DEB Deutsche* case, para 42.

40 Legal protection in environmental matters, on the other hand, generally serves not only the individual interests of claimants, but also, or even exclusively, the public. This public interest has great importance in the European Union, since a high level of protection of the environment is one of the European Union's aims under article 191(2)FEU of the FEU Treaty and article 37 of the Charter: see also recital (9) in the Preamble to the Treaty on European Union and article 11FEU.

41 The Convention has this two-fold interest in view. Under article 1, each party must guarantee the right of access to justice in environmental

matters 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 health and well-being. The seventh and eighth recitals in the Preamble to the Convention confirm that aim and supplement it with the *duty* of every person to protect and improve the environment for the benefit of present and future generations. Consequently, according to its eighteenth recital, the Convention seeks to make effective judicial mechanisms accessible to the public, including organisations, so that its legitimate interests are protected and *the law is enforced*.

42 Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations.

43 The two-fold interest in environmental protection precludes risks in terms of prohibitive costs from being prevented only having regard to the capacity to pay of those who seek to enforce environmental law. They cannot be expected to bear the full risk in terms of costs of judicial proceedings up to the limit of their own capacity to pay if the proceedings are also, or even exclusively, in the public interest.

44 Consequently, in assessing whether costs of proceedings are prohibitive, due account must be taken of the respective public interest. Furthermore, the Compliance Committee rightly also infers this from the fair procedures likewise required by article 9.4[7].

45 Taking the public interest into account does not, however, rule out the inclusion of any individual interests of claimants. A person who combines extensive individual economic interests with proceedings to enforce environmental law can, as a rule, be expected to bear higher risks in terms of costs than a person who cannot anticipate any economic benefit. The threshold for accepting the existence of prohibitive costs may thus be higher where there are individual economic interests. This possibly explains why, in a dispute over odour nuisance between persons who were neighbours, hence a case with a relatively low public interest, the Compliance Committee did not consider a claim of more than £5,000 in respect of part of the costs to be prohibitive[8].

46 Conversely, the presence of individual interests cannot prevent all account being taken of public interests that are also being pursued. For example, the individual interests of a few people affected by an airport project cannot, upon assessment of the permissible costs, justify disregard for the considerable public interest in the case which in any event stems from the fact that the group of those affected is very much wider[9].

47 The prospects of success may also be relevant with regard to the extent of the public interest. A clearly hopeless action is not in the interest of the public, even if it has an interest in the subject matter of the action in principle.

48 As regards the level of permissible costs, it is lastly significant that provisions of the Convention on judicial proceedings are to be interpreted with the aim of ensuring "wide access to justice": see the *Djurgården-Lilla* case, para 45, on the recognition of non-governmental organisations. "[Wide] access to justice" is admittedly only expressly mentioned in

article 9(2) of the Convention and the corresponding provisions of the Directives in connection with the preconditions for an action relating to a sufficient interest and the impairment of a right. However, article 9(2) at least makes clear that this is a general objective of the Convention. This principle of interpretation must therefore also apply in determining permissible costs. It would not be compatible with wide access to justice if the considerable risks in terms of cost are, as a rule, liable to prevent proceedings.

49 The answer to the second question is therefore that in examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue.

C—The fourth question: actual deterrence

50 The fourth question asks whether it is relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings.

51 Such an approach could make the proscription of prohibitive costs redundant: if proceedings were conducted, the risk in terms of costs evidently did not prevent them. In the absence of proceedings, the question of costs remains hypothetical. However, this cannot be the conclusion.

52 The question can be explained by the fact that in the United Kingdom there is the possibility, before a hearing on the merits, of a decision on an application for a protective costs order. Thus, in the main proceedings, Ms Pallikaropoulos' risk in terms of costs before the Court of Appeal was capped at £2,000, whilst at last instance, before the then House of Lords, her application for a protective costs order was refused. It might be inferred from the fact that Ms Pallikaropoulos nevertheless maintained her appeal before the House of Lords that the risk in terms of costs was not prohibitive.

53 It should be noted, first of all, in this regard that, despite certain practical problems in its arrangements[10], an instrument like the application for a protective costs order is in principle an appropriate element in the implementation of article 9.4 of the Convention and the provisions of the Directives. The decision on such an application makes it possible to prevent prohibitive costs in advance and thus simultaneously removes a further possible obstacle to bringing proceedings, namely the uncertainty over the potential costs of the proceedings.

54 If the decision on the application for a protective costs order has already correctly implemented article 9.4 of the Aarhus Convention and the corresponding provisions of the directives, this outcome must, as a rule, no longer be called into question. The refusal of the application for a protective costs order may then be regarded as an indication that the risk in terms of costs did not preclude proceedings. In exceptional cases, however, it may become necessary to limit the payable costs afterwards, for example, if new considerations emerge in the proceedings which are relevant to the weighting of the public interest or if the costs are actually much higher than

had been expected when the decision was made on the application for a protective costs order.

55 If, on the other hand, insufficient regard was had to the relevant considerations for preventing prohibitive costs, it is not possible to use willingness to bring proceedings as an indication that the permitted risk in terms of costs was not prohibitive. This would amount to depriving the claimant of his right to the prevention of prohibitive costs. Rather, it would have to be ensured that those rights were effective in the order for costs after the conclusion of the proceedings on the merits: compare with *Brussels Hoofstedelijk Gewest v Vlaams Gewest (The Brussels Airport Co NV intervening)* (Case C-275/09) [2011] ECR I-1753, para 37.

56 Consequently, the fact that, despite the refusal of an application for a protective costs order, the claimant has not in fact been deterred from bringing or continuing with the proceedings may be taken duly into account afterwards in an order for costs if the obligation to prevent prohibitive costs was observed in the decision on the application for a protective costs order.

D—The fifth question: limitation of costs at different levels of jurisdiction

57 Lastly, the Supreme Court asks whether a different approach is permissible with regard to the limitation of costs at the different levels of jurisdiction. In the main proceedings, costs protection was granted before the Court of Appeal, but not before the House of Lords.

58 Article 9.4 of the Convention and the provisions of the directives refer only to "procedures" and do not differentiate between different levels of jurisdiction. It is true that the Convention does not require a certain appellate system, or even an appeal, to be guaranteed. However, the proceedings covered are not concluded until the decision in question becomes final. As a result, contrary to the view taken by Denmark, prohibitive costs must be prevented at all levels of jurisdiction[11].

59 This also applies in principle to appeals lodged by a claimant who was protected against prohibitive costs at the lower level of jurisdiction. The criterion of procedural equality of arms, forming part of the fundamental right to a fair trial (see the *Ordre des barreaux* case [2007] ECR I-6597, paras 29–31) which is also explicitly mentioned as a procedural principle in article 9.4 of the Convention, prohibits the claimant from being exposed to the risk of prohibitive costs in appeal proceedings. Otherwise, it would have to be feared that the opposing party would gear its procedural strategy to an appeal being in practice ruled out for him.

60 Ms Pallikaropoulos also rightly states that under article 267FEU of the FEU Treaty only courts or tribunals of last instance are required to make a reference to the court for a preliminary ruling in cases of doubt as to the interpretation or validity of EU law. If relevant questions have not yet been referred to the court by the lower courts, it is not possible to bar the way to a court or tribunal which is required to make a reference by means of risks of prohibitive costs.

61 Nevertheless, it is also possible that after the decision by the lower court the public interest in the further continuation of the proceedings will dissipate or at least be reduced. It is therefore compatible with article 9.4 of the Convention and with the provisions of the directives to re-examine at each level of jurisdiction the extent to which prohibitive costs must be prevented.

V—Conclusion

62 I therefore propose that the court rule as follows:

(1) Under article 9.4 of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, article 10a of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended, and article 15a of Directive 96/61/EC concerning integrated pollution prevention and control, as amended, it is in principle for the member states to determine how to avoid the judicial proceedings covered not being conducted on account of their costs. However, those measures must ensure in a sufficiently clear and binding manner that the objectives of the Aarhus Convention are satisfied in each individual case and, at the same time, observe the principles of effectiveness and equivalence and the fundamental rights under EU law.

(2) In examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue.

(3) The fact that, despite the refusal of an application for a protective costs order, the claimant has not in fact been deterred from bringing or continuing with the proceedings may be taken duly into account afterwards in an order for costs if the obligation to prevent prohibitive costs was observed in the decision on the application for a protective costs order.

(4) It is compatible with article 9.4 of the Aarhus Convention and with article 10a of Directive 85/337 and article 15a of Directive 96/61 to re-examine at each level of jurisdiction the extent to which prohibitive costs must be prevented.

Notes

1. Respectively (i) now the second sub-paragraph of article 11(4) of Directive 2011/92 and (ii) for an intermediate period, the second sub-paragraph of article 16(4) of Directive 2008/1 and now the second sub-paragraph of article 25(4) of Directive 2010/75.

2. The French version states: "Les procédures . . . doivent être objectives, équitables et rapides sans que leur coût soit prohibitif."

3. The English version states: "The procedures . . . shall . . . be fair, equitable, timely and not prohibitively expensive."

4. See findings and recommendations of 24 September 2010, Morgan and Baker/United Kingdom (ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, para 49), Cultra Residents' Association/United Kingdom (ACCC/C/2008/27, paras 44 and 45) and ClientEarth/United Kingdom (ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, para 128 et seq), and of 30 March 2012, DOF/Denmark (ACCC/C/2011/57, ECE/MP.PP/C.1/2012/7, para 45 et seq).

5. But see Compliance Committee, findings and recommendations of 18 June 2010, Plataforma Contra la Contaminación del Almendralejo/Spain (ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, p 12, para 66).

6. See Compliance Committee, findings and recommendations in ClientEarth/United Kingdom, para 92.

7. See the findings and recommendations in Cultra Residents' Association/United Kingdom, para 45.

A 8. See findings and recommendations in Morgan and Baker/United Kingdom, para 49.

9. This is illustrated by the findings and recommendations in Cultra Residents' Association/United Kingdom.

10. See the findings and recommendations in ClientEarth/United Kingdom, para 129 et seq.

11. Likewise, Compliance Committee, findings and recommendations of
B 21 January 2011, AJA/Spain (ACCC/C/2008/24, ECE/MP.PP/C.1/2009/8/Add.1, p 20, para 108).

11 April 2013. **THE COURT** (**Fourth Chamber**) delivered the following judgment.

1 This request for a preliminary ruling concerns the interpretation of the fifth paragraph of article 10a of Council Directive 85/337/EEC of 27 June
C 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L175, p 40) and the fifth paragraph of article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L257, p 26), as amended by Parliament and Council Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain
D 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 L156, p 17).

2 The request has been made in proceedings between, on the one hand, Mr Edwards and Ms Pallikaropoulos and, on the other, the Environment Agency, the First Secretary of State and the Secretary of State for Environment, Food and Rural Affairs concerning a permit issued by the
E Environment Agency for the operation of a cement works. The request concerns the conformity with European Union law of the decision of the House of Lords ordering Ms Pallikaropoulos, whose appeal had been dismissed as unfounded, to pay the costs of the opposing parties.

Legal context

F *International law*

3 The Preamble to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on
G access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L124, p 1) ("the Aarhus Convention") states:

> "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,
>
> H "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."

4 Article 1 of the Aarhus Convention, under the heading "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."

5 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."

6 Under the heading "Access to justice", article 9 of the Aarhus Convention states:

"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."

A *European Union law*

7 According to article 10a of Directive 85/337 and article 15a of Directive 96/61, as inserted by article 3(7) and 4(4) of Council Directive 2003/35/EC:

> "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.
>
> "Member states shall determine at what stage the decisions, acts or omissions may be challenged.
>
> "What constitutes a sufficient interest and impairment of a right shall be determined by the 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, where such a requirement exists under national law.
>
> "Any such procedure shall be fair, equitable, timely and not prohibitively expensive."

8 Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L26, p 1) codified Directive 85/337. The second sub-paragraph of article 11(4) of Directive 2011/92 contains provisions identical to those of the fifth paragraph of article 10a of Directive 85/337.

9 Parliament and Council Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L24, p 8) codified Directive 96/61. The second sub-paragraph of article 16(4) of Directive 2008/1 contains provisions identical to those of the fifth paragraph of article 15a of Directive 96/61.

United Kingdom law

10 Rule 49(1) of the Supreme Court Rules 2009 (SI 2009/1603) provides:

> "Every detailed assessment of costs shall be carried out by two costs officers appointed by the President and— (a) one costs officer must be a costs judge (a taxing master of the Senior Courts), and (b) the second may be the registrar."

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

11 Mr Edwards challenged the decision of the Environment Agency to approve the operation of a cement works, including waste incineration, in Rugby (United Kingdom), in the light of environmental law, relying,

in particular, on the fact that the project had not been the subject of an environmental impact assessment. In that connection, Mr Edwards was granted legal aid.

12 That action was dismissed and Mr Edwards brought an appeal before the Court of Appeal, before eventually deciding, on the final day of the hearing, to withdraw the case.

13 Ms Pallikaropoulos was granted leave, at her request, to take part as appellant in the remainder of the proceedings. While she did not satisfy the necessary requirements for entitlement to legal aid, the Court of Appeal agreed to cap her liability for costs at £2,000.

14 The Court of Appeal dismissed the appeal brought by Ms Pallikaropoulos and ordered her to bear her own costs and to pay the opposing parties' costs as thus capped.

15 Ms Pallikaropoulos appealed to the House of Lords and requested that she should not be required to give a guarantee in respect of foreseeable costs in the sum of £25,000 as required by that court. That request was refused.

16 Ms Pallikaropoulos also applied for a "protective costs order" whereby her liability for costs would be capped should her appeal not be allowed. That application was refused.

17 By decision of 16 April 2008 the House of Lords affirmed the Court of Appeal's decision to dismiss the appeal and, on 18 July 2008, ordered Ms Pallikaropoulos to pay the respondents' costs of the appeal, the amount of which, in the event of disagreement between the parties, was to be fixed by the Clerk of the Parliaments. The respondents submitted two bills for recoverable costs in the amounts of £55,810 and £32,290.

18 The jurisdiction of the House of Lords was transferred to the newly established Supreme Court of the United Kingdom on 1 October 2009. In accordance with the Supreme Court Rules 2009, the detailed assessment of the costs was carried out by two costs officers appointed by the President of the Supreme Court. In that context, Ms Pallikaropoulos relied on Directives 85/337 and 96/61 to challenge the costs order that had been made against her.

19 By decision of 4 December 2009, the costs officers took the view that they were, in principle, competent to assess the merits of that argument.

20 The respondents in the main proceedings appealed, in the costs proceedings, against that decision to a single judge of the Supreme Court of the United Kingdom, requesting that the case be referred to a panel of five judges. It was ultimately decided that the case should be so referred.

21 That panel delivered its decision on 15 December 2010. It found that the costs officers ought to have confined themselves to the jurisdiction which the Supreme Court Rules 2009 conferred on them and thus to have limited themselves to quantifying the costs. The panel took the view that the question whether the procedure was prohibitively expensive, within the meaning of Directives 85/337 and 96/61, was within the sole jurisdiction of the court adjudicating on the substance of the case, which may adjudicate either at the outset of the proceedings, when determining the request for a protective costs order, or in its decision on the substance.

22 The panel also took the view that the question whether the order that Ms Pallikaropoulos pay the respondents' costs was contrary to those

A Directives had not been examined by the House of Lords when it considered her application for a protective costs order.

23 It is in those circumstances that the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

"(1) How should a national court approach the question of awards of
B costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of article 9.4 of the Aarhus Convention, as implemented by article 10a [of Directive 85/337] and article 15a of [Directive 96/61]?

"(2) Should the question whether the cost of the litigation is or is not 'prohibitively expensive' within the meaning of article 9.4 of the Aarhus Convention as implemented by [those] Directives be decided on an
C objective basis (by reference, for example, to the ability of an 'ordinary' member of the public to meet the potential liability for costs), or should it be decided on a subjective basis (by reference to the means of the particular claimant) or upon some combination of these two bases?

"(3) Or is this entirely a matter for the national law of the member state subject only to achieving the result laid down by [those] Directives,
D namely that the proceedings in question are not 'prohibitively expensive'?

"(4) In considering whether proceedings are, or are not, 'prohibitively expensive', is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings?

"(5) Is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance?"
E

Consideration of the questions referred

24 By its various questions, which it is appropriate to consider together, the referring court asks the Court of Justice to clarify, first, the meaning of the requirement laid down in the fifth paragraph of article 10a of Directive 85/337 and in the fifth paragraph of article 15a of Directive 96/61 that
F judicial proceedings covered by those provisions should not be prohibitively expensive, and, second, the criteria for assessing that requirement which a national court may apply when deciding on costs, and the latitude available to member states in defining those criteria in national law. In the context of the assessment by a national court as to whether proceedings may be prohibitively expensive, the referring court also asks the Court of Justice to
G clarify whether courts must take account of the fact that the party liable to be ordered to pay the costs has not actually been deterred from bringing or pursuing its claim and whether, moreover, their analysis may differ, according to whether they are adjudicating at the conclusion of first instance proceedings, an appeal or a second appeal.

The notion of "not prohibitively expensive" within the meaning of
H *Council Directives 85/337/EEC and 96/61/EC*

25 As the court has already held, it should be recalled, first of all, that the requirement, under the fifth paragraph of article 10a of Directive 85/337 and the fifth paragraph of article 15a of Directive 96/61, that judicial proceedings should not be prohibitively expensive does not prevent the

national courts from making an order for costs: see *Commission of the European Communities v Ireland* (Case C-427/07) [2009] ECR I-6277, para 92.

26 That follows expressly from the Aarhus Convention, with which European Union law must be "properly aligned", as is evident from recital (5) in the Preamble to Directive 2003/35, which amended Directives 85/337 and 96/61, 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.

27 Next, it must be pointed out that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings: see *Commission of the European Communities v Ireland* (Case C-427/07), para 92.

28 The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned.

29 Furthermore, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose pursued: see, inter alia, *Flachglas Torgau GmbH v Federal Republic of Germany* (Case C-204/09) [2013] QB 212, para 37.

30 It follows from this that even if neither the Aarhus Convention—article 9.4 of which provides that the procedures referred to in paragraphs 1 to 3 of that article are not to be prohibitively expensive—nor Directives 85/337 and 96/61 specify how the cost of judicial proceedings should be assessed in order to establish whether it must be regarded as prohibitively expensive, that assessment cannot be a matter for national law alone.

31 As is expressly stated in the third paragraph of article 10a of Directive 85/337 and the third paragraph of article 15a of Directive 96/61, the objective of the European Union legislature is to give the public concerned "wide access to justice".

32 That objective pertains, more broadly, to the desire of the European Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role.

33 Moreover, the requirement that the cost should be "not prohibitively expensive" pertains, in environmental matters, to the observance of the right to an effective remedy enshrined in article 47 of the Charter of Fundamental Rights of the European Union (OJ 2010 C83, p 389), and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law: see, inter alia, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Case C-240/09) [2012] QB 606; [2011] ECR I-1255, para 48.

34 Lastly, although the document published in 2000 by the United Nations Economic Commission for Europe, entitled *The Aarhus Convention, An Implementation Guide*, cannot offer a binding interpretation of that Convention, it may be noted that, according to that document, the cost of bringing a challenge under the Convention or to enforce national

A environmental law must not be so expensive as to prevent the public from seeking review in appropriate cases.

35 It follows from the foregoing that the requirement, under the fifth paragraph of article 10a of Directive 85/337 and the fifth paragraph of article 15a of Directive 96/61, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by
B the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make 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—as courts in the United Kingdom may be—to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for
C which the unsuccessful party may be liable, it must satisfy itself that that requirement 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.

The relevant criteria for assessing the requirement that the cost be "not prohibitively expensive"

D

36 As stated in para 24 of the present judgment, the Supreme Court of the United Kingdom wishes to establish the assessment criteria that the national court must apply in order to ensure compliance, when deciding on costs, with the requirement that the costs of the proceedings should not be prohibitively expensive. It asks, in particular, whether that assessment is objective in nature or, on the contrary, subjective, and to what extent
E national law must be taken into account.

37 It must be recalled that, according to settled case law, where European Union law lacks precision, it is effectively for the member states, when they transpose a Directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of methods: see, inter alia, *Commission of the European Communities v Ireland* (Case C-216/05) [2006] ECR I-10787, para 26.

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38 It follows that, as regards the methods likely to secure 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 any national legal aid scheme as well as of any costs protection regime, such as that referred to in para 16 of the present judgment. Significant differences between national laws in that area
G do have to be taken into account.

39 Furthermore, as previously stated, the national court called upon to give a ruling on costs must satisfy itself that that requirement 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.

40 That assessment cannot, therefore, be carried out solely on the basis of the financial situation of the person concerned but must also be based on
H an objective analysis of the amount of the costs, particularly since, as has been stated in para 32 of the present judgment, members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of proceedings

must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.

41 As regards the analysis of the financial situation of the person concerned, the assessment which must be carried out by the national court cannot be based exclusively on the estimated financial resources of an "average" applicant, since such information may have little connection with the situation of the person concerned.

42 The court may also 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 relevant law and procedure and the potentially frivolous nature of the claim at its various stages: see, by analogy, *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (Case C-279/09) [2010] ECR I-13849, para 61.

43 It must also be stated that the fact, put forward by the Supreme Court of the United Kingdom, that the claimant has not been deterred, in practice, from asserting his or her claim is not in itself sufficient to establish that the proceedings are not, as far as that claimant is concerned, prohibitively expensive for the purpose (as set out above) of Directives 85/337 and 96/61.

44 Lastly, as regards the question whether the assessment as to whether or not the costs are prohibitively expensive ought to differ according to whether the national court is deciding on costs at the conclusion of first instance proceedings, an appeal or a second appeal, an issue which was also raised by the referring court, no such distinction is envisaged in Directives 85/337 and 96/61, nor, moreover, would such an interpretation be likely to comply fully with the objective of the European Union legislature, which is to ensure wide access to justice and to contribute to the improvement of environmental protection.

45 The requirement that judicial proceedings should not be prohibitively expensive cannot, therefore, be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first instance proceedings, an appeal or a second appeal.

46 It must therefore be held that, where the national court is required to determine, in the context referred to in para 41 of the present judgment, whether judicial proceedings on environmental matters are prohibitively expensive for a claimant, it cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also 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 relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

47 By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

48 Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first instance proceedings, an appeal or a second appeal.

Costs

49 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 (Fourth Chamber) hereby rules:

The requirement, under the fifth paragraph 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 and the fifth paragraph of article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Parliament and Council Directive 2003/35/EC of 26 May 2003, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make 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—as courts in the United Kingdom may be—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 satisfy itself that that requirement 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.

In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also 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 relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first instance proceedings, an appeal or a second appeal.

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