Date de réception : 22/02/2017

THE COURT OF JUSTICE OF THE EUROPEAN UNION

PRELIMINARY REFERENCE C-470/16

(REFERRING COURT: HIGH COURT (IRELAND) NO: 2016/150 JR)

BETWEEN:

NORTH EAST PYLON PRESSURE CAMPAIGN LIMITED AND MAURA SHEEHY (Applicants)

AND

AN BORD PLEANALA AND THE MINISTER FOR COMMUNICATIONS ENERGY AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL (Respondents)

AND

EIRGRID PLC (Notice Party)

WRITTEN OBSERVATIONS OF AN BORD PLEANALA

1. The Irish High Court has submitted seven questions to this Court for determination. The questions concern the interpretation of the costs provisions of Article 10 of Council Directive 2011/92 (the EIA Directive) and Article 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June 1998 (the Aarhus Convention). The context of the questions is explained by the High Court. An Bord Pleanála (the Board) is the Irish planning appeals board. It is an independent administrative body whose function is to determine whether projects should receive consent. It is the competent authority in this case for the purposes of the EIA Directive.

2. The development at issue in this case is a proposal to build an electricity cable to connect the electricity grids of Ireland and Northern Ireland. It is a Project of Common Interest (PCI) under Regulation No 347/2013 of the European Parliament and of the Council of

17th April 2013 on guidelines for trans-European energy infrastructure (the PCI Regulation.)

3. The Board notes that in a reference under Article 267 TFEU, it is for the national court to determine the questions it considers arise in the case. This is done after it has heard all relevant arguments from the parties, and the questions raised relate to the issues as the Court sees them to be. The function of the reference procedure is not to provide the parties with an opportunity to dispute the relevance of the questions, but rather to suggest how those questions should be answered. The Board therefore replies to the questions as posed, without comment on their relevance, and reserves its position on the latter point.

4. The questions posed by the Court about the EIA Directive relate to an unnumbered paragraph after Article 11(4). The lack of numbering posed an issue in another case, where the Irish High Court came to the conclusion that the lack of numbering meant that the costs provisions related to Article 11(4) only, and not to Article 11(1) to (4). The Board has never been of that opinion. It notes that Article 11 was originally Article 10a, and was inserted into the earlier version of the EIA Directive by Directive 2003/35 on public participation in decision making; and that it clearly related to all of the preceding paragraphs. The Board believes this continues to be the case, notwithstanding the incomplete numbering scheme adopted. In any event, it is clearly stated in Article 11 that the procedure under Art 11(1) to (4) "shall be fair, equitable, timely and not prohibitively expensive." For identification purposes, this requirement will be referred to as Art 11(4A).

5. For ease of reference each question has been summarised as a heading. The full question is set out as a footnote to the heading. The heading is followed by the Board's replying submission.

6. It is submitted that logically the first question is a specific instance of the second, so that their order should be reversed. Therefore question (ii) will be addressed first, then question(i), and then questions (iii) to (vi) in order.

(ii) Does the 'not prohibitively expensive' rule apply to all elements of a Judicial Review, or just to the elements of same relating to EIA?[1]

7. In ***McCallig v. Bord Pleanala*** (McCallig -v- An Bord Pleanala [2014] IEHC 353 (09 April 2014)), ruling in relation to costs, the High Court (Herbert J) held that the costs requirements in Article 11 applied only to that portion of the case that dealt with matters to which the EIA Directive applied. Accordingly, the provision implementing those rules, S50B of the Planning and Development Act 2000 as amended, only applied to that portion of the case that raised issues governed by the EIA Directive. Judge Herbert said:

> *44. In my judgment "proceedings" as used in s. 50B(1) only refers to that part of judicial review proceedings which challenge a decision made or action taken or a failure to take action pursuant to one or more of the three categories therein specified. [EIA, SEA and Industrial Emissions Directives.] "Proceedings" is not defined in the Act of 2010, in the Planning and Development Act 2000, or in the Interpretation Act 2005. It is not a term of legal art and where undefined its meaning falls to be established by reference to the context in which it is used, (see Minister for Justice v. Information Commissioner [2001] 3 IR 43 at 45: Littaur v. Steggles Palmer [1986] 1 W.L.R. 287 at 293 A-E). In my judgment it cannot be considered that the legislature intended so radical an alteration to the law and practice as to costs as to provide that costs in every judicial review application in any planning and development matter, regardless of how many or how significant the other issues raised in the proceedings may be, must be determined by reference only to the fact that an environmental issue falling within any of the three defined legal categories is raised in the proceedings. Such a fundamental change in the law and practice as to awarding costs is not necessary in order to comply with the provisions of the Directive. It would encourage a proliferation of judicial review applications.*

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

Litigants would undoubtedly resort to joining or non-joining purely planning issues and environmental issues in the same proceedings so as to avoid or to take advantage of the provisions of s. 50B(2). This is scarcely something which the legislature would have intended to encourage.

8. The Board submits that this is a correct statement of the legal position: the requirement that a procedure be not prohibitively expensive pursuant to Art 11(4) of Directive 2011/92/EU applies to those elements of the judicial procedure that address the legality of the decision, act or omission by reference to the requirements of the EIA Directive, not to the elements of that challenge that are governed by other requirements of national law unrelated to the Directive. It is not, however, limited merely to the elements of the challenge related to issues regarding the public participation provisions of the directive: it extends to the substantive requirements of the Directive as well.

9. Thus, if the challenge is that there was no EIA, or that the EIA actually carried out was defective for failing to identify, describe and assess the likely significant effects of the proposed development on the environment, or that the information submitted by the developer was deficient, then the costs rules of Art 11(4A) would apply. If the challenge was that a replying submission from the developer was not made available to members of the public for comment, this would ground both a challenge in national law for breach of the parties' rights of natural justice (audi alteram partem) and a challenge in EU law for breach of the right of public participation. Art 11(4A) would clearly apply to such a mixed question of national and European law. However, where a question is raised that is of pure national law, such as whether the developer had adequate legal title to the property to allow him to apply for development consent (planning permission), Art 11(4A) would not apply. In this final instance, the outcome would and should be the same regardless of whether an EIA was, or was not, required, because the case has nothing to do with EIA at all.

10. This is because the object and purpose of Article 11 is to enable people to participate in the environmental assessment process. That process has, in accordance with Article 2(2), been incorporated into an existing development consent process, namely the process

under the Planning and Development Acts, and now forms a part of it. But it is still *only* a *part* of that process, and it is important that the whole process should not be subsumed by the Directive. To allow the EIA process to take control of *every* aspect of the pre-existing process would run contrary to the principles of subsidiarity and proportionality set out in Article 5 TEU, referred to in Recital 24 EIA.

11. There is no purpose or reason behind interpreting Article 11(4A) to require it to cover all aspects of a legal challenge simply because (a) the project required EIA or (b) some of the grounds of challenge relate to EIA arguments. It should be interpreted to offer this special and important costs protection to arguments that are about EIA and it would then be for the national Court to determine what aspects of a challenge related to EIA such that a case should be capable of being viewed as "divisible" for the purposes of Article 11(4A).

12. This, it is submitted, is the context in which the first question arises, and it is proposed now to address that question.

(i) Does the 'not prohibitively expensive' rule apply to the determination of when a claim can be brought?[2]

13. The EIA Directive aims to ensure effective public participation in decision-making in accordance with the objectives of the Aarhus Convention to contribute to the right to live in an environment that is adequate for human health and well-being.[3] Member States have to ensure that individuals have a right of access to a remedy before a Court to challenge the procedural and substantive validity of decisions, acts or omissions (Art

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

[3] Recitals 16-21

11(1)). It is for the individual Member State to determine the stage at which those decisions, acts or omissions can be challenged (Art 11(2)).

14. It is also for the individual Member States to determine who has a sufficient interest to bring a challenge, and that determination must be consistent with a wide access to justice (Art 11(3)). Ireland provides broad access to justice, because any person, any company, or any unincorporated association can participate in the authorisation procedure and, having participated, can bring a challenge. Any NGO with an environmental objective that has been active for more than 12 months can bring a challenge, even if it has not participated. Any person with an interest in land can bring a challenge. And anybody else who can satisfy the Court that, in the circumstances of a particular case, he has an interest, can also bring proceedings. Wide access to justice is a hallmark of Irish democracy and is a right which precedes the intervention of European law and is jealously safeguarded by the Courts. In the law on consents for projects, the Planning and Development Acts 2000 to 2015, any person can become involved in the application, can appeal the decision to the Board, and, having participated, can bring a judicial review of the decision. The rights of public participation and access to justice under Irish law are exceptionally broad.

15. It is expressly acknowledged in Article 11(4) that the State may require exhaustion of administrative procedures before a challenge to the procedural or substantive validity of the decision can be brought.

16. The legal issue in the High Court, as classified by the Judge, was whether S50 of the Planning and Development Act means that a person who wishes to bring a challenge must challenge each individual decision within the development consent process as it is taken, or instead must wait until the process is over and then bring a challenge to the decision as a whole. He held in favour of the latter proposition (§78).

17. The question he poses for this Court is whether Art 11(4A) of the EIA Directive applies to the determination of that issue.

18. The Board would point out that this is not an issue which *it* raised against the Applicant. Nor has it ever raised that issue: the Board has always taken the position that the administrative procedure should be completed before any judicial challenge is launched. The Board has a clear interest in this: the integrity of the administrative process is important. If that integrity is breached, by proceedings challenging administrative determinations along the way, such as whether there should be an oral hearing, or whether a particular issue should be determined before an oral hearing takes place, or at what stage in the administrative process a particular issue should be determined, the administrative process can be drawn out for 6, 12, 18 months, or however long it takes for the proceedings to be determined – longer if there is an appeal or a reference – and a shadow can be cast over the entire administrative process. The Court itself has an interest in not having the procedure interrupted by a multiplicity of judicial reviews, because this safeguards scarce judicial resources. The High Court identified these interests at paragraphs 68 to 77 of its judgment. Other participants in the process have an interest in the process being concluded as well. There are many objectors in this case. They all have an interest in having the matter determined quickly, so that they do not have to devote too much time to it. If the Applicant had succeeded, the administrative procedure would have been put into abeyance for months while the legal issue was teased out. The High Court appropriately realised this and refused to allow it to happen; but the first relief the Applicant sought was to bring the administrative process crashing to a halt while the issues it raised were addressed.

19. The Applicant only felt the need to bring the present proceedings because of certain dicta of the High Court that tended to the view that the right to challenge intermediate procedural determinations arose when those determinations were made, rather than when the decision as a whole was taken. Thus, the Applicant was arguing that it was obliged to act at a very early stage and to interrupt the procedure, while the Respondent always accepted that the Applicant was entitled to await the end of the process. In effect, then, the Applicant was contending to have an additional right to challenge the decision, a second right, over and above the right which the Board accepted it did have, to challenge the entire decision and its entire basis when it came to be taken. This is hugely significant: the argument was not that there was no right to bring a challenge, or that the

Applicant had lost its right by delay. The argument was that the Applicant had acted prematurely by bringing a challenge before the time allowed, namely before the administrative procedure was completed, so it was accepted that the Applicant had a right, and the Applicant was contending for a second, much more disruptive, right. In short, the Board was not contending that the Article 11 rights of challenge did not exist and, indeed, that the Applicant should wait and exercise them when final decision was made.

20. The Board would also point out that each Member State and the EU have a clear interest in carrying out appropriate development, provided the rules on EIA are respected. This is why sustainable development is written into the EU Treaties as an objective.[4] In the present instance, the proposed development is an important piece of infrastructure. It is an international electrical cable which has been designated a Project of Common Interest by the EU under Regulation No. 347 of 2013. It is a project which must go ahead, whether on this alignment or an alternative alignment, subject to EIA[5]; and it should not be derailed by one or more judicial challenges at intermediate stage, before an EIA has been completed, and before that EIA can even be subjected to challenge.

21. Bearing all that in mind, the object of the EIA Directive is, as this Court has often stated, broad, and its scope is wide.[6] To that end, there must be access to an independent review procedure and that right of access must be broad – and Ireland provides a particularly broad right of access. Insomuch as Articles 11(2) and (4) allow the State to restrict the time at which an action can be brought, they are restricting provisions and must be interpreted restrictively.

22. However, it is submitted that the broad interpretation required should not be so broad that it obstructs economic development and the construction of important infrastructure, including Projects of Common Interest, by reason of delay. The Board would point to the

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[4] Article 3(3) TEU: *"3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."*

[5] Article 7(1) of Regulation No. 347 of 2013.

[6] Case C-72/95, §31 and 39, Kraaijveld, et al.

Union's own object of sustainable development, set out at Article 3(3) TEU. Environmental protection is an important element of the EU's objectives, but it is not the sole objective.

23. Thus, Artice 11(4A) could apply to a procedure where a Respondent was seeking to allege that the Applicant had no right of access, or had lost that right by delay, but not to a situation where an Applicant was arguing in effect that he had a second right of access and a right to disrupt the administrative process, or to a situation where the Applicant is arguing for a strict interpretation of national law which would restrict his later right of access, especially where the Respondent is expressly rejecting such a strict interpretation. It is a question of national law. It is, bizarrely, a question where the Applicant is arguing for an interpretation that is contrary to the general interests of the public concerned. It is a question where the Respondent is not seeking to obstruct the Applicant in any way from bringing a challenge at the appropriate time, but is attempting to protect the interests of developers, the public and the State in the integrity of the process, as well as its own interest in not having its procedures interrupted and made more cumbersome than they need be.

24. Further, if the *substantive* claim includes grounds not covered by the Directive then it may make little sense for Article 11(4A) to apply to a determination of when the claim should be brought. In this particular case, for example, the Board contended that a good deal of time was taken up in argument over the point at which the Applicant's challenge regarding land ownership issues should be brought. This claim, had nothing whatever to do with EIA, and therefore the question of when it could be raised also has nothing to do with EIA and should not itself trigger protection for the Applicant under Article 11(4A).

25. In those circumstances, it is submitted that the appropriate answer to the question is that: "*In the context of a national legal system where there is an uncontested right to challenge the decision at the end of the administrative procedure, and the question arises whether there is an additional right to challenge it before that procedure has concluded, the entitlement under Art 11(4) of Directive 2011/92/EU to a not prohibitively expensive*

procedure is not engaged. The position would be otherwise if the question for determination was whether there was any right to challenge the decision."

(iii) Is there a right to challenge preliminary decisions that do not determine rights of parties?[7]

26. In the context of the reply to question (i) and (ii) above, it is submitted that there is clearly a right to challenge administrative decisions reached in the course of the consent process and which determine aspects of the procedure leading to the final decision, because such decisions relate to the procedural legality of the ultimate decision; but the time at which such decisions can be challenged is a matter for the Member State.

(iv) Does Aarhus apply to PCIs and Habitats?[8]

27. In Case C-240/09, Lesoochranarske Zoskupenie the Court held, in relation to Council Directive 92/43:

> *Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on*

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

[8] Whether a national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, should interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Art 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June 1998 (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under Regulation No 347/2013 of the European Parliament and of the Council of 17th April 2013 on guidelines for trans-European energy infrastructure, and / or (b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under Council Directive 92/43/EEC of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora?

behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

28. The Court confirmed this in Case C-243/15, Lesoochranarske Zoskupenie 2, saying, at paragraph 55:

> *56 Decisions adopted by the competent national authorities within the framework of Article 6(3) of Directive 92/43, whether they concern a request to participate in the authorisation procedure, the assessment of the need for an environmental assessment of the implications of a plan or project for a protected site, or the appropriateness of the conclusions drawn from such an assessment as regards the risks of that plan or project for the integrity of the site, and whether they are autonomous or integrated in a decision granting authorisation, are decisions which fall within the scope of Article 9(2) of the Aarhus Convention.*

29. Therefore, the answer to the question posed is yes insofar as Habitats are concerned. By analogy it would have to be accepted that if the Court deemed Regulation No 347/2013 to exist within the identified competences of the "environmental field" as in C-240/09 then it would attract the same conclusions as in that case.

30. However, it is a matter for the national court to determine the particular rule of national law under which that effect should be given. In the instant case, it appears to the Board that the Applicant has identified a provision of national law that is not capable of giving effect to Article 11(4A). There may be other provisions of national law that are apposite for this purpose, and it is a matter for the Applicant and the national Court to identify

them. It is not the function of the Board to assist the Applicant in advancing its case, or for this Court to speculate on what the correct provision of national law might be.

31. The Board would also draw attention to what it believes to be a misidentification of the relevant Article of the Convention. The High Court, following the decision in Lesoochranarske refers to Article 9(3). The Board submits that the appropriate provision is Article 9(2) which relates to the validity of administrative decisions. The decision in Lesoochranarske 2 appears to confirm this interpretation, as it relies on Article 9(2) as the provision applicable to an administrative decision approving a project.

32. The Convention requires three remedies: the first, under Article 9(1), relates to decisions on access to environmental information; the second, under Article 9(2), relates to administrative project consent decisions that are likely to have an effect on the environment; and the third, under Article 9(3), relates to private or public actions which contravene provisions of law relating to the environment. The private or public actions envisaged are actions such as the carrying out of development, but not the action of granting development consent. Whilst Article 9(3) could in principle duplicate the protection afforded under Article 9(2), it is submitted that this is not in fact the case. Rather, Article 9(2) is the sole provision dealing with challenges to decisions – and those decisions are referred to in Article 6(3), which provides as follows:

33. Each Party:

> Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
>
> Shall, in accordance with its national law, also apply the provisions of this article to decisions on *proposed activities not listed in annex I which may have a significant effect on the environment.* To this end, Parties shall determine whether such a proposed activity is subject to these provisions;

34. Thus, any decision on an application which may have a significant effect on the environment is subject to Article 6(1), and the decision may be challenged under Article 9(2). The procedure under Article 9(3), then, only applies to enforcement against private or public actions affecting the environment. This does not affect the substance of the rights protected by European law or their interpretation, but may affect how the High Court applies Section 50B and Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 to give effect to those obligations. As this Court has always held, the application of this Court's ruling to provisions of national law is a matter for the national court.

35. Therefore, the answer to the fourth question should be: *As this Court has held in Case C-240/09, Lesoochranarske Zoskupenie, a national court, in order to ensure effective judicial protection in the fields covered by EU environmental law*[9]*, should interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Art 9(2) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June 1998 (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under Regulation No 347/2013 of the European Parliament and of the Council of 17th April 2013 on guidelines for trans-European energy infrastructure, and (b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under Council Directive 92/43/EEC of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora. However, it is for the national court to identify provisions of national law that are capable of having such effect: it is not obliged to accept the argument of one of the parties as to what provision that should be.*

[9] Having regard to the decision in Lesoochranarske 2, the Court may wish to insert reference to Article 47 of the Charter of Fundamental Rights of the European Union at this point.

(v) If Aarhus applies, does the requirement to meet criteria of national law preclude Article 9 from being directly effective where there has been no failure to meet those criteria and the Applicant is entitled to bring the proceedings?[10]

36. Again, as the Court has held in Case C-240/09, Lesoochranarske Zoskupenie, the Convention is not directly effective. The High Court must nonetheless give effect to Article 9(3) or, in the Board's submission, Article 9(2), in order to guarantee the right of public participation in relation to the Habitats Directive or the PCI Regulation. It is admitted that this conclusion would have to apply to the proceedings if the Applicant has met all the requirements of national law. Whether it has met them is a question for the trial Judge.

37. A subsequent question would seem to arise, namely: how should the national court give effect to that requirement? This is in essence a matter for the High Court to determine, and it has not posed any question for this Court on the matter. The Board would not dispute that, if the Article applies, the Court should give full effect to it insofar as possible within the limits of its jurisdiction.

38. The Board has submitted to the High Court that S50B is not capable of being invoked to give effect to Article 9(3) or 9(2) of the Aarhus Convention, because S50B is expressly stated to apply only to cases involving the EIA Directive, the Industrial Emissions Directive (2010/75/EC), and the SEA Directive (2001/42/EC). Those Directives give effect to the Article 9(2) obligation, and S50B gives effect to the corresponding provisions of those Directives. Insofar as Article 9(2) may have a broader scope, it is for the Applicant and the High Court to identify how those provisions may be given effect to

[10] Whether, if the answer to questions (iv)(a) and / or (b) is in the affirmative, the stipulation that applicants must "meet the criteria, if any, laid down in its national law" precludes the Convention being regarded as directly effective, in the circumstances where the applicants have not failed to meet any criteria in national law for making an application and / or are clearly entitled to make the application (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under Regulation No 347/2013 of the European Parliament and of the Council of 17th April 2013 on guidelines for trans-European energy infrastructure, and / or (b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under Council Directive 92/43/EEC of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora?

in Irish law. The Board is not arguing that Article 9(2) cannot be given effect to; rather it is arguing that the provision identified for giving effect to it is not appropriate for that purpose. And the Board stands on the principle that a litigant is not obliged to assist his opponent in making its case.

39. By similar reasoning the Board submits that Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 (EMPA) are not capable of being invoked to give effect to the Aarhus Convention in this case, because they apply only to cases involving Article 9(3), whereas the present case involves Article 9(2), a position confirmed by the judgment in Lesoochranarske 2. So though Sections 3 and 4 do give effect to the Aarhus Convention, they do not give effect to the provision, Article 9(2), that is at issue in this case. In their search for a provision of Irish law capable of giving effect to Article 9(2), it is for the Applicant and the High Court to identify the appropriate provision that is capable of having that effect; and this Court's concern should be merely to ensure that the High Court applies the correct provision of the Convention correctly and effectively in relation to the correct provision of European law.

40. The Board would again stress that it is not arguing that Article 9(2) cannot be given effect to; rather it is arguing that the provision identified for giving effect to it is not appropriate for that purpose; and that, as Respondent, it is not obliged to assist the Applicant in making its case.

41. As this Court has always held, the interpretation of national law is not a matter for this Court, and therefore, on the basis of the question submitted, the answer should be:

42. *As the Court has held in Case C-240/09, Lesoochranarske Zoskupenie, the Convention is not directly effective. However, the High Court is obliged to give effect to the fullest extent possible to the requirements of Article 9(2) of the Convention in accordance with national law. It is for that Court to identify whether there is any relevant provision of national law under which such effect can effectively be given, either (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under Regulation No 347/2013 of the European Parliament and of the Council of 17th April 2013 on guidelines for trans-European*

energy infrastructure, and / or (b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under Council Directive 92/43/EEC of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora?

(vi) Can there be a legislative exception to prohibitive costs, such as S50B(3)(b)[11]

43. A question as to the validity of a provision of national legislation in the light of European law is, as a matter of Irish administrative law, a matter for the State rather than for a public authority applying the law as enacted. For that reason the Board proposes to leave this question primarily to Ireland to answer.

44. It does, nonetheless, appear to the Board that the decision in *Case C-137/14, Commission v Germany* allows an exception for abuse of court procedures, so the answer should be yes, to the extent that same is necessary to prevent an abuse of court procedures.

(vii) Can national law require a causal link between the unlawful decision and damage to the environment?[12]

[11] (vi) Whether it is open to a Member State to provide in legislation for exceptions to the rule that environmental proceedings should not be prohibitively expensive, where no such exception is provided for in Directive 2011/92/EU or the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June 1998?

[12] (vii) Whether a requirement in national law for a causative link between the alleged unlawful act or decision and damage to the environment as a condition for the application of national legislation giving effect to Art 9(4) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th June 1998 to ensure that environmental proceedings are not prohibitively expensive is compatible with the Convention?

45. This question follows on from question (v) above. The condition of national law referred to in that question is the causal link between the unlawful decision and the damage to the environment.

46. This question concerns Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 (EMPA) which is intended to give effect to Article 9(3) rather than Article 9(2) which applies in this case. Because this case properly concerns the relationship between Article 9(2) and 9(4) where no causative link is required, there is no need to answer this question in light of the answer given to question (iv).

47. If the Court finds that both Article 9(2) and (3) apply, the causative link issue does not arise because the Applicant can nonetheless establish its claim under Article 9(2).

48. Even if the Court rejected the contention that Article 9(2) applied, the position would merely be that the national requirement under Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 to show actual or likely environmental damage would be unlawful if it breached the principles of equivalence or effectiveness. That is to say, it would be unlawful if it made it more difficult to raise a question of European law than a question of Irish law, or if it made it unduly difficult to raise a question of European law. There is no suggestion of any lack of equivalence; and as to effectiveness, a requirement to show a likelihood of damage to the environment can hardly reduce the effectiveness of a Directive that is only triggered where there is a likelihood of a significant effect on the environment or on a protected site. If necessary, the concept of damage can be read in accordance with the concept of significant effect. The Irish and European provisions are so similar that they should be construed in the same way. There is, therefore, no potential invalidity here, even on the alternative interpretation, applying Article 9(3).

49. Therefore the answer to the seventh question should be that a requirement in national law for a causative link between the alleged unlawful act or decision and damage to the environment as a condition for the application of national legislation giving effect to Art 9(4) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25th

June 1998 to ensure that environmental proceedings are not prohibitively expensive is compatible with the Convention because the requirement applies only to proceedings under Article 9(2) challenging the legality of an act or omission, and not to proceedings under Article 9(3) challenging the validity of a decision.

Conclusion

50. For the reasons offered above, the Board submits that the Court should answer the questions posed as suggested at the end of the submission on each question.

Filed on behalf of the Respondent (the Board) by Barry Doyle and Company, Solicitors, the 9th day of December 2016.

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THE COURT OF JUSTICE OF THE EUROPEAN UNION

PRELIMINARY REFERENCE C-470/16

NORTH EAST PYLON PRESSURE CAMPAIGN et SHEEHY

(Referring Court: High Court (Irlande) – Ireland)

HIGH COURT NO: 2016/150 JR

BETWEEN:

NORTH EAST PYLON PRESSURE CAMPAIGN LIMITED AND MAURA SHEEHY

Applicants

AND

AN BORD PLEANALA AND BY ORDER THE MINISTER FOR COMMUNICATIONS ENERGY AND NATURAL RESOURCES AND BY ORDER IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

EIRGRID PLC

Notice Party

LEGAL SUBMISSIONS OF AN BORD PLEANALA

Barry Doyle & Company

Marshalsea Court

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