Court of Justice of the European Union

European Commission *v* United Kingdom of Great Britain and Northern Ireland (supported by Kingdom of Denmark and another intervening)

(Case C-530/11)

EU:C:2013:554

EU:C:2014:67

2013 July 11; Sept 12; 2014 Feb 13

President of Chamber R Silva de Lapuerta, Judges J L da Cruz Vilaça, G Arestis, J-C Bonichot, A Arabadjiev
Advocate General J Kokott

European Union — Directive — Transposition into national law — Directive partially transposed by case law — Defective transposition alleged — Whether transposition by national case law effective and sufficient — Whether United Kingdom failing to fulfil obligations — Council Directive 85/337/EEC, art 10a (as inserted by Parliament and Council Directive 2003/35/EC, art 3(7)) — Council Directive 96/61/EC, art 15a (as inserted by Parliament and Council Directive 2003/35/EC, art 4(4))

European Union — Environment — Costs — Council Directives requiring member states to ensure public access to review procedure for environmental decisions "not prohibitively expensive" — Detailed rules for grant of protective costs orders in United Kingdom specified in case law — Whether domestic law principles for grant of protective costs order requiring modification in light of European Union law — Whether system of cross-undertakings in respect of interim relief uncertain and imprecise — Whether United Kingdom failing to transpose Directive fully and apply provisions correctly — Council Directive 85/337/EEC, art 10a (inserted by Parliament and Council Directive 2003/35/EC, art 3(7)) — Council Directive 96/61/EC, art 15a (as inserted by Parliament and Council Directive 2003/35/EC, art 4(4))

In March 2010 the European Commission issued a reasoned opinion that the United Kingdom had failed to transpose fully and to apply correctly article 10a of Council Directive 85/337/EEC[1] ("the environmental impact assessment Directive") and article 15a of Council Directive 96/61/EC[2] ("the integrated pollution and prevention control Directive"), which had been inserted by articles 3(7) and 4(4) respectively of Parliament and Council Directive 2003/35/EC on public participation in respect of environmental plans and programmes ("the inserted articles"), and requested the United Kingdom Government to remedy that failure within two months. The inserted articles provided that procedures for the review of approvals of projects which might affect the environment were not to be prohibitively expensive. In England and Wales, while the general position on costs was that the unsuccessful party would be ordered to pay the costs of the successful party, the courts had a discretion to grant a protective costs order which enabled the claimant to obtain a cap on the costs which might be payable. The detailed rules for granting such relief, which applied at the time of the reasoned opinion, were specified in a Court of Appeal judgment from 2005 according to which a court had the discretion to make a protective costs order at any stage of the proceedings if satisfied that the issues to be

[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.

A resolved were of public interest, but the courts were not obliged to grant protection where the cost of the proceedings was objectively unreasonable or where only the particular interest of the claimant was involved. The United Kingdom conceded that, until a later judgment of the Court of Appeal delivered in July 2010 and thus after the expiry of the time limit laid down in the reasoned opinion, the principles governing protective costs orders had not complied in every respect with European Union law since prior to that judgment the public interest in enforcing environmental law in the
B procedures specified in the inserted articles had not been accorded sufficient weight and recognition.

The commission, considering the United Kingdom's response to its opinion to be unsatisfactory, applied to the Court of Justice of the European Union for a declaration that the United Kingdom had failed to fulfil its obligations under the Directives on the grounds, inter alia, that (i) in England and Wales, despite the criteria laid down by the Court of Appeal, the case law remained contradictory and gave rise
C to legal uncertainty and, moreover, the courts granted protective costs orders only rarely; and (ii) the infringement of the requirement that proceedings not be prohibitively expensive was further exacerbated by the regime governing interim relief, because of the courts' practice of requiring claimants to give cross-undertakings, which could result in high financial costs.

On the application and on the preliminary issue of whether a Directive could be transposed by national case law—

D *Held*, (1) that, although the transposition of a Directive did not necessarily require its provisions to be enacted in precisely the same words in a specific, express provision of national law, where the relevant provision was designed to create rights for individuals the legal situation had to be sufficiently precise and clear, and the persons concerned had to be put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts; that a judicial practice under which the courts simply had the power to decline to order an unsuccessful party to pay the costs and could order expenditure incurred by the
E unsuccessful party to be borne by the other party was, by definition, uncertain and could not meet the requirements of clarity and precision necessary in order to be regarded as valid implementation of the obligations arising from the inserted articles; but that not every judicial practice was uncertain and inherently incapable of meeting those requirements (post, judgment, paras 33–36).

Commission of the European Communities v Ireland (Case C-427/07) [2009] ECR I-6277, ECJ applied.

F (2) Granting the application, that analysis of the financial situation of a party to an environmental dispute could not be based exclusively on the estimated financial resources of an average claimant, since such information might have little connection with the situation of the person concerned, but required the court to take into account the situation of the parties, whether the claimant had a reasonable prospect of success, the importance of what was at stake for him and for the protection of the environment, the complexity of the law and the applicable procedure, the potentially
G frivolous nature of the claim at its various stages, and, where appropriate, costs already incurred at earlier levels in the same dispute; that the court could not conclude that the inserted articles had been transposed correctly in England and Wales unless the national courts were obliged by a rule of law to ensure that environmental proceedings were not prohibitively expensive for a claimant, and it did not appear that that was the case; that, in any event, the mere fact that in order to determine whether national law met the objectives of the articles the court was
H obliged to analyse and assess the effect of a body of national case law, whereas European Union law conferred on individuals specific rights which would need unequivocal rules in order to be effective, showed that the United Kingdom's transposition was not sufficiently clear and precise; that, therefore, the very conditions under which the national courts ruled on applications for costs protection did not ensure that the national law complied with the requirement laid down by the

inserted articles that proceedings not be prohibitively expensive, in that the condition that the issues to be resolved had to be of public interest was inappropriate, and the courts did not appear to be obliged to grant protection where the cost of the proceedings was objectively unreasonable or where only the particular interest of the claimant was involved; that, moreover, the regime laid down by case law did not ensure the claimant reasonable predictability in relation to both whether the costs of the judicial proceedings were payable by him and their amount (post, judgment, paras 48–49, 55–58, operative part, para 1).

R (Edwards) v Environment Agency (No 2) (Case C-260/11) [2013] 1 WLR 2914, ECJ applied.

R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600, CA and *R (Garner) v Elmbridge Borough Council (WWF-UK intervening)* [2012] PTSR 250, CA considered.

(3) That the requirement that proceedings not be prohibitively expensive applied also to the costs resulting from measures which the national court might impose as a condition for the grant of interim measures in the context of disputes falling within the inserted articles; that, subject to that reservation, the conditions under which the national court granted such interim relief were, in principle, a matter for national law alone, provided that the principles of equivalence and effectiveness were observed, and so the application of a financial guarantee provided for by national law, such as that of the cross-undertakings, was not necessarily precluded; but that, since it was incumbent on the court to make sure that the resulting financial risk for the claimant was also included when it assessed whether the proceedings were prohibitively expensive, the system of cross-undertakings operating in England and Wales in respect of the grant of interim relief constituted an additional element of uncertainty and imprecision so far as concerned compliance with the requirement that proceedings not be prohibitively expensive; and that, accordingly, by failing to transpose the inserted articles correctly, the United Kingdom had failed to fulfil its obligations under Council Directive 85/337/EEC and Council Directive 96/61/EC (post, judgment, paras 66–69, 71–72, operative part, para 1).

Križan v Slovenská inšpekcia životného prostredia (Ekologická skládka as intervening) (Case C-416/10) [2013] Env LR 649, ECJ considered.

The following cases are referred to in the judgment:

Commission of the European Communities v Federal Republic of Germany (Case 29/84) EU:C:1985:229; [1985] ECR 1661, ECJ

Commission of the European Communities v French Republic (Case C-233/00) EU:C:2003:371; [2003] ECR I-6625, ECJ

Commission of the European Communities v Ireland (Case C-427/07) EU:C:2009:457; [2009] ECR I-6277, ECJ

Commission of the European Communities v Kingdom of Spain (Case C-358/01) EU:C:2003:599; [2003] ECR I-13145, ECJ

European Commission v Federal Republic of Germany (Case C-600/10) EU:C:2012:737; 22 November 2012, ECJ

Križan v Slovenská inšpekcia životného prostredia (Ekologická skládka as intervening) (Case C-416/10) EU:C:2013:8; [2013] Env LR 649, ECJ

R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192; [2005] 1 WLR 2600; [2005] 4 All ER 1, CA

R (Edwards) v Environment Agency (No 2) (Case C-260/11) EU:C:2013:221; [2013] 1 WLR 2914; [2014] All ER (EC) 207, ECJ

R (Garner) v Elmbridge Borough Council (WWF-UK intervening) [2010] EWCA Civ 1006; [2012] PTSR 250; [2011] 3 All ER 418, CA

Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe (Joined Cases C-143/88 and C-92/89) EU:C:1991:65; [1991] ECR I-415, ECJ

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

Anheuser-Busch Inc v Portugal (2007) 45 EHRR 830, GC

Commission of the European Communities v Federal Republic of Germany (Case C-191/95) EU:C:1998:441; [1999] All ER (EC) 483; [1998] ECR I-5449, ECJ

Commission of the European Communities v Federal Republic of Germany (Case C-387/99) EU:C:2004:235; [2004] ECR I-3751, ECJ

B *Commission of the European Communities v French Republic* (Case 252/85) EU:C:1988:202; [1988] ECR 2243, ECJ

Commission of the European Communities v Ireland (Case C-494/01) EU:C:2005:250; [2006] All ER (EC) 188; [2005] ECR I-3331, ECJ

Commission of the European Communities v Ireland (Case C-418/04) EU:C:2007:780; [2007] ECR I-10947, ECJ

C *Commission of the European Communities v Ireland* (Case C-456/08) EU:C:2010:46; [2010] PTSR 1403; [2010] ECR I-859, ECJ

Commission of the European Communities v Italian Republic (Case C-129/00) EU:C:2003:656; [2003] ECR I-14637, ECJ

Commission of the European Communities v Kingdom of Spain (Case C-186/06) EU:C:2007:813; [2007] ECR I-12093, ECJ

Commission of the European Communities v Kingdom of Spain (Case C-88/07) EU:C:2009:123; [2009] ECR I-1353, ECJ

D *Commission of the European Communities v Republic of Austria* (Case C-147/03) EU:C:2005:427; [2005] ECR I-5969, ECJ

Commission of the European Communities v Republic of Austria (Case C-507/04) EU:C:2007:427; [2007] ECR I-5939, ECJ

Commission of the European Communities v United Kingdom (Case C-382/92) EU:C:1994:233; [1994] ICR 664; [1994] ECR I-2435, ECJ

E *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-127/05) EU:C:2007:338; [2007] ICR 1393; [2007] All ER (EC) 986; [2007] ECR I-4619, ECJ

DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (Case C-279/09) EU:C:2010:811; [2010] ECR I-13849, ECJ

ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond "Zemedelie"—Razplashtatelna agentsia (Case C-93/12) EU:C:2013:432; [2014] 1 CMLR 47, ECJ

F *European Commission v Portuguese Republic* (Case C-20/09) EU:C:2011:214; [2011] ECR I-2637, ECJ

European Commission v Republic of Austria (Case C-535/07) EU:C:2010:602; [2010] ECR I-9483, ECJ

European Commission v Republic of Poland (Case C-311/10) EU:C:2011:702; [2011] ECR I-159, ECJ

G *Germany (Federal Republic of) v Council of the European Union* (Case C-280/93) EU:C:1994:367; [1994] ECR I-4973, ECJ

Katsikas v Konstantinidis (Joined Cases C-132/91, C-138/91 and C-139/91) EU:C:1992:517; [1992] ECR I-6577, ECJ

MGN Ltd v United Kingdom (2012) 55 EHRR SE89

Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107; [2009] 2 P & CR 30, CA

H *Nold (J), Kohlen- und Baustoffgrofshandlung v Commission of the European Communities* (Case 4/73) EU:C:1974:51; [1974] ECR 491, ECJ

Ordre des Barreaux Francophones et Germanophone v Conseil des Ministres (Conseil des Barreaux de l'Union européene intervening) (Case C-305/05) EU:C:2007:383; [2007] All ER (EC) 953; [2007] ECR I-5305, ECJ

Pine Valley Developments v Ireland (1991) 14 EHRR 319

R (Birch) v Barnsley Metropolitan Borough Council [2010] EWCA Civ 1180; [2011] Env LR 282, CA
Solvay v Région Wallonne (Case C-182/10) EU:C:2012:82; [2012] Env LR 545, ECJ
Stankiewicz v Poland (2006) 44 EHRR 938

APPLICATION for a declaration that a member state had failed to fulfil obligations

By a reasoned opinion dated 22 March 2010, the European Commission determined that the United Kingdom of Great Britain and Northern Ireland had failed to fulfil its obligations under article 10a of Council Directive 85/337/EEC (inserted by article 3(7) of Parliament and Council Directive 2003/35/EC) and article 15a of Council Directive 96/61/EC (inserted by article 4(4) of Parliament and Council Directive 2003/35/EC) by failing to transpose those articles fully and apply them correctly, and required the United Kingdom to remedy the infringement within a period of two months.

The United Kingdom had partially transposed those articles by case law, including the Court of Appeal judgments in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 and *R (Garner) v Elmbridge Borough Council (WWF-UK intervening)* [2012] PTSR 250, the latter having been decided after the date of the commission's opinion.

On considering that the United Kingdom's response to the opinion was unsatisfactory, on 18 October 2011 the commission applied under article 258FEU of the FEU Treaty to the Court of Justice for the European Union for a declaration that the United Kingdom had failed to fulfil its obligations the under those Directives, on the grounds that (1) a Directive could not be transposed by case law, and in any event the case law relied upon by the United Kingdom did not comply with the requirement that proceedings not be prohibitively expensive; (2) the requirement that proceedings not be prohibitively expensive meant that all the various costs had to be reasonably predictable in relation to whether they were payable and their amount; (3) in England and Wales, despite the criteria laid down by the Court of Appeal, the case law remained contradictory and gave rise to legal uncertainty and, moreover, the courts granted such orders only rarely; and (4) the infringement of the requirement that proceedings not be prohibitively expensive was further exacerbated by the regime governing interim relief, because of the courts' practice of requiring claimants to give "cross-undertakings", which could result in high financial costs.

By an order of the President of the Court of Justice of 4 May 2012 the Kingdom of Denmark, and Ireland, were granted leave to intervene in support of the United Kingdom.

The judge rapporteur was Judge Bonichot.

The facts are stated, post, opinion, paras 12–17; judgment, paras 8–12.

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

James Maurici QC (instructed by *Treasury Solicitor*) for the United Kingdom.

CH Vang, agent, for the Kingdom of Denmark.

E Creedon and *A Joyce*, agents, and *E Barrington* and *G Gilmore*, for Ireland.

A 12 September 2013. **ADVOCATE GENERAL J KOKOTT** delivered the following opinion.

I—Introduction

1 It is well known that in the United Kingdom court proceedings are not cheap. Legal representation in particular can result in considerable cost. As
B an unsuccessful party is generally ordered to bear the costs of the successful party, litigation involves considerable risks in terms of costs.

2 On the other hand, the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) (OJ 2005 L124, p 4) and the provisions in 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
C 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) implementing it in relation to certain procedures require that judicial procedures in environmental law matters not be prohibitively expensive. In *R (Edwards) v Environment Agency (No 2)* (Case C-260/11) [2013] 1 WLR 2914 the court examined the
D meaning of that requirement in general terms against the background of English law. In the present case, it must be determined specifically whether the United Kingdom has correctly transposed the relevant provisions.

3 At issue in this connection, first, is the discretion of the courts to cap in certain cases the costs of the defendant for which an applicant may be liable in the event that he is unsuccessful. Further, it must be clarified whether it is compatible with European Union law that on exercising that discretion
E courts at the same time cap the costs of the applicant for which the defendant—in general a public body—may be liable in the event that it is unsuccessful. Finally, it is contested whether, in the proceedings concerned, the availability of interim relief may be made conditional on an undertaking by the applicant for such relief to pay damages for the losses resulting from the relief granted in the event that he is unsuccessful in the substantive
F action. As a preliminary matter, the extent to which Directives may be transposed by case law also requires examination.

II—Legal framework

A—International law

4 The relevant rules on the legal costs of environmental proceedings are
G contained in the Aarhus Convention, which was signed by the then European Community on 25 June 1998 in Aarhus (Denmark) (and approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L124, p 1)).

5 Article 6 of the Convention provides for public participation in relation to the approval of certain activities.

6 Article 9 of the Convention regulates access to justice in
H environmental matters. The present case concerns procedures referred to by article 9(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 . . ." A

7 Article 9(4) refers, inter alia, to costs:

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

B—Law of the European Union

8 In implementing the provisions on access to justice laid down in article 9(2) of the Aarhus Convention, article 3(7) of Directive 2003/35 inserted article 10a into 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) (the Environmental Impact Assessment Directive (EIA) Directive) (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)) and article 4(4) of Directive 2003/35 inserted article 15a into Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (the Integrated Pollution and Prevention Control Directive (IPPC) Directive) (OJ 1996 L257, p 26) (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)). Paragraph 5 of each of those inserted provisions lays down, in identical words, rules on costs: "Any such procedure shall be fair, equitable, timely and not prohibitively expensive." C D E

C—Law of the United Kingdom F

9 Under CPR r 44.2(2), in general the unsuccessful party will be ordered to pay the costs of the successful party. However, having regard to the circumstances of the case, the court may make a different order. In particular, rule 44.2(6) allows courts to make orders capping a party's liability for the costs of another party. A similar legal position applies in Scotland and Northern Ireland. G

10 CPR r 25 concerns interim remedies. That rule is supplemented by a practice direction (Practice Direction 25A) which provides in paragraph 5.1 that any order for an injunction must contain an undertaking given by the applicant for the injunction to the court to pay any damages which the opposing party sustains which the court considers the applicant should pay. In addition, pursuant to paragraph 5.1A, the court should consider whether to require such an undertaking also in relation to losses which third parties may suffer as a consequence of the order. However, courts have the discretion not to require those undertakings. Whilst the rules in Northern Ireland are similar, Scots law makes no provision for such an undertaking to pay damages. H

A **11** Following the court's judgment in the *Edwards* case, the United Kingdom supplemented these provisions to take account of the Aarhus Convention and articles 3(7) and 4(4) of Directive 2003/35; however, ratione temporis, those amendments are not the subject of the present proceedings.

B *III—Pre-litigation procedure and forms of order sought*

12 As a result of a complaint, the European Commission called on the United Kingdom on 23 October 2007 to submit observations concerning whether it had fulfilled its obligations under articles 3(7) and 4(4) of Directive 2003/35.

13 Notwithstanding the replies of the United Kingdom of 20 December 2007 and 5 September 2008, the commission addressed a reasoned opinion C to that member state on 22 March 2010 in which it contended that it had failed to transpose those provisions correctly and, moreover, that it did not apply them correctly. The commission called on the United Kingdom to take the necessary measures to comply with the opinion within a period of two months, that is to say, by 22 May 2010.

14 Notwithstanding the United Kingdom's reply of 19 July 2010 the D commission maintained its assessment and on 18 October 2011 it brought the present action. It claims that the court should: (1) declare that, by failing to transpose fully and apply correctly articles 3(7) and 4(4) of Directive 2003/35, the United Kingdom has failed to fulfil its obligations under that Directive; (2) order the United Kingdom to pay the costs of the proceedings.

15 The United Kingdom contends that the court should: (1) declare that the United Kingdom has not failed to fulfil its obligations under articles 3(7) E and 4(4) of Directive 2003/35; (2) order the commission to pay the costs.

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

17 The parties made written submissions and, with the exception of Denmark, took part in the hearing on 11 July 2013.

F *IV—Legal appraisal*

18 Although the commission bases its action on articles 3(7) and 4(4) of Directive 2003/35, in the discussion of the pleas it appears to me more expedient to refer to the provisions thereby introduced, that is to say, article 10a of the EIA Directive and article 15a of the IPPC Directive. G Pursuant to the identically worded fifth paragraph of each of those provisions, procedures for the review of approvals on the basis of each of those Directives are not to be prohibitively expensive. This implements article 9(4) of the Aarhus Convention in relation to the review procedures specified in article 9(2) of the Convention.

19 By its action, the commission contests both the transposition of that rule in all three of the United Kingdom's jurisdictions, that is to say, England H and Wales (including Gibraltar), Scotland and Northern Ireland (in this regard see section B below), and its application (in this regard see section C below). First, however, I should like to set out aspects of the recent ruling in the *Edwards* case of fundamental relevance to the present case and, in the light thereof, consider certain arguments raised by the parties which

although concerned with litigation costs do not assist in clarifying the individual pleas advanced by the commission (in this regard see section A below).

A—Preliminary observations

20 The fifth paragraph of article 10a of the EIA Directive, the fifth paragraph of article 15a of the IPPC Directive and article 9(4) of the Aarhus Convention establish an obligation referred to here as an obligation of costs protection. Its characteristics were specified in the *Edwards* case.

21 Pursuant to that judgment, the persons covered by article 10a of the EIA Directive and article 15a of the IPPC Directive 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. In that connection, account must be taken both of the interest of the person wishing to defend his rights and the public interest in the protection of the environment: see *R (Edwards) v Environment Agency (No 2)* [2013] 1 WLR 2914, para 35.

22 In addition, the court held that the requirement that litigation should not be prohibitively expensive 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 the *Edwards* case, paras 27, 28. These include, in principle, the costs of legal representation.

23 Finally, the court clarified in the *Edwards* case that, contrary to the argument advanced by Denmark, the requirement that judicial proceedings should not be prohibitively expensive cannot 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: see the *Edwards* case, para 45. However, that finding cannot be interpreted as meaning that in assessing the permissible cost burden in appeal proceedings the costs already incurred in courts below may be ignored. Instead, each court must ensure that the costs at all levels of jurisdiction taken together are not prohibitive or excessive.

24 Denmark is correct to point out, however, that in certain review proceedings professional representation may be unnecessary. This is conceivable, for example, if the competent body concerned has extensive responsibility for the procedure and, for that reason, investigates of its own motion all the relevant arguments and circumstances. However, the possibility that representation may be unnecessary must be assessed in the context of each specific case having regard to all the legal and practical circumstances and custom and practice.

25 In the present proceedings, it is not disputed that legal representation is necessary before the courts of the United Kingdom and that this can result in considerable costs. The member state explains this by referring to the particular characteristics of the adversarial system under common law which imposes particularly high demands on the legal representatives of the parties.

26 As is the case before the European Union judicature, in the United Kingdom the unsuccessful party is in general ordered to pay the costs of the legal representation. Consequently, if they are unsuccessful, the applicants specified in article 10a of the EIA Directive and article 15a of the IPPC

A Directive must, as a rule, cover both their own costs and those of the opposing party. If the action is successful, however, their costs will be borne by the opposing party.

27 Although the United Kingdom appears to regard the costs arising in this system as justified, the risk in terms of costs may dissuade persons from bringing or pursuing an action specified in article 10a of the EIA Directive and article 15a of the IPPC Directive. Those proceedings may therefore be B excessively or prohibitively expensive for the purpose of those provisions. Consequently, adequate costs protection must be ensured.

28 The United Kingdom identifies various mechanisms to cover, or at least limit, the risks in terms of litigation costs. The commission does not criticise those mechanisms as such but considers them, in my view correctly, inadequate for the purposes of transposing article 10a of the EIA Directive C and article 15a of the IPPC Directive.

29 For example, the United Kingdom has a legal aid scheme but does not deny the fact that associations cannot apply for legal aid[1*] and that legal aid is means tested. As associations and individuals with the capacity to pay (see the *Edwards* case, para 40) must also be protected against prohibitive costs, this instrument is inadequate to ensure costs protection.

D **30** Further, the United Kingdom stresses that the risk involved in *applying* for judicial review is in costs terms minimal. Such applications are permitted to proceed only if a summary permission hearing determines that there is merit in the application. According to the United Kingdom, only limited costs may be awarded in conjunction with that procedure.

31 Admittedly, this permission procedure limits the risks in terms of costs in cases with very little chance of success, as they are dismissed at an E early stage before generating further costs. However, the Aarhus Convention and its implementation in the European Union are not focused primarily on actions with particularly slim chances of success: compare the *Edwards* case [2013] 1 WLR 2914, para 42, and my opinion in that case, point 47. The public interest in the protection of the environment is considerably better served if actions with some merit but whose success is F uncertain are furthered. In general, those cases are based on a legitimate interest in the protection of the environment but as their outcome is uncertain the risks in terms of cost are particularly substantial.

32 Finally, the United Kingdom also mentions the possibility of taking out insurance against litigation costs known as "after the event insurance". However, it is uncontested that that device too does not cover all cases. It is clear that precisely in cases where the outcome is uncertain, that is to say, G where considerable risks in terms of costs are at stake, insurance undertakings will demand premiums that may also be prohibitive.

33 Although the commission emphasises the need for costs to be predictable, it is unnecessary in the present case to determine the extent to which costs must actually be known at an early stage of the proceedings. United Kingdom law has a mechanism, the protective costs order, by which H the maximum risk in terms of costs may be determined at an early stage.

34 Although the commission criticises certain consequences of, and criteria for, the application of that instrument, it does not consider the

* *Reporter's note*. The superior figures in the text refer to notes which can be found at the end of the opinion, on p 1010.

instrument as such inadequate. To the extent that it criticises the uncertainty in relation to the amount of costs involved, its complaint, in fact, is that United Kingdom law does not provide in a sufficiently clear and precise manner for costs protection. I will analyse this problem below.

B—Transposition

35 The commission criticises the absence of legal provisions transposing the concept of costs protection into United Kingdom law. In that connection, it relies on a judgment concerning the legal position in Ireland. The courts in Ireland had a discretion not to order an unsuccessful party to pay the costs and, in addition, to order expenditure incurred by the unsuccessful party to be borne by the other party. As that was mere judicial practice, the court did not recognise it as transposition: see *Commission of the European Communities v Ireland* (Case C-427/07) [2009] ECR I-6277, paras 93, 94.

36 The United Kingdom counters that argument with national case law. It relies on the fact that, according to the wording of the third paragraph of article 288FEU of the FEU Treaty, a Directive, while being binding, as to the result to be achieved, on each member state to which it is addressed, leaves to the national authorities the choice of form and methods: see *Commission of the European Communities v Ireland* (Case C-418/04) [2007] ECR I-10947, para 157 and *European Commission v Republic of Austria* (Case C-535/07) [2010] ECR I-9483, para 60.

37 Indeed, the court has held that the transposition of European Union legislation into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision. A general legal context may be sufficient for the purpose if it actually ensures the full application of the provisions of European Union law in a sufficiently clear and precise manner: see *Commission of the European Communities v French Republic* (Case 252/85) [1988] ECR 2243, para 5; *Commission of the European Communities v Republic of Austria* (Case C-507/04) [2007] ECR I-5939, para 89; and *European Commission v Republic of Poland* (Case C-311/10) [2011] ECR I-159, para 40.

38 It is true that it has not yet been determined whether binding judicial precedents, in other words, the case law that characterises the common law system in the United Kingdom, are accordingly sufficient to transpose a Directive. However, the court has already acknowledged that, also when assessing the transposition of a Directive, the scope of national laws, Regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts: see *Katsikas v Konstantinidis* (Joined Cases C-132/91, C-138/91 and C-139/91) [1992] ECR I-6577, para 39; *Commission of the European Communities v United Kingdom* (Case C-382/92) [1994] ICR 664; [1994] ECR I-2435, para 36; *Commission of the European Communities v Italian Republic* (Case C-129/00) [2003] ECR I-14637, para 30; and *Commission v Ireland* (Case C-418/04) [2007] ECR I-10947, para 166.

39 Nevertheless, it cannot suffice for the transposition of a Directive that the courts have the power to comply with the Directive's requirements and possibly also do so: it is settled case law that a discretion which may be exercised in accordance with a Directive is not sufficient to implement provisions of a Directive since such a practice can be changed at any time:

A see my opinion in *Commission v Ireland* (Case C-427/07) [2009] ECR I-6277, point 99 and the case law referred to. That is precisely what was found in the case cited by the commission. Although the Irish courts had a discretion allowing costs protection, they were not obliged to ensure this. Nor did criteria exist specifying the circumstances in which costs protection was to be afforded. Moreover, relevant judicial precedents establishing an obligation of that kind were not adduced in argument in that case.

B **40** Therefore, what matters is whether the relevant national case law actually ensures with sufficient clarity and precision and in a binding manner the full application of the costs protection required: cf *Commission of the European Communities v Ireland* (Case C-456/08) [2010] PTSR 1403; [2010] ECR I-859, para 65, and my opinion in that case, point 60 et seq. If those conditions are satisfied, precedent could ensure transposition: cf the

C opinion of Advocate General Mengozzi in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-127/05) [2007] ICR 1393; [2007] ECR I-4619, point 130 et seq.

41 In the present case, the parties refer to various judgments of the United Kingdom courts. Although the commission criticises these as a failure to apply the provisions adequately in practice, in light of the above considerations they are also crucial for the transposition of the provisions.

D **42** In this connection, I shall examine, first, the fact that the courts have a discretion in the issue of a protective costs order (on this point, see section 1 below), then the possible capping of the costs that an applicant may recover if he is successful (on this point, see section 2 below) and, finally, interim relief (on this point, see section 3 below).

E 1. The court's discretion in the issue of a protective costs order

43 The concept of a protective costs order was developed by the Court of Appeal of England and Wales in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, paras 72, 74. The courts in Scotland and Northern Ireland have adopted the practice. In exceptional circumstances, an order of that kind may establish a cap on the costs that the

F applicant may be ordered to pay in respect of the proceedings before the relevant court in the event that he is unsuccessful. An order of that kind may be made at any stage of the proceedings provided the court is satisfied that: the issues raised are of general public importance; the public interest requires that those issues should be resolved; the applicant has no private interest in the outcome of the case; having regard to the financial resources of the applicant and respondents and to the amount of costs that are likely to be

G involved it is fair and just to make the order; if the order is not made the applicant will probably discontinue the proceedings.

44 A consequence of this restrictive approach is that the decision itself whether to cap costs involves considerable time and effort and entails additional costs without furthering the resolution of environmental law issues.

H **45** This instrument allows the relevant courts, first, a discretion to determine whether the various conditions for the issue of a protective costs order are satisfied and, if so, a discretion concerning the degree of protection to be afforded in the specific case. The latter discretion relates both to the level of costs permissible and the question whether, and if so, to what extent, the risk in terms of costs facing the opposing party should also be limited.

46 Neither of these discretions as such may be criticised. Given the considerable differences between the member states in their rules on access to justice, there remains a broad discretion with a view to ensuring costs protection: see the *Edwards* case [2013] 1 WLR 2914, paras 30, 37, 38, and my opinion in that case, points 19 et seq and 45 et seq. In addition, the court itself has recognised the need for discretion in the area of costs protection: cf the *Edwards* case, in particular para 40, and my opinion in that case, in particular point 36. However, national courts must be placed under an unambiguous obligation to exercise their discretion with the objective of ensuring adequate costs protection in the proceedings at issue: see the *Edwards* case, in particular paras 35, 40, and my opinion in that case, in particular point 24.

47 The discretion afforded to the courts in the United Kingdom in issuing a protective costs order does not meet those requirements. Its exercise is intended to determine whether *by way of exception* (see the *Corner House* case, para 72) in an individual case it would be inequitable or unfair to adhere to the general principle that no protection exists in relation to costs. A fundamental obligation to observe the objective of ensuring costs protection in the proceedings concerned is, on the other hand, not apparent.

48 The cases subsequent to the *Corner House* case do not alter that assessment. Instead, it is stated in the judgment in *Morgan v Hinton Organics (Wessex) Ltd* [2009] 2 P & CR 30, para 47(ii) that the courts' existing discretion as to costs may be incompatible with the requirement to ensure costs protection.

49 Also the ruling in *R (Garner) v Elmbridge Borough Council (WWF-UK intervening)* [2012] PTSR 250, para 50 does not suggest that the discretion now focuses on ensuring costs protection.

50 In addition, the criteria applied in the United Kingdom are incompatible with the findings of the court in the *Edwards* case.

51 Although the United Kingdom argues that the criteria for granting the necessary costs protection are not the subject matter of the present case, I am not convinced by that argument. Rather, the criteria for the grant of costs protection go to the very heart of the commission's allegation that the requirement to ensure costs protection has not been adequately transposed. For that reason, they require examination here.

52 The problems with the criteria applied in the United Kingdom begin with the consideration given to the public and private interest in pursuing the litigation. The court too requires consideration to be given to those interests (see the *Edwards* case [2013] 1 WLR 2914, paras 35, 39), but the United Kingdom concedes that prior to the judgment in the *Garner* case they were not taken into consideration in the manner required: the defence, para 70, which makes reference to the *Garner* case, para 39. The United Kingdom Government thus accepts that prior to that judgment the public interest in enforcing environmental law in the procedures specified in article 10a of the EIA Directive and article 15a of the IPPC Directive was not accorded sufficient weight and recognition. As that judgment was not delivered until after the expiry of the time limit laid down in the reasoned opinion, the United Kingdom did not remedy the infringement within the period prescribed.

53 A further incompatibility with the requirement for costs protection is the fact that the very existence of a private interest in the outcome of the

A case precludes the issue of protective costs order. Although the court also requires consideration of an interest of that kind, costs protection is not to be precluded by it. Instead, an individual is to be protected also when enforcing his own rights conferred by European Union law: see the *Edwards* case, para 33.

54 Although the judgment in the *Morgan* case—seemingly in an obiter dictum—indicates that this criterion should be applied flexibly, (see para 35 et seq) it is clear that, in this respect, at least considerable uncertainty prevails.

55 The requirement of costs protection is also infringed if an applicant's capacity to pay, in other words, the lack of proof of inadequate financial resources, operates to preclude protection. Instead, the correct position is that litigation costs may not exceed the personal financial resources of the person concerned and that, in objective terms, that is to say, regardless of the person's own financial capacity, they must not be unreasonable: see the *Edwards* case, para 40. In other words, even applicants with the capacity to pay may not be exposed to the risk of excessive or prohibitive costs and, in the case of applicants with limited financial means, objectively reasonable risks in terms of costs must in certain circumstances be reduced further.

56 Finally, the court has rejected the ruling out of costs protection on the ground that an applicant will probably not be deterred by the risk in terms of costs: see the *Edwards* case, para 43. However, according to the *Corner House* case, such a risk that he will be deterred is a further condition for the issue of a protective costs order.

57 Consequently, the United Kingdom has failed to fulfil its obligations under articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that the courts' discretion to grant costs protection is not tied to the objective of costs protection and the criteria to be applied in that connection are incompatible with those provisions.

2. Capping of both parties' liability for costs

58 The commission also criticises the fact that protective costs orders often cap the risk in terms of costs also for the opposing party. This problem concerns all three jurisdictions in the United Kingdom.

Admissibility

59 The United Kingdom considers this complaint inadmissible as it was not raised in the pre-litigation procedure. In fact, it was only in the reasoned opinion that the commission first expressly criticised the practice whereby both parties' liability for costs may be capped.

60 The United Kingdom's objection is based on the argument that the letter of formal notice sent by the commission to the member state concerned and then the reasoned opinion issued by the commission delimit the subject matter of the dispute, so that it cannot thereafter be extended. The opportunity for the member state concerned to be able to submit its observations constitutes an essential guarantee adherence to which is an essential formal requirement of the procedure for finding that a member state has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the commission must be based on the same complaints as those set out in the letter of formal notice initiating the

pre-litigation procedure: see *Commission of the European Communities v Federal Republic of Germany* (Case C-191/95) [1998] ECR I-5449; [1999] All ER (EC) 483, para 55; *Commission of the European Communities v Kingdom of Spain* (Case C-358/01) [2003] ECR I-13145, para 27; and *Commission of the European Communities v Kingdom of Spain* (Case C-186/06) [2007] ECR I-12093, para 15.

61 However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject matter of the proceedings has not been extended or altered: see *Commission v Germany* [1998] ECR I-5449, para 56; *Commission v Spain* [2003] ECR I-13145, para 28; and *Commission of the European Communities v Republic of Austria* (Case C-147/03) [2005] ECR I-5969, para 24.

62 In particular, the letter of formal notice cannot be subject to requirements of precision as strict as those applied to the reasoned opinion, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice: see *Commission v Germany* [1998] ECR I-5449, para 54; *Commission v Spain* [2003] ECR I-13145, para 29; and *European Commission v Portuguese Republic* (Case C-20/09) [2011] ECR I-2637, para 20.

63 That is what happened in the present case. The commission is correct in arguing that the costs of a party's own representation are also included within the litigation costs which member states are under an obligation to limit: see the *Edwards* case, paras 27, 28. Consequently, the complaint that the risk in relation to those costs is not sufficiently limited was included in the allegation that in the United Kingdom the risk in terms of litigation costs as a whole is not sufficiently limited.

64 This view is confirmed by the United Kingdom's reply to the letter of formal notice, that is to say, the first letter sent by that member state in the pre-litigation procedure. That letter mentions the possibility for a party of concluding a conditional fee agreement with his lawyer, under which fees are paid only if an action is successful, as a means of limiting the risk in terms of costs. Thus, the commission's submission set out in the reasoned opinion that protective costs orders undermine the effectiveness of such agreements as they cap the costs that the applicant can recover in the event of being successful is simply a counter-argument to refute that position. As a result, this point became included within the subject matter of the case.

65 Thus, this submission is admissible and requires examination.

Substance

66 The commission criticises the fact that in certain cases protective costs orders may be structured on a reciprocal basis such that, in addition to capping the applicant's risk in relation to the costs of the opposing party in the event that he is unsuccessful, they also cap the risk for the opposing party, in the event that the action is successful, of an order to pay the applicant's costs.

67 A *one-way* protective costs order which benefits simply the applicant, capping his liability for the costs of the opposing party, may

A contribute significantly to the prevention of excessive or prohibitive litigation costs. However, simply the costs of a party's *own* representation may dissuade the persons covered by article 10a of the EIA Directive and article 15a of the IPPC Directive from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles.

68 Consequently, as regards the costs of a party's own representation, both the United Kingdom and Ireland refer to the possibility that the lawyer B agrees to waive his fees. However, only in exceptional cases can a waiver of that kind reduce the risk in terms of costs, as in general lawyers need to earn income. To call for the representation of applicants in the legal procedures specified in article 10a of the EIA Directive and in article 15a of the IPPC Directive to be provided, as a rule, free of charge would destroy the economic basis on which lawyers can develop the necessary specialisation in C these areas.

69 Conditional fee agreements provide lawyers an opportunity of earning the necessary income in the case of applicants with limited financial resources who are not in receipt of legal aid. In England and Wales and in Scotland, conditional fee agreements are allowed under which the applicant's lawyer is paid a fee only if the action is successful. In both systems, the unsuccessful opposing party must normally bear the costs that D would have been payable in the absence of such an agreement. In England and Wales an additional success payment for the applicant's lawyer is also borne by that party, whereas in Scotland such payment would be borne by the applicant. In Northern Ireland conditional fee agreements do not exist. Although such agreements are also not free from criticism, in particular in so far as they involve a premium over standard fees[2], according to the United E Kingdom's submissions in many of the cases covered by article 10a of the EIA Directive and article 15a of the IPPC Directive they appear necessary in order to ensure the required protection in terms of costs in that legal system.

70 However, a reciprocal protective costs order caps the costs that an opposing party is required to bear in the event that the action is successful. Where there is such a cap, the applicant will in all probability have to be responsible for part of the costs of his own representation. In the case of F conditional fee agreements the success fee that the unsuccessful opposing party would have to bear is capped. Either the applicant's lawyers agree to accept this capped level of fees or, in the event that the applicant's action is successful, he must top-up these fees at his own expense. Such additional costs may also have a dissuasive effect. Consequently, reciprocal protective costs orders have the potential to undermine the objective of costs G protection.

71 However, in assessing reciprocal protective costs orders a distinction must though be made between private and public parties.

72 In the case of private parties, in certain circumstances the reciprocal cap on costs may be justified in the name of procedural equality of arms, one of the elements of the fundamental right to a fair hearing (see *Ordre des Barreaux Francophones et Germanophone v Conseil des Ministres (Conseil* H *des Barreaux de l'Union européene intervening)* (Case C-305/05) [2007] ECR I-5305; [2007] All ER (EC) 953, paras 29–31) a right explicitly mentioned as a procedural principle in article 9(4) of the Aarhus Convention. One may have doubts as to that equality of arms (cf, on the exemption of the prosecuting authorities from the liability to pay litigation

costs, the judgment of the European Court of Human Rights in *Stankiewicz v Poland* (2006) 44 EHRR 938, para 60 et seq) if one party has been largely exempted from the risk of having to bear the costs of the opposing party, whereas the other party must always bear most of his own costs and, in the event that he is unsuccessful, must bear the entire costs of the proceedings. It is conceivable even that where the risk in terms of costs is distributed so unevenly this may influence the parties' litigation strategies. A party who is largely exempt from risks in terms of costs could be tempted to widen the subject matter of the dispute unnecessarily in order to increase the costs of the opposing party and, thus, his willingness to agree to a compromise.

73 However, the commission is correct to emphasise that the present case only concerns the actions covered by article 10a of the EIA Directive and article 15a of the IPPC Directive. By their very nature, these are challenges to decisions taken by public bodies, that is so say, development consents given to projects following an environmental impact assessment or permits for certain industrial activities granted under the integrated approach.

74 In actions brought against public bodies, no true equality exists from the outset as those bodies generally have much greater resources at their disposal than the persons covered by article 10a of the EIA Directive and article 15a of the IPPC Directive. To that extent, therefore, a one-way protective costs order is simply an initial step towards establishing equality of arms.

75 Furthermore, actions of that kind ultimately involve an interest common to both parties, namely, ensuring that the law is upheld. A public body which is unsuccessful in proceedings before a court because its decision under challenge proves to be unlawful does not deserve protection in relation to litigation costs comparable to that afforded to an applicant. It was, of course, the public body's own unlawful act that prompted the action to be brought.

76 Finally, under the Aarhus Convention particular emphasis is placed on the public interest in upholding the law: cf my opinion in the *Edwards* case [2013] 1 WLR 2914, point 40 et seq. That interest prohibits, at least in the proceedings covered by article 10a of the EIA Directive and article 15a of the IPPC Directive, detriment to an instrument such as the conditional fee agreement which can help an applicant to avoid prohibitive costs for his own representation.

77 Moreover, that objective of the Aarhus Convention serves to refute the argument of the United Kingdom in relation to the limited resources of the relevant authorities. It is admittedly the case that funds spent by the authorities on legal proceedings cannot be used to fulfil their primary tasks. However, the Convention accepts this. That is also appropriate since the judicial enforcement of environmental law or the risk of a legal challenge forces the authorities to exercise particular care in applying the law in this area.

78 This of course does not mean that public bodies should be afforded no costs protection. There is no reason to impose an obligation on those bodies to pay success-related fees of the opposing party's lawyers that considerably exceed the standard fees payable where no conditional fee agreement applies. Thus, in the name of procedural equality of arms, in actions against public bodies too the possibility of making an

A "asymmetrical" reciprocal protective costs order that caps the risk in terms of costs for both parties but allows all the same for a reasonable success fee cannot be entirely rejected.

79 However, the order must not provide an incentive to the public body—which is endowed with greater financial resources—to widen unnecessarily the subject matter of the dispute such as to increase the applicant's own legal costs to the point that they exceed considerably
B the level at which costs have been capped. (It appears from para 26 of the commission's reply that a strategy of that kind may have been pursued in *R (Birch) v Barnsley Metropolitan Borough Council* [2011] Env LR 282.) Therefore, what constitutes a reasonable success fee can only be determined in the circumstances of an individual case.

80 Consequently, the United Kingdom has failed to fulfil its obligations
C under articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that in proceedings covered by those provisions the courts may order reciprocal costs protection which prevents the costs of a reasonable success fee for the representation of the persons and associations covered by those provisions from being imposed on the opposing party if the action is successful.

3. Interim relief

D

81 Finally, the commission complains that in England and Wales as well as Gibraltar and in Northern Ireland interim relief is usually granted only if the applicant for relief undertakes to pay any damages resulting from the order.

82 It is not clear from the case file what this undertaking to pay damages includes. I presume that it does not relate to loss and damage caused by
E culpable unlawful conduct. No specific undertaking in damages would be necessary in that case, as the general law of tort would apply.

83 Instead, I assume that this undertaking has effect if the claim protected by means of the interim injunction proves in the course of the subsequent proceedings to be unfounded. It would appear that in this case the applicant for relief must compensate for the loss and damage caused by
F the interim injunction[3]. Thus, in the kinds of proceedings at issue in the present case, the applicant risks having to pay the costs resulting from project delays.

84 The parties' first point of disagreement is whether this risk in terms of costs even falls within the scope of the costs protection required by the fifth paragraph of article 10a of the EIA Directive and the fifth paragraph of article 15a of the IPPC Directive. According to the wording of those
G provisions, it is simply the judicial procedure that must not be prohibitively expensive. On a strict interpretation, an obligation to compensate for delays resulting from interim relief is not included within the notion of litigation costs.

85 The court has, however, already held that the guarantee of effectiveness of the right to bring an action provided for in article 10a of the
H EIA Directive and article 15a of the IPPC Directive requires that the members of the public concerned should have the right to apply for interim measures: see *Križan v Slovenská inšpekcia životného prostredia (Ekologická skládka as intervening)* (Case C-416/10) [2013] Env LR 649, para 109. Correspondingly, the document *The Aarhus Convention: An Implementation Guide*, published in 2000 by the United Nations Economic

Commission for Europe, also includes interlocutory relief ("preliminary injunctive relief") within the judicial decisions[4] that are specified in article 9(4) of the Convention as part of review procedures[5].

86 Moreover, it is to be remembered that the requirement that litigation should not be prohibitively expensive 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 the *Edwards* case, paras 27, 28. In addition, the court has held that the persons covered by article 10a of the EIA Directive and article 15a of the IPPC Directive 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: see the *Edwards* case, para 35.

87 As an application for interim relief also constitutes such a legal remedy and as any damages claims would increase the resulting financial burden, they, too, must be included within the principle of costs protection. Otherwise, persons might be prevented from applying for relief of that kind by reason of the risk that they will have to pay damages.

88 Admittedly, the United Kingdom contends in response to the commission that, even in the absence of interim relief, projects covered by article 10a of the EIA Directive and article 15a of the IPPC Directive are generally not advanced further while legal proceedings are pending. Expensive works are often not carried out if there is a chance that the consent will be overturned.

89 This argument mitigates the practical significance of the commission's criticism but in the cases in which interim relief is necessary does not invalidate it.

90 Furthermore, the United Kingdom contends that in public law cases the courts generally exercise their discretion in such a way that no undertaking in damages is required. Here too, however, the mere possibility that discretion may be exercised in accordance with the requirement for costs protection is not sufficient to implement the fifth paragraph of article 10a of the EIA Directive and the fifth paragraph of article 15a of the IPPC Directive.

91 Of greater significance is the United Kingdom's argument that the obligation to pay damages is compatible with the principle of effectiveness, that is to say, it does not render excessively difficult or impossible in practice the exercise of rights conferred by European Union law.

92 That argument is based on the valid premise that, subject to compliance with the principles of equivalence and effectiveness, the member states have discretion in implementing article 10a of the EIA Directive and article 15a of the IPPC Directive: see the *Križan* case, para 106. Moreover, that discretion is also not called into question by the principle of effective legal protection—to which the principle of effectiveness is related—set out in the first paragraph of article 47 of the Charter of Fundamental Rights of the European Union: see *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (Case C-279/09) [2010] ECR I-13849, paras 28, 29, and *ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond "Zemedelie"—Razplashtatelna agentsia* (Case C-93/12) [2014] 1 CMLR 47, paras 59, 60.

A **93** For that reason, the possibility cannot be excluded that, in principle, the member states may provide for an obligation to pay damages in connection with interim relief measures which pertains also to the exercise of rights conferred by European Union law. This applies in particular in proceedings between private parties as a measure of that kind necessarily interferes with the rights of the opposing party.

B **94** In that regard, the United Kingdom refers correctly to the protection of the property rights of the beneficiary of the contested approval.

95 I should like to point out that an approval that may still be challenged before the courts does not establish property rights: see my opinion in the *Križan* case, point 181. Prior to that, what is involved is simply the prospect of being able to exploit the approval. Mere prospects, however, are not protected as property rights[6], at any rate when their C realisation is contested: see the judgment of the European Court of Human Rights in *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 830, paras 64, 65. On the other hand, the obligations imposed as a result of the court proceedings may limit the exercise of certain property rights (see the *Križan* case [2013] Env LR 649, para 112) for example, by preventing land from being used in a certain manner for the implementation of a project.

D **96** However, protection of the environment is capable of justifying a restriction on the use of the right to property: see the *Križan* case, para 114. This applies also to interim measures to preserve the status quo whilst a court reviews an environmental law permit. The restriction on the right to property and other freedoms is founded primarily on the fact that the projects which it is sought to pursue require approval on grounds of environmental protection. If the requirement for approval is justified, that E justification extends in principle also to interim relief with a view to preventing the de facto pre-emption of the main proceedings while the approval is subject to ongoing judicial review.

97 Moreover, it is likely that similar considerations underlie the judicial practice mentioned by the United Kingdom not to require an undertaking in damages in most public law cases.

F **98** In the proceedings covered by article 10a of the EIA Directive and article 15a of the IPPC Directive, additional weight is attached to those considerations as the public interest in the enforcement of environmental law is given *special* recognition there. Consequently, applicants in those proceedings deserve protection against excessive or prohibitive costs which goes further than the protection afforded by the principle of effectiveness and the right to effective legal protection: see my opinion in the *Edwards* case, G point 39 et seq.

99 This conclusion is not called into question by the judgment in *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* (Joined Cases C-143/88 and C-92/89) [1991] ECR I-415, para 32 which the United Kingdom cites. Admittedly, in that judgment, the court called for a guarantee to be provided in the event that interim relief involves a financial risk for the European Union. However, that decision cannot be applied to H proceedings covered by article 10a of the EIA Directive and article 15a of the IPPC Directive.

100 The action in that case did not seek to pursue the public interest in the enforcement of environmental law but was directed—in pursuit simply of the applicant's own private interest—against a levy payable to the then

Community. Moreover, the guarantee in question was intended primarily to ensure payment of the contested levy itself and not to compensate for any losses arising from the delay caused by the interim relief. Losses of that kind would most probably have been covered by the default interest ordinarily payable.

101 None the less, the possibility of taking action against the misuse of interim relief is not precluded. However, the need to prevent or punish misuse does not require the grant of interim relief to be conditional on an undertaking to pay damages. Instead, in cases of that kind, it would suffice to refuse the interim relief or, where the misuse is discovered only subsequently, to grant damages on the normal basis.

102 Consequently, the United Kingdom has failed to fulfil its obligations under articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that the courts in England and Wales, as well as Gibraltar, and in Northern Ireland may make necessary measures granting interim relief in proceedings covered by those provisions conditional on an undertaking to pay damages.

C—Application

103 In addition to its allegation of a failure to transpose articles 3(7) and 4(4) of Directive 2003/35, the commission contests the application of those provisions by the courts of the United Kingdom.

104 This plea cannot be interpreted to mean that the commission challenges certain individual court decisions as infringing articles 3(7) and 4(4) of Directive 2003/35. The information provided by the commission in relation to each case is inadequate to assess whether, in fact, those provisions have been infringed.

105 However, one could understand the commission to mean that by this plea it criticises a practice of the United Kingdom courts that is, to some degree, of a consistent and general nature: see *Commission of the European Communities v Federal Republic of Germany* (Case C-387/99) [2004] ECR I-3751, para 42; *Commission of the European Communities v Ireland* (Case C-494/01) [2005] ECR I-3331; [2006] All ER (EC) 188, para 28; and *Commission of the European Communities v Kingdom of Spain* (Case C-88/07) [2009] ECR I-1353, para 54. For this it would have to adduce sufficient evidence to show that in the member state concerned a repeated and persistent practice has developed: see *Commission v Ireland* [2005] ECR I-3331, para 47.

106 At first sight, the findings concerning the inadequate transposition of articles 3(7) and 4(4) of Directive 2003/35 through case law appear to indicate that the United Kingdom courts consistently infringe those provisions.

107 However, that conclusion does not bear closer examination. The findings at issue rest on the fact that the case law does not ensure the necessary costs protection with sufficient clarity and precision. On the other hand, a consistent practice would presuppose that the judgments also ultimately infringe the requirement for costs protection.

108 The commission has not proved this. Although it mentions numerous individual court decisions, what that argument shows, above all, is that these decisions do not yet adequately transpose costs protection under articles 3(7) and 4(4) of Directive 2003/35 in the United Kingdom. As I set

A out above, the central problem in that connection is the discretion afforded to the courts in the relevant matters and the resulting uncertainty in relation to costs.

109 On the other hand, the commission has not attempted to prove on the basis of the various individual decisions certain consistent practices that are incompatible with specific requirements of costs protection.

B **110** The commission comes closest to attempting such proof when it criticises four of the judgments cited on the ground that the applicants were ordered to bear certain costs by the United Kingdom courts.

111 However, that argument is inadequate to prove that it is a consistent practice of the United Kingdom courts to order the applicants covered by articles 3(7) and 4(4) of Directive 2003/35 to bear excessive or prohibitive costs.

C **112** First, four decisions from two jurisdictions of the United Kingdom are insufficient to prove a consistent practice. Second, the commission also does not describe those cases precisely enough to assess whether the costs awarded in each case were in fact too high.

113 If, by its allegation that articles 3(7) and 4(4) of Directive 2003/35 are not properly applied, the commission wishes to challenge a consistent and general practice of the United Kingdom courts, that plea must be D rejected.

114 I presume, however, that this plea simply contests the inadequate transposition of articles 3(7) and 4(4) of Directive 2003/35 by a system of judicial precedent: see above, point 41. For that reason, a separate rejection of the plea is unnecessary.

E *V—Costs*

115 Under article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the commission has applied for the United Kingdom to be ordered to pay the costs and the United Kingdom has essentially been unsuccessful, the latter must be ordered to pay the costs. F Under article 140(1) of the Rules of Procedure, Ireland and the Kingdom of Denmark, which have intervened in the case, must bear their own costs.

VI—Conclusion

116 I propose that the court should:

(1) Declare that the United Kingdom of Great Britain and Northern G Ireland has failed to fulfil its obligations under articles 3(7) and 4(4) of 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 Council Directives 85/337/EEC and 96/61/EC, by reason of the fact that: the courts' discretion to grant costs protection is not tied to the objective of costs protection and the criteria to be H applied in that connection are incompatible with those provisions; in proceedings covered by those provisions the courts may order reciprocal costs protection which prevents the costs of a reasonable success fee for the representation of the persons and associations covered by those provisions from being imposed on the opposing party if the action is successful; and the

courts in England and Wales, as well as Gibraltar, and in Northern Ireland may make necessary measures granting interim relief in proceedings covered by those provisions conditional on an undertaking to pay damages.

(2) Order the United Kingdom to pay the commission's costs and order the Kingdom of Denmark and Ireland each to bear their own costs.

Notes

1. On the possibility of more extensive rights under the third paragraph of article 47 of the Charter of Fundamental Rights of the European Union, see my opinion in the *Edwards* case [2013] 1 WLR 2914, point 38, and *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (Case C-279/09) [2010] ECR I-13849, paras 60, 61.

2. On the possible threat to the freedom of the press as a result of excessive success fees, see the judgment of the European Court of Human Rights in *MGN Ltd v United Kingdom* (2012) 55 EHRR SE89, para 192 et seq.

3. In German law of civil procedure, paragraph 945 of the Zivilprozessordnung (Code of Civil Procedure) establishes a right to damages of that kind. However, following the judgment of the Bundesgerichtshof (Federal Court of Justice) of 23 September 1980 (*Neue Juristische Wochenschrift* (Case VI ZR 165/78) 1981, p 349) that right does not apply to loss and damage caused to third party interveners in the procedure under administrative law.

4. The German version of the Convention, which under article 22 of the Convention is not an authentic text, misleadingly refers in this regard to "vorläufige [r] Rechtsschutz". The authentic versions in English and French use the terms "injunctive relief" and "redressement par injonction".

5. Page 133 of the English version and p 170 of the French version (both available at http://www.unece.org/index.php?id=21437). According to *Solvay v Région Wallonne* (Case C-182/10) [2012] Env LR 545, para 27, the implementation guide can be taken into consideration but is not binding.

6. Cf *J Nold Kohlen- und Baustoffgrofshandlung v Commission of the European Communities* (Case 4/73) [1974] ECR 491, para 14; *Federal Republic of Germany v Council of the European Union* (Case C-280/93) [1994] ECR I-4973, paras 79, 80; and the judgment of the European Court of Human Rights in *Pine Valley Developments Ltd v Ireland* (1991) 14 EHRR 319, para 51.

13 February 2014. **THE COURT (Second Chamber)** delivered the following judgment.

1 By its application, the European Commission asks the court to declare that, by failing to transpose fully and apply correctly articles 3(7) and 4(4) of 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 Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L156, p 17), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that Directive.

Legal context

Aarhus Convention

2 The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed at Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L124, p 1) ("the Aarhus Convention"), states in its Preamble:

A "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
B 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 . . ."

C **3** Article 1 of the Aarhus Convention, which is headed "Objective", provides:

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

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

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

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

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

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

"2. Each party shall, within the framework of its national legislation, ensure that members of the public concerned: (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the
H 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 . . . A

"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. B

"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." C

European Union law D

6 In order to contribute to implementation of the obligations arising under the Aarhus Convention, articles 3(7) and 4(4) of Directive 2003/35 inserted, respectively, article 10a in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L175, p 40) and article 15a in Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L257, p 26), which has been codified by Parliament and Council Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L24, p 8). E

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

"Member states shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a member state requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive . . . F G

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

"The provisions of this article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures . . . H

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

A *Pre-litigation procedure*

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

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

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

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

The action

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

E

Arguments of the parties

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

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

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

H **16** As to the costs regime and, more specifically, the possibility for the national courts to grant "protective costs orders' enabling the amount of the costs that may be payable to be limited at an early stage of the proceedings, the commission considers that in England and Wales, despite the criteria laid down by the judgment of the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, the case law

remains contradictory and gives rise to legal uncertainty. Furthermore, the courts grant such orders only rarely. The commission considers that the Court of Appeal's judgment of 29 July 2010 in *R (Garner) v Elmbridge Borough Council (WWF-UK intervening)* [2012] PTSR 250, which was, however, delivered after expiry of the period laid down in the reasoned opinion mentioned in para 9 above, is a favourable but still insufficient development. Any cost caps obtained are in practice set at very high amounts and they generate satellite litigation that increases the overall cost of the dispute.

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

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

19 The United Kingdom contests the commission's contentions.

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

21 The United Kingdom contends that a Directive can be transposed by case law. In *Commission v Ireland* [2009] ECR I-6277, on which the commission relies, the court found a failure to fulfil the obligation to transpose solely on the ground that the requirement that proceedings not be prohibitively expensive, which was also at issue in that case, was not sufficiently safeguarded solely by the court's discretion not to order the unsuccessful party to pay the costs. The situation is different in the United Kingdom, given that the court can adopt protective measures, such as protective costs orders. The United Kingdom also considers that account should be taken of the specific nature of its common law legal system, which is founded essentially on case law and the rule of precedent.

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

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

24 The United Kingdom submits that very often the public authorities and bodies which win a case do not ask for costs against the claimant.

A Furthermore, from time to time leave to appeal to the higher courts is granted to a public body only on condition that it will pay both sides' costs.

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

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

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

28 As regards cross-undertakings in respect of the grant of interim relief, the United Kingdom contends that in a high proportion of environmental cases the very fact of a challenge to the grant of consent suspends, in practice, the commencement of works or of other activities until the dispute has been decided. The claimant might, moreover, obtain interim D relief without a cross-undertaking where his resources are slender. The possibility of cross-undertakings being requested is in any event consistent with European Union law, by reference to *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* (Joined Cases C-143/88 and C-92/89) [1991] ECR I-415, para 32, and their grant also contributes to compliance with article 1 of the First Protocol to the European Convention for the Protection E of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, a provision relating to protection of the right to property.

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

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

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

32 The Kingdom of Denmark submits that the member states have H competence to determine the form and methods of implementation of the requirement that proceedings not be prohibitively expensive. Furthermore, that requirement applies only at first instance, since the Aarhus Convention provides no indication regarding appeals or the number of judicial stages necessary. Moreover, only costs directly linked to the handling of the case

are concerned, which excludes the fees of the lawyer whom the claimant decides to consult. Finally, that requirement is unconnected to the question of the predictability of the cost of the proceedings for the claimant from the time when he brings his action, but means only that, when the case has been concluded, the financial cost borne, on an overall assessment, must not be prohibitive.

Findings of the court

33 According to settled case law, the transposition of a Directive does not necessarily require the provisions of the Directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the Directive in a sufficiently clear and precise manner: see, inter alia, *Commission of the European Communities v Federal Republic of Germany* (Case 29/84) [1985] ECR 1661, para 23, and *Commission v Ireland* [2009] ECR I-6277, para 54.

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

35 The court has thus ruled that a judicial practice under which the courts simply have the power to decline to order an unsuccessful party to pay the costs and can order expenditure incurred by the unsuccessful party to be borne by the other party is, by definition, uncertain and cannot meet the requirements of clarity and precision necessary in order to be regarded as valid implementation of the obligations arising from articles 3(7) and 4(4) of Directive 2003/35: see *Commission v Ireland* [2009] ECR I-6277, para 94.

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

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

Costs regime

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

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

A **40** The court has also held that, although the reasoned opinion must contain a coherent and detailed statement of the reasons which led the commission to conclude that the state in question has failed to fulfil one of its obligations under the FEU Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the commission from setting out in B detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice: see *Commission v Spain* [2003] ECR I-13145, para 29.

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

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

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

44 As to the merits of the commission's arguments, it should be recalled that the requirement that proceedings not be prohibitively expensive does not prevent the national courts from making an order for costs in judicial E proceedings provided that they are reasonable in amount and that the costs borne by the party concerned taken as a whole are not prohibitive: see *R (Edwards) v Environment Agency (No 2)* (Case C-260/11) [2013] 1 WLR 2914, paras 25, 26, 28.

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

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

47 However, the court cannot limit its assessment to the financial situation of the person concerned, but must also conduct an objective

analysis of the amount of the costs, particularly since members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of the proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable: see the *Edwards* case [2013] 1 WLR 2914, para 40.

48 The analysis of the financial situation of the person concerned cannot be based exclusively on the estimated financial resources of an "average" claimant, since such information may have little connection with the situation of the person concerned: see the *Edwards* case, para 41.

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

50 The fact that the claimant has not been deterred in practice from bringing his action is not in itself sufficient to establish that the proceedings are not prohibitively expensive for him: see the *Edwards* case, para 43.

51 Finally, that assessment cannot differ depending on whether the national court is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal: see the *Edwards* case [2013] 1 WLR 2914, para 45.

52 According both to the documents submitted to the court and to the discussion at the hearing, in England and Wales section 51 of the Senior Courts Act 1981 provides that the court concerned is to determine by whom and to what extent the costs are to be paid. This power is stated to be exercised in accordance with the detailed provisions laid down in CPR r 44.2. The decision on costs is accordingly generally made by the court concerned at the conclusion of the proceedings, but the claimant may also apply for a "protective costs order", which enables him to obtain, at an early stage of the proceedings, a cap on the amount of costs that may be payable.

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

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

55 However, it is not apparent from the various factors put forward by the United Kingdom and discussed, in particular, at the hearing that national

courts are obliged by a rule of law to ensure that the proceedings are not prohibitively expensive for the claimant, which alone would permit the conclusion that Directive 2003/35 has been transposed correctly.

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

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

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

59 The United Kingdom expressly concedes, moreover, in para 70 of its defence, that until the judgment of the Court of Appeal in the *Garner* case [2012] PTSR 250 the principles governing protective costs orders did not comply in every respect with European Union law.

60 As regards the argument raised by the commission that the costs protection regime also does not comply with European Union law in so far as protective costs orders involve a "reciprocal cap on costs' enabling the defendant public authority to limit its financial liability if it loses the case, which indirectly reduces the protection conferred by a fee agreement, it is to be recalled that in proceedings brought under article 258FEU of the FEU Treaty for failure to fulfil obligations it is for the commission to prove the allegation that an obligation has not been fulfilled. It is the commission's responsibility to place before the court the information required to enable the court to establish that the obligation has not been fulfilled, and in so doing the commission may not rely on any presumption: see, inter alia, *European Commission v Federal Republic of Germany* (Case C-600/10) EC:C:2012:737; 22 November 2012, para 13 and the case law cited.

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

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

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

Cross-undertakings in respect of the grant of interim relief

64 As regards the system of cross-undertakings imposed by the court in respect of the grant of interim relief, which, as is apparent from the documents submitted to the court, principally involves requiring the claimant to undertake to compensate for the damage which could result from interim relief if the right which the relief was intended to protect is not finally recognised as being well founded, it is to be recalled that the prohibitive expense of proceedings, within the meaning of articles 3(7) and 4(4) of Directive 2003/35, concerns all the financial costs resulting from participation in the judicial proceedings, so that their prohibitiveness must be assessed as a whole, taking into account all the costs borne by the party concerned (see the *Edwards* case [2013] 1 WLR 2914, paras 27, 28), subject to the abuse of rights.

65 In addition, it is apparent from settled case law that a national court seised of a dispute governed by European Union law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law (see *Križan v Slovenská inšpekcia životného prostredia (Ekologická skládka as intervening)* (Case C-416/00) [2013] Env LR 649, para 107 and the case law cited), including in the area of environmental law: see the *Križan* case, para 109.

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

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

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

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

B **70** As to the United Kingdom's argument that the limiting of cross-undertakings could result in infringement of the right to property, the court consistently acknowledges that the right to property is not an absolute right, but must be viewed in relation to its social function. Its exercise may therefore be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, C disproportionate and intolerable interference, impairing the very substance of the right guaranteed: see the *Križan* case, para 113 and the case law cited. Protection of the environment is one of those objectives and is therefore capable of justifying a restriction on the exercise of the right to property: see, also the *Križan* case [2013] Env LR 649, para 114 and the case law cited.

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

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

Costs

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

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

G 1. Declares that, by failing to transpose correctly articles 3(7) and 4(4) of 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 Council Directives 85/337/EEC and 96/61/EC, in as much as they provide that the judicial proceedings referred to H must not be prohibitively expensive, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that Directive;

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

Susanne Rook, Barrister