



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

17 October 2018\*

(Reference for a preliminary ruling — Environment — Assessment of the effects of certain projects on the environment — Right to challenge a development consent decision — Requirement for a procedure which is not prohibitively expensive — Concept — Temporal application — Direct effect — Effect on a national decision on the taxation of costs which has become final)

In Case C-167/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 23 March 2017, received at the Court on 3 April 2017, in the proceedings

**Volkmar Klohn**

v

**An Bord Pleanála,**

interveners:

**Sligo County Council,**

**Maloney and Matthews Animal Collections Ltd,**

THE COURT (First Chamber),

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

Advocate General: M. Bobek,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 February 2018,

after considering the observations submitted on behalf of:

- Mr Klohn, by himself and by B. Ohlig, advocate,
- An Bord Pleanála, by A. Doyle, Solicitor, and by B. Foley, Barrister-at-Law,
- Ireland, by M. Browne, G. Hodge and A. Joyce, acting as Agents, and by M. Gray and H. Godfrey, Barristers-at-Law, and R. Mulcahy, Senior Counsel,

\* Language of the case: English.

– the European Commission, by C. Zadra, G. Gattinara and J. Tomkin, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 5 June 2018,  
gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of the fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337 as amended').
- 2 The request has been made in proceedings between Mr Volkmar Klohn and An Bord Pleanála (the Planning Appeals Board, Ireland) ('the Board') concerning the burden of the costs of the judicial proceedings brought by Mr Klohn against the planning permission granted by the Board for the construction in Achonry, County Sligo (Ireland) of a fallen animal inspection unit for animals from across Ireland.

### **Legal context**

#### *International law*

- 3 The preamble to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed at Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1, 'the Aarhus Convention'), states:

'...

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

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

...

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

...'

4 Article 1 of the Aarhus Convention, entitled ‘Objective’, provides:

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

5 Article 3 of that convention, entitled ‘General provisions’, states, in paragraph 8:

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

6 Article 9 of the Aarhus Convention, entitled ‘Access to justice’, states:

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

...

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

(a) having a sufficient interest or, alternatively,

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

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5), shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

...

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

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

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.'

### *EU law*

7 Directive 85/337 as amended provides that public and private projects likely to have a major effect on the environment are to be subject to an environmental impact assessment. It also lays down obligations on the participation and consultation of the public in the decision-making process regarding the consent for such projects.

8 Following the accession of the European Union to the Aarhus Convention, the EU legislature adopted Directive 2003/35, Article 3(7) of which inserted Article 10a into Directive 85/337, which provides:

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

- (a) having a sufficient interest, or alternatively,
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

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

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

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

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

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

- 9 As provided for in the first paragraph of Article 6 of Directive 2003/35, ‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 June 2005 at the latest. They shall forthwith inform the Commission thereof.’
- 10 Article 10a of Directive 85/337 as amended was reproduced in Article 11 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

### *Irish law*

- 11 The Irish system of judicial review comprises two stages. Applicants must first of all apply to the High Court (Ireland) for leave to bring judicial review proceedings, setting out the grounds for their application and the relief sought. It is only if that leave is granted that proceedings may be brought.
- 12 Under Article 99 of the rules of the Superior Courts ‘costs [shall] follow the event’. Consequently, an applicant who is unsuccessful is to be ordered, as a rule, to pay the other party’s costs in addition to bearing his own costs. That is the general rule, but the High Court has discretion to depart from that rule if the particular circumstances of the case so require.
- 13 The court hearing the case rules only on how the costs are to be borne. Subsequently, the amount of costs awarded against the unsuccessful party is quantified in a separate decision by the Taxing Master, a judge specially entrusted with the taxation of costs, in the light of the supporting documents provided by the successful party. That decision is open to appeal.
- 14 In its judgment of 16 July 2009, *Commission v Ireland* (C-427/07, EU:C:2009:457, paragraphs 92 to 94), the Court held that Ireland had failed to transpose into national law the rule in Article 10a of Directive 85/337 as amended according to which procedures must ‘not [be] prohibitively expensive’.
- 15 In the course of 2011, in order to give due effect to the finding of a failure to fulfil obligations on that point, Ireland inserted Section 50B in the Planning and Development Act, so that in the field of application of that law, each party is, as a rule, obliged to bear its own costs. That provision is not, however, applicable, *ratione temporis* to the main proceedings.

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

- 16 In the course of 2004, the Board granted Maloney and Matthews Animal Collections Ltd planning permission to construct in Achonry an inspection unit for fallen animals from across Ireland. The building of that unit had been decided as part of the response to the bovine spongiform encephalopathy epizootic.
- 17 On 24 June 2004, Mr Klohn, owner of a farm close to the site of that facility, applied for leave to seek judicial review of that planning permission. On 31 July 2007, he was granted leave to commence judicial review proceedings.
- 18 By judgment dated 23 April 2008, the High Court dismissed Mr Klohn’s application for judicial review.
- 19 On 6 May 2008, that court ordered Mr Klohn to pay the costs incurred by the Board. That decision has not been challenged.

- 20 Before the Taxing Master of the High Court, charged with quantifying the amount of the costs to be reimbursed in accordance with national law, Mr Klohn argued that, pursuant to Article 3(8) and Article 9(4) of the Aarhus Convention and Article 10a of Directive 85/337 as amended, costs awarded against him should not be ‘prohibitively expensive’.
- 21 By a decision of 24 June 2010, the Taxing Master took the view that under Irish law he did not have powers to enter into a consideration of the prohibitive nature of that expense and he assessed the costs which Mr Klohn would have to reimburse the Board at approximately EUR 86 000.
- 22 After receiving a request from Mr Klohn to review the Taxing Master’s decision, the High Court upheld that decision.
- 23 Mr Klohn then appealed against that judgment of the High Court to the Supreme Court (Ireland).
- 24 The Supreme Court decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Can the “not prohibitively expensive” provisions of Article 10a of [Directive 85/337 as amended] potentially have any application in a case such as the instant case where the development consent challenged in the proceedings was granted prior to the latest date for transposition of that directive and where the proceedings challenging the relevant development consent were also commenced prior to that date? If so have the “not prohibitively expensive” provisions of [Directive 85/337 as amended] potential application to all costs incurred in the proceedings or only to costs incurred after the latest date for transposition?
- (2) Is a national court which enjoys a discretion concerning the award of costs against an unsuccessful party, in the absence of any specific measure having been adopted by the Member State in question for the purposes of transposing Article 10a of [Directive 85/337 as amended], obliged, when considering an order for costs in proceedings to which that provision applies, to ensure that any order made does not render the proceedings “prohibitively expensive” either because the relevant provisions are directly effective or because the court of the Member State concerned is required to interpret its national procedural law in a manner, to the fullest extent possible, which fulfils the objectives of Article 10a?
- (3) Where an order for costs is unqualified and would, by virtue of the absence of any appeal, be regarded as final and conclusive as a matter of national law, does Union law require that either:
- (a) a Taxing Master charged in accordance with national law with the task of quantifying the amount of costs reasonably incurred by the successful party; or,
- (b) a court asked to review a decision of such a Taxing Master
- nonetheless have an obligation to depart from otherwise applicable measures of national law and determine the amount of costs to be awarded in such a way as ensures that the costs so awarded do not render the proceedings prohibitively expensive?’

## **Consideration of the questions referred**

### ***The second question***

- 25 By its second question, which must be examined first, the referring court asks, in essence, whether the requirement that certain judicial proceedings in environmental matters must not be prohibitively expensive (‘the not prohibitively expensive rule’), in the fifth paragraph of Article 10a of Directive

85/337 as amended, is directly effective or whether the national court must only interpret national law in a manner, to the fullest extent possible, which achieves an outcome consistent with the objective pursued by that rule.

- 26 The question of the direct effect of the not prohibitively expensive rule is at issue in the main proceedings as a result of Ireland's failure to transpose the fifth paragraph of Article 10a of Directive 85/337 as amended, within the period laid down in Article 6 of Directive 2003/35, that is by 25 June 2005 at the latest. That failure to fulfil obligations was found by the Court in its judgment of 16 July 2009, *Commission v Ireland* (C-427/07, EU:C:2009:457, paragraphs 92 to 94 and operative part). It is also apparent from the explanations provided by the referring court that it was not until 2011 that a national provision was adopted to transpose the not prohibitively expensive rule into national law, that is after the decision on the substance ending the judicial proceedings for which the taxation of costs is at issue in the main proceedings.
- 27 It must be borne in mind that provisions of EU law are directly applicable when they confer on individuals rights enforceable by them in the courts of a Member State (judgment of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraphs 4 and 8).
- 28 Such provisions impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the EU institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power (judgment of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraph 6).
- 29 In that regard, it must be borne in mind, first, that the fifth paragraph of Article 10a of Directive 85/337 as amended simply provides that the judicial proceedings concerned 'shall be fair, equitable, timely and not prohibitively expensive'. Given the general nature of the words used, it is difficult to envisage how those provisions may be regarded as imposing sufficiently precise obligations on the Member States in order to dispense with national implementing measures.
- 30 Next, the Court has held that, by virtue of their procedural autonomy and subject to compliance with the principles of equivalence and effectiveness, the Member States have a discretion in implementing Article 10a of Directive 85/337 as amended (judgments of 16 February 2012, *Solway and Others*, C-182/10, EU:C:2012:82, paragraph 47, and of 7 November 2013, *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraph 30).
- 31 Above all, lastly, the Court has ruled on the direct effect of the not prohibitively expensive rule. That rule is also found in very similar terms in Article 9(4) of the Aarhus Convention. That similarity is not a coincidence, since Directive 2003/35, which inserted Article 10a into Directive 85/337, had indeed sought to align Community law with the Aarhus Convention with a view to its approval by the Community, as is apparent from recital 5 of Directive 2003/35.
- 32 The Court has held in its judgment of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C-470/16, EU:C:2018:185, paragraphs 52 and 58), that Article 9(4) of the Aarhus Convention is not directly applicable.
- 33 As the Court does not assess the direct applicability of the provisions of an agreement signed by the European Union according to criteria other than those that it uses in order to determine whether the provisions of a directive are directly applicable (see, to that effect, judgment of 30 September 1987, *Demirel*, 12/86, EU:C:1987:400, paragraph 14), it may also be concluded from the judgment mentioned in the preceding paragraph that the not prohibitively expensive rule in the fifth paragraph of Article 10a of Directive 85/337 as amended does not have direct effect.

- 34 Given that the provisions of Directive 85/337 as amended at issue do not have direct effect and were transposed belatedly into the legal system of the Member State concerned, the national courts of that Member State are required to interpret national law so far as possible, once the time limit for the Member States to transpose those provisions has expired, with a view to achieving the objective sought by those provisions, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive (see, to that effect, judgment of 4 July 2006, *Adelener and Others*, C-212/04, EU:C:2006:443, paragraph 115 and operative part).
- 35 The objective pursued by the EU legislature when it laid down the not prohibitively expensive rule in Article 10a of Directive 85/337 as amended means that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts, which falls within the scope of that provision, by reason of the financial burden that might arise as a result (judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraph 35). That objective, which is to give the public concerned wide access to justice, pertains, more broadly, to the desire of the EU legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role, and to ensure that the right to an effective remedy and the principle of effectiveness are observed (see, to that effect, judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraphs 31 to 33).
- 36 In the light of the foregoing considerations, the answer to the second question is that the fifth paragraph of Article 10a of Directive 85/337 as amended must be interpreted as meaning that the not prohibitively expensive rule which it lays down does not have direct effect. Where that article has not been transposed by a Member State, the national courts of that Member State are nonetheless required to interpret national law to the fullest extent possible, once the time limit for transposing that article has expired, in such a way that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts, which falls within the scope of that article, by reason of the financial burden that might arise as a result.

### ***The first question***

- 37 By its first question, the referring court asks, in essence, whether the not prohibitively expensive rule laid down in Article 10a of Directive 85/337 as amended applies to proceedings such as those at issue in the main proceedings, brought before the date on which the time limit for transposing that article expired. If that question is answered in the affirmative, the referring court also asks whether that rule applies to all the costs incurred in the context of those proceedings or only to those incurred after that time limit expired.
- 38 According to the settled case-law of the Court, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule (judgments of 11 December 2008, *Commission v Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 43 and the case-law cited; of 6 July 2010, *Monsanto Technology*, C-428/08, EU:C:2010:402, paragraph 66; and of 6 October 2015, *Commission v Andersen*, C-303/13 P, EU:C:2015:647, paragraph 49).
- 39 It is otherwise — subject to the principle of the non-retroactivity of legal acts — only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (judgment of 16 December 2010, *Stichting Natuur en Milieu and Others*, C-266/09, EU:C:2010:779, paragraph 32).
- 40 Accordingly, the measures taken to transpose a directive must apply to the future effects of situations which arose under the old rule, as from the date on which the time limit for transposing that directive expired, unless that directive provides otherwise.

- 41 Directive 2003/35 does not include any special provision as regards the conditions for the temporal application of Article 10a of Directive 85/337 as amended (judgment of 7 November 2013, *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraph 23).
- 42 In that regard, the Court has held that Article 10a of Directive 85/337 as amended is to be interpreted as meaning that the rules of national law adopted in order to transpose that article into the national legal order ought to apply to administrative development consent procedures ongoing as at the date on which the time limit for transposing that provision expired (see, to that effect, judgment of 7 November 2013, *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraph 31).
- 43 Where no implementing measure has been adopted before the time limit laid down by a directive, as is the case in the main proceedings, it must be considered that the obligation to interpret national law in conformity with the untransposed rule applies also in the conditions referred to in paragraphs 39 and 40 above, as from the expiry of that time limit.
- 44 In that situation, the national court is under an obligation to interpret national law, so far as possible, in order to achieve the result sought by the untransposed provisions of a directive, as pointed out in paragraph 35 above. The immediate applicability of a new rule stemming from a directive to the future effects of existing situations, as from the expiry of the time limit for transposing that directive, forms part of that result, unless the directive concerned has provided otherwise.
- 45 Consequently, national courts are required to interpret national law, as soon as the time limit for transposing an untransposed directive expires, so as to render the future effects of situations which arose under the old rule immediately compatible with the provisions of that directive.
- 46 In the light of the objective of the not prohibitively expensive rule, which consists in altering the allocation of costs in certain judicial proceedings, proceedings brought before the expiry of the time limit for transposing Directive 2003/35 must be regarded as a situation which arose under the old rule. In addition, the decision on the allocation of costs taken by the court at the end of the proceedings represents a future, indeed uncertain, effect of the ongoing proceedings. Consequently, national courts are under an obligation, when deciding on the allocation of costs in proceedings which were ongoing as at the date on which the time limit for transposing that directive expired, to interpret national law in order to achieve so far as possible an outcome consistent with the objective pursued by the not prohibitively expensive rule.
- 47 In that regard, there is no need to distinguish between costs depending on whether they have in practice been incurred before or after the end of the transposition period, provided that the decision on the allocation of costs has not been taken as at that date and that therefore the obligation to interpret national law in conformity with the not prohibitively expensive rule is applicable to that decision, as stated in the preceding paragraph. In addition, the Court has held that the prohibitive nature of proceedings must be assessed as a whole, taking into account all the costs borne by the party concerned (judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraph 28).
- 48 However, the obligation of a national court to refer to the content of a directive when interpreting and applying the relevant rules of national law is limited by the general principles of law, in particular, the principles of legal certainty and non-retroactivity (judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 63 and the case-law cited).
- 49 In that regard, the Board submits that the immediate applicability of the not prohibitively expensive rule to ongoing proceedings is contrary to the principle of legal certainty. It argues that the rule on the allocation of costs, as known at the outset of the proceedings, influenced the amount of the costs which the parties decided to commit to defending their rights.

- 50 Admittedly, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, inter alia, that rules of law be clear, precise and predictable in their effect, especially where they may have negative consequences on individuals and undertakings (judgment of 22 June 2017, *Unibet International*, C-49/16, EU:C:2017:491, paragraph 43 and the case-law cited).
- 51 In addition, the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation in which it is clear that the relevant authorities have, in giving him precise assurances, caused him to entertain expectations which are justified (see, to that effect, judgment of 14 October 2010, *Nuova Agricast and Cofra v Commission*, C-67/09 P, EU:C:2010:607, paragraph 71).
- 52 However, in the main proceedings, it must be stated that the parties did not receive any assurances that the rule on the allocation of costs would be maintained in force until the end of the proceedings. On the contrary, from the outset of those proceedings, on 24 June 2004, the date on which Mr Klohn applied for leave to seek judicial review, they could envisage, having regard to Ireland's obligations under Directive 2003/35 which entered into force on 25 June 2003, that that rule would have to be amended before long and by 25 June 2005 at the latest, that is to say probably before the end of those proceedings. In particular, Ireland and the Board in its capacity as a body of that Member State may not rely on a legitimate expectation that a rule would remain in force which Ireland failed to amend, notwithstanding its obligation to amend it within the period laid down by that directive, as found by the Court in its judgment of 16 July 2009, *Commission v Ireland* (C-427/07, EU:C:2009:457).
- 53 Lastly, the Court has held that the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule (judgment of 6 October 2015, *Commission v Andersen*, C-303/13 P, EU:C:2015:647, paragraph 49).
- 54 Consequently, the Board is not justified in maintaining that the principle of legal certainty precludes the obligation for the national courts to interpret national law in conformity with the not prohibitively expensive rule when ruling on the allocation of costs.
- 55 In the light of the foregoing considerations, the answer to the first question is that the fifth paragraph of Article 10a of Directive 85/337 as amended must be interpreted as meaning that a Member State's courts are under an obligation to interpret national law in conformity with that directive, when deciding on the allocation of costs in judicial proceedings which were ongoing as at the date on which the time limit for transposing the not prohibitively expensive rule laid down in the fifth paragraph of Article 10a expired, irrespective of the date on which those costs were incurred during the proceedings concerned.

### ***The third question***

- 56 For a proper understanding of the third question, it should be noted at the outset that the Irish costs procedure takes place in two stages. Following its decision on the substance, the court hearing the dispute initially makes an order as to how the costs are to be borne. Subsequently, the Taxing Master fixes the amount of costs, subject to review by a court, namely the High Court, and then if necessary, the Supreme Court.
- 57 According to the information provided by the referring court concerning the procedure at issue in the main proceedings, the High Court, after dismissing Mr Klohn's application, ordered him on 6 May 2008 to pay the Board's costs, in accordance with Article 99 of the Rules of the Superior Courts, according to which 'costs [shall] follow the event'. That decision became final, since it was not

challenged within the time limits set. The Taxing Master quantified the costs Mr Klohn had to reimburse the Board at approximately EUR 86 000, by a decision dated 24 June 2010, which was challenged before the High Court and then the referring court.

- 58 In the light of those factors, the third question must be understood as seeking to ascertain whether, in the main proceedings, having regard to the force of *res judicata* attaching to the High Court's decision of 6 May 2008, which became final as to how the costs are to be borne, national courts ruling on Mr Klohn's application challenging the Taxing Master's decision fixing the amount of costs are required to interpret national law so that he does not bear prohibitively expensive costs.
- 59 According to settled case-law, when national courts apply national law, they are required to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU (judgment of 4 July 2006, *Adelener and Others*, C-212/04, EU:C:2006:443, paragraph 108 and the case-law cited).
- 60 The requirement for national law to be interpreted in conformity with EU law is inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them (judgment of 4 July 2006, *Adelener and Others*, C-212/04, EU:C:2006:443, paragraph 109 and the case-law cited).
- 61 However, the principle of interpreting national law in conformity with EU law has certain limitations.
- 62 First, as mentioned in paragraph 48 above, the obligation of a national court to refer to the content of a directive when interpreting and applying the relevant rules of national law is limited by the general principles of law.
- 63 In that regard, the principle of *res judicata* is, both in the legal order of the European Union and in national legal systems, of particular importance. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become final after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard can no longer be called into question (judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 38 and the case-law cited).
- 64 EU law does not, therefore, preclude the application of national procedural rules conferring *res judicata* effects on a judicial decision (judgment of 20 March 2018, *Di Puma and Consob*, C-596/16 and C-597/16, EU:C:2018:192, paragraph 31 and the case-law cited).
- 65 Secondly, the obligation for national law to be interpreted in conformity with EU law ceases when national law cannot be interpreted so as to achieve a result which is compatible with that sought by the directive concerned. In other words, the principle that national law is to be interpreted in conformity with EU law cannot serve as the basis for an interpretation of national law *contra legem* (judgments of 4 July 2006, *Adelener and Others*, C-212/04, EU:C:2006:443, paragraph 110, and of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 100).
- 66 The Court points out that when a matter is brought before it under Article 267 TFEU, it does not have jurisdiction to assess whether the abovementioned limits preclude an interpretation of national law in conformity with a rule of EU law. Generally, it is not for the Court, when giving a preliminary ruling, to interpret national law (judgment of 1 December 1965, *Dekker*, 33/65 EU:C:1965:118), since the national court has sole jurisdiction in that regard (see, to that effect, judgment of 26 September 2013, *Ottica New Line*, C-539/11, EU:C:2013:591, paragraph 48).

- 67 It is, therefore, for the referring court to assess the force of *res judicata* attaching to the decision of 6 May 2008 by which the High Court ordered Mr Klohn to bear the costs of the proceedings concerned, so as to determine if and to what extent national law may be interpreted in conformity with the not prohibitively expensive rule in the main proceedings.
- 68 In those circumstances, the Court may only provide clarification designed to give the national court guidance in its assessment (judgment of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 77) and indicate to it which interpretation of national law would fulfil its obligation to interpret that law in conformity with EU law.
- 69 In that regard, the Court notes that the purpose of the High Court's decision of 6 May 2008 as to how the costs are to be borne, ordering inter alia Mr Klohn to pay the Board's costs, is not the same as the Taxing Master's decision giving rise to the judicial proceedings before the referring court, in that, in particular, the former decision did not fix the precise amount of the costs awarded against the applicant in the main proceedings. According to the Court's case-law, the force of *res judicata* extends only to the legal claims on which the court has ruled. It does not, therefore, preclude the Taxing Master or a court, in a later dispute, from ruling on points of law on which there is no ruling in that definitive decision (see, to that effect, judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 36).
- 70 In addition, an interpretation according to which, having regard to the close connection between the decision as to how the costs are to be borne and the decision quantifying those costs, the Board would be entitled to claim all the costs reasonably incurred for its defence, would be contrary to the principle of legal certainty and the requirement for the foreseeability of EU law. As the Advocate General observed in point 114 of his Opinion, Mr Klohn could not have been aware of the amount of the costs which he might have to reimburse the successful parties until the Taxing Master's decision delivered more than a year after the decision awarding costs against him, and could not, therefore, challenge the first of those decisions with full knowledge of the facts. The amount of the Board's costs which were recoverable as determined by the Taxing Master was all the more unforeseeable by Mr Klohn since it was around three times the amount of the costs which he himself had incurred in the procedure concerned.
- 71 The answer to the third question is, therefore, that the fifth paragraph of Article 10a of Directive 85/337 as amended must be interpreted as meaning that, in a dispute such as that at issue in the main proceedings, the national court called upon to rule on the amount of costs is under an obligation to interpret national law in conformity with that directive, in so far as the force of *res judicata* attaching to the decision as to how the costs are to be borne, which has become final, does not preclude this, which it is for the national court to determine.

### Costs

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

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

- 1. The fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that the requirement that certain judicial proceedings in environmental matters must not be prohibitively expensive which it lays down does not have direct effect. Where that article has not been transposed by a Member State, the**

**national courts of that Member State are nonetheless required to interpret national law to the fullest extent possible, once the time limit for transposing that article has expired, in such a way that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts, which falls within the scope of that article, by reason of the financial burden that might arise as a result.**

- 2. The fifth paragraph of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that a Member State's courts are under an obligation to interpret national law in conformity with that directive, when deciding on the allocation of costs in judicial proceedings which were ongoing as at the date on which the time limit for transposing the requirement, laid down in the fifth paragraph of Article 10a, that certain judicial proceedings in environmental matters must not be prohibitively expensive expired, irrespective of the date on which those costs were incurred during the proceedings concerned.**
- 3. The fifth paragraph of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that, in a dispute such as that at issue in the main proceedings, the national court called upon to rule on the amount of costs is under an obligation to interpret national law in conformity with that directive, in so far as the force of *res judicata* attaching to the decision as to how the costs are to be borne,**

**which has become final, does not preclude this, which it is for the national court to determine.**

Silva de Lapuerta

Bonichot

Arabadjiev

Regan

Fernlund

Delivered in open court in Luxembourg on 17 October 2018.

A. Calot Escobar  
Registrar

K. Lenaerts  
President