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Court procedural documents

TO THE PRESIDENT AND THE MEMBERS OF THE COURT OF JUSTICE

WRITTEN OBSERVATIONS

Submitted pursuant to Article 23, second paragraph, of the Protocol on the Statute of the Court of Justice by the European Commission, represented by Carlo ZADRA and Jonathan TOMKIN, Members of its Legal Service, acting as Agents, with a postal address for service in Brussels at the Legal Service, Greffe Contentieux, BERL 1/169, 200, rue de la Loi, 1049 Brussels, who consent to service by e-Curia, in

Case C-470/16

concerning a reference for a preliminary ruling under Article 267 TFEU from the High Court - Ireland, in the proceedings pending before that court between

North East Pylon Pressure Campaign Limited and Maura Sheehy (Applicants)

and

**An Bord Pleanála, the Minister for Communications, Energy and Natural Resources,
Ireland and the Attorney General (Respondents)**

and

EirGrid PLC (Notice Party)

on the interpretation of 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, hereinafter also "the Directive") and the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC (OJ 2005 L 124, p. 1) (hereinafter "the Aarhus Convention").

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I. LEGAL CONTEXT

Aarhus Convention

1. 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 Union by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), states in its preamble:

"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,

[...]"

2. 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 to justice in environmental matters in accordance with the provisions of this Convention."

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

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

4. Article 9 of the Aarhus Convention, headed "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.

In the circumstances where a Party provides for such a review by a 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 administrative procedural law of a Party requires this as a precondition,

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

[...]

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

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

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

EU Law

5. Directive 2011/92/EU (the "Directive") codified 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).
6. Article 11 of the Directive provides as follows:
 1. *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.
 2. *Member States shall determine at what stage the decisions, acts or omissions may be challenged.*
 3. *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 that 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 point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.*
 4. *The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.*

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.
 5. *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.*

7. The requirement for review procedures not to be prohibitively expensive laid down in the second subparagraph of Article 11(4) of the Directive 2011/92/EU appeared previously in the fifth paragraph of Article 10a of Directive 85/337/EEC. The provision is based on the wording used in Article 9(4) of the Aarhus Convention.

National law

Judicial review

8. In Ireland the judicial review system is a two stage process. Applicants must first seek permission (referred to as "leave") from the High Court to apply for judicial review, setting out the grounds for the application and the reliefs sought. It is only if and when such leave is granted that an application for judicial review may be made.
9. The general rule governing the award of litigation costs in Ireland is that "the costs follow the event" (Order 99 of the Rules of the Superior Courts). According to that principle, an applicant that is unsuccessful in his or her action will be ordered to pay the costs of the other party in addition to his or her own costs.
10. This general rule, is however, modified in the field of environmental and planning law. Pursuant to Section 50B of the Planning and Development Act, 2000 (as amended) (the "2000 Act"), where a procedure concerns areas falling within the scope of that provision, including, among others, reviews instituted under Union environmental impact assessment legislation, each party is required to pay his or her own costs.¹ This provision is intended to protect an unsuccessful applicant against an order to pay the costs of the other party.

II. THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED

11. The present request for a preliminary ruling arises in the context of proceedings determining the award of costs following an unsuccessful attempt by the Applicants to obtain leave to apply for judicial review.

¹ The amendment was inserted following the judgment of the Court in Case C-427/07 *Commission v Ireland*, ECLI:EU:C:2009:457, in which the Court declared that Ireland had failed to transpose into national law the requirement that a procedure not be "prohibitively expensive" provided for in Article 11 of the EIA Directive (paragraphs 92 to 94 of the judgment). Nevertheless, Commission services have since received several complaints claiming that the regime continues not to comply with the costs requirement as well as, with the need to ensure access to substantive and procedural review of decisions in the environmental field. Following an examination of such complaints the Commission opened a further infringement procedure for incorrect transposition of Article 11 of the EIA Directive (Case 2012-4028).

12. By their action, the Applicants had sought to challenge the *process that would lead to a decision* on an application for development consent. The application for development consent concerned the installation of an electricity interconnector between Ireland and Northern Ireland. The project was designated as a "project of common interest" under Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure.
13. The Applicants had alleged that the process leading to the adoption of a decision on development consent was vitiated by an administrative error. In particular, they claimed that information submitted to an inspector during an oral hearing was inconsistent with information that had been contained in the Environmental Impact Assessment. The application was instituted after the oral hearing, but prior to the adoption of a decision in relation to the application for development consent.
14. By judgment dated 12 May 2016, the High Court refused to grant leave to apply for judicial review, on the ground that the challenge was premature. The Court observed that while an examination of the case-law of the High Court revealed divergences concerning the stage at which proceedings may be instituted,² it was preferable on policy grounds to limit the right of judicial review as provided for in Section 50 of the 2000 Act, to decisions made at the end of a particular process.
15. Following this refusal, the successful parties applied to the High Court seeking their costs against the Applicants. The applicants, in turn, sought their costs against the other parties.
16. In the context of the determination of the cost proceedings, the question arose as to whether the Applicant's application for judicial review is to be considered as benefitting from the requirement laid down in Article 11(4) of Directive 2011/92/EU that procedures taken within the scope of that Article not be prohibitively expensive. The Court observes that while the procedure was dismissed for having been taken at an incorrect stage, Ireland had not adopted an explicit rule setting out the stage at which decisions, acts or omissions may be challenged. This is notwithstanding the obligation imposed on Member States by Article 11(2) of the Directive to determine the stage at which decisions, acts or omissions may be challenged.

² At paragraph 80 of the judgment of 12 May 2016, the Court refers to case-law where Section 50 of the 2000 Act was interpreted more broadly, and includes references to *Mac Mahon v An Bord Pleanála* [2010] IECH 431 and *An Taisce v An Bord Pleanála* [2015] IECH 604. See also paragraph 13 of the Request for a Preliminary Ruling.

17. Having doubts as to the correct interpretation of Union law, the High Court decided to suspend the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- "(i) *in the context of a national legal system where the legislature has not expressly and definitively stated at what stage of the process a decision is to be challenged and where this falls for judicial determination in the context of each specific application on a case-by-case basis in accordance with common law rules, whether the entitlement under art. 11(4) of Directive 2011/92/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;*
- (ii) *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);*
- (iii) *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;*
- (iv) *whether a national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, should interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in art. 9(3) of the 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;*
- (v) *whether, if the answer to question (iv)(a) and/or (b) is in the affirmative, the stipulation that applicants must "meet the criteria, if any, laid down in its*

national law" precludes the Convention being regarded as directly effective, in circumstances where the applicants have not failed to meet any criteria in national law for making an application and/or are clearly entitled to make the application (a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under Regulation No. 347/2013 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) *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; and*
- (vii) *in particular, whether a requirement in national law for a causative link between the alleged unlawful act or decision and damage to the environment as a condition for the application of national legislation giving effect to art. 9(4) of the 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".*

III. LEGAL ASSESSMENT

A. On the scope of the questions referred

18. The Commission observes that by its seven questions, the referring Court requests guidance on the interpretation and application of Directive 2011/92/EU and of the Aarhus Convention for the purposes of determining the right of the Applicants to be protected from an order to pay costs arising from an unsuccessful challenge to the process leading to a decision on an application for development consent.
19. As regards Directive 2011/92/EU, the referring court essentially inquires whether the challenge is to be considered as being subject to the costs requirements laid down in Article 11(4) of the Directive according to which procedures challenging decisions, acts or omissions, falling within the scope of that Article must not be 'prohibitively

expensive'.

20. Concerning the Aarhus Convention, the referring court inquires, firstly, as to the extent to which Article 9(3) of the Convention is to be given effect in the legal order of the Member States and whether the provision is directly effective (Questions four and five). That court further inquires whether Member States may provide in legislation for exceptions to the rule that costs not be prohibitively expensive, in circumstances where no such exception is provided for either in the Directive or in the Convention (Question six). In a seventh question, the referring court asks whether the Aarhus Convention precludes a contracting party from making the rights laid down in Article 9(4) of the Convention, subject to the requirement that there exist a causal link between an alleged unlawful decision and damage to the environment.
21. At the outset, the Commission submits that in a context where Article 11(4) of Directive 2011/92/EU is intended specifically to implement access to justice provisions laid down in Article 9(4) of the Aarhus Convention into the legal order of the Member States,³ the rights and obligations of individuals falling within the scope of application of the Directive fall, in the first instance, to be determined by reference to the provisions and requirements of that Directive.
22. It should therefore be clarified that while it may be necessary to interpret the rights and obligations under Directive 2011/92/EU with due regard to the spirit and purpose of the Aarhus Convention, the resolution of the present proceedings does not require a separate and parallel examination of the direct applicability of the Convention in the legal order of the Member States or of the compatibility of national law with provisions of the Convention.⁴
23. The Commission also considers that a reply to the sixth question, concerning the right of Member States to provide for exceptions to the costs requirements laid down in Article 11(4) of the Directive, does not appear necessary for the purposes of resolving the dispute in the main proceedings. It is apparent from the Reference for a Preliminary Ruling that the question results from exchanges before the national court, as regards

³ See recitals 18 to 22 of the Directive.

⁴ It is, in any event, recalled that the Court has confirmed that Article 9(3) of the Convention is not directly applicable: Case C-405/12 *P Stichting Natuur* ECLI:EU:C:2015:5 and Case C-240/09 *Lesoochránárske zoskupenie VLK (Slovak Bears)* ECLI:EU:C:2011:125. However, Article 11 of Directive 2011/92/EU is based on Articles 9(2) and (4) not 9(3) of the Convention.

the extent to which vexatious litigants could be prevented from benefitting from the costs protection offered by Article 11(4) of the Regulation. However, nothing in the Reference would suggest that the unsuccessful claim of the Applicants in the main proceedings was vexatious in character. On the contrary, on this point, the referring court observes that while the Applicants had instituted their challenge at an incorrect stage, the case-law concerning the correct stage at which proceedings are to be instituted is not without ambiguity in national law.⁵

24. It is recalled that in accordance with settled case-law, the preliminary reference procedure constitutes an instrument of cooperation, intended to assist the administration of justice, by enabling a national court to obtain a ruling on the interpretation or validity of Union law that is necessary for it to be able to resolve a particular dispute upon which it is called to adjudicate. While national courts are afforded wide discretion in determining both the necessity for a reference, and the terms of any questions referred, the Court has consistently held that, since its function under the reference procedure is to assist in the administration of justice, it will not deliver advisory opinions on general or hypothetical questions.⁶ With this in mind, the Court of Justice has, where necessary, reformulated questions referred to it, in order to ensure that it is in a position to provide a useful reply to the referring court.⁷
25. Having regard to the considerations set out above, the Commission submits that the seven questions referred by the national court may usefully be considered together, examined by reference to the provisions of Directive 2011/92/EU, interpreted in the light of the Aarhus Convention.
26. On this basis, the referring court may, by its questions, essentially be understood to inquire whether the requirement laid down in Article 11(4) of Directive 2011/92/EU for procedures falling within the scope of that Article not to be prohibitively expensive, is to be considered as applying to proceedings challenging the process leading to a decision on an application for development consent that has not yet been adopted, in

⁵ See paragraph 29 of the Reference for a Preliminary Ruling. Moreover, it is not clear from the Reference that Ireland has introduced legislation providing for exceptions to Article 11(4) of the Directive or would be proposing to introduce such legislation.

⁶ Joined Cases C-261/08 and C-348/08, *María Julia Zurita García and Aurelio Choque Cabrera v Delegado del Gobierno en la Región de Murcia*, ECLI:EU:C:2009:648; and Case C-470/12, *Pohotovost' s.r.o. v Miroslav Vašuta* ECLI:EU:C:2014:101.

⁷ Case C-233/15 *Oniors Bio*, EU:C:2016:305.

circumstances where the proceedings were dismissed for being premature, but where national law did not clearly specify the stage at which a decision may be challenged, as provided for under Article 11(2) of the Directive.

B. Reply

27. The Commission recalls that pursuant to Article 11(1) of Directive 2011/92/EU, Member States are required to ensure the existence of a review procedure that allows interested parties to challenge before a court of law or another independent and impartial body, the substantive or procedural legality of decisions, acts or omissions that are subject to the public participation provisions of the Directive.
28. It is apparent from Article 6(2)(a) of Directive 2011/92/EU, that the public participation provisions of the Directive expressly provide for a right to such participation as regards the determination of applications for *development consent*. It follows, that the obligation to ensure a review procedure laid down in Article 11(1) that meets the requirements laid down in paragraph 4,⁸ applies to decisions concerning the granting of development consent in a project such as that at issue in the main proceedings, namely, the proposed construction of an electricity interconnector between Ireland and Northern Ireland.
29. Of course, the extent of the right to review is circumscribed by the terms of Article 11 of Directive 2011/92/EU. It is, in particular, limited to challenges to *decisions, acts or omissions* falling within the scope of the public participation provisions of the Directive. In this regard, it is noted that the national court has found that the challenge in question concerned intermediate steps leading to a decision, as opposed to the final decision itself (which had yet to be taken). In these circumstances, the referring court inquires as to whether the challenge to the process leading to a decision, may be regarded as a challenge to a decision within the meaning of Article 11(1) of the Directive that must benefit from an entitlement for the costs not to be prohibitive.

⁸ It should be noted that while it is not apparent from the English language version of Article 11(4) of the Directive that the rule on costs applies to judicial proceedings, such an ambiguity does not arise in the French language version of the text. In any event, in Case C-530/11 *Commission v UK*, ECLI:EU:C:2014:67, the Court confirmed that the prohibition on procedures being prohibitively expensive within the meaning of (what is now) Article 11(4) of Directive 2011/92, includes the financial costs resulting from participation in judicial proceedings, and that the prohibitive nature of such costs must be assessed as a whole, taking into account all the costs borne by the party concerned, subject to the abuse of rights (paragraph 64).

30. The Commission submits that it is apparent from the judgment of the referring Court of 12 May 2016, that while the challenge in the main proceedings disputed *an intermediate step* in the determination of an application for development consent, its essential and ultimate concern was the *substance of the final determination* that would result from what, in its view, was a flawed decision-making process. Thus while the Applicants challenged a step in the decision-making process, their ultimate concern remained the anticipated outcome of that process, namely, a decision on development consent.
31. The Commission therefore considers that the fact that a challenge impugns intermediate steps taken as part of a process leading to a decision which has not yet been taken, does not mean that the challenge itself was not essentially concerned with the decision on development consent falling within the scope of Article 11(1) of Directive 2011/92/EU.
32. Moreover, nothing in the wording of Article 11(1) of the Directive would support an interpretation according to which procedures seeking to review decisions falling within the scope of that Article would be limited to procedures challenging decisions that *have already been taken*, and would exclude procedures challenging the process leading to a decision on an application for development consent *that has yet to be taken*.
33. On the contrary, the very existence of Article 11(2) of Directive 2011/92/EU, which requires Member States to determine the stage at which a procedure may be initiated, implies that Union law does not impose any particular requirement according to which the scope of the right of review laid down in Article 11(1) of the Directive, and the costs requirements laid down in paragraph 4, would only apply to procedures challenging a decision that has already been taken.
34. While Article 11(2) of Directive 2011/92/EU requires Member States to specify the stage at which review proceedings under Article 11(1) may be instituted, it is apparent from the Reference for a Preliminary Ruling that Ireland failed to provide such specification in its implementation of the Directive. The referring court explains that, as a result, the determination of the appropriate stage for the institution of a procedure is left to national judges to carry out on a case by case basis. Moreover, it is apparent

from the Reference that there exists considerable divergence between different members of the High Court, and consequently considerable uncertainty, as regards the appropriate stage at which judicial review proceedings may be taken.⁹

35. The Commission considers, however, that the principle of effectiveness precludes an interpretation of Article 11(2) of the Directive, according to which the determination as regards the correct stage in bringing judicial review proceedings, could only take place, on a case by case basis, after proceedings have been instituted.
36. A fundamental objective of the costs rule laid down in Article 11(4) of Directive 2011/92/EU is to ensure that interested parties are afforded access to a review procedure of decisions falling within the scope of the Directive and are not deterred from taking an action on the basis of their exposure to significant financial risk.¹⁰ Indeed, in Case C-260/11 *Edwards and Pallikaropoulos*, the Court observed that the requirement that costs not be ‘prohibitively expensive’ pertains, in environmental matters, to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual’s rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law.¹¹
37. However, it is manifest that that fundamental objective would be wholly undermined, if an Applicant would only know whether or not the action was taken at a correct stage, and whether or not he or she would be exposed to prohibitive costs, after the case was instituted and the costs incurred.¹²
38. The Commission therefore submits that where a Member State has failed to identify the stage at which proceedings under Article 11(1) may be challenged, Applicants may not be deprived of the protection against incurring prohibitive costs, on the grounds that they have instituted proceedings at an incorrect stage.
39. On the basis of these considerations, the Commission considers that the requirement

⁹ See paragraph 13 of the Reference for a Preliminary Ruling and paragraph 80 of the judgment of 12 May 2016 and the cases cited therein.

¹⁰ Case C-260/11 *Edwards and Pallikaropoulos*, ECLI:EU:C:2013:221, paragraph 35.

¹¹ Case C-260/11 *Edwards and Pallikaropoulos*, ECLI:EU:C:2013:221, paragraph 33.

¹² See, by analogy, Case C-427/07 *Commission v Ireland*, ECLI:EU:C:2009:457, paragraphs 93 and 94.

laid down in Article 11(4) of Directive 2011/92/EU that procedures seeking to challenge decisions falling within the scope of that Article not be 'prohibitively expensive', is not, in principle, limited to procedures challenging decisions that *have already been taken*, but may also include procedures challenging the process leading to a decision on an application for development consent that has not yet been adopted.

40. While the stage at which a decision, act or omission may be challenged is to be determined by Member States in accordance with Article 11(2) of the Directive, Applicants may not be deprived of the protection against incurring prohibitive costs, on the grounds that they have instituted proceedings at an incorrect stage, in circumstances where a Member State has not determined, in advance, the stage at which a decision may be challenged.
41. The Commission further underlines that it is clear from the terms of Article 11(1) of Directive 2011/92/EU, that the right of review provided for in that provision, and indeed the obligation that the procedure not be prohibitively expensive, is established by reference to the grounds for taking a procedure and its subject matter, and not by the outcome of the procedure. It follows that the fact that a challenge is ultimately unsuccessful on substantive or procedural grounds cannot be the basis for subjecting applicants to prohibitive costs.
42. For the sake of completeness, the Commission would add that even in the absence of an order to pay the costs of the other party, the Applicants may likely, in any event, on the basis of the applicable costs rules, be placed in a situation where they remain liable to discharge their own High Court costs as a result of the finding that the proceedings were initiated at an incorrect stage. Moreover, according to information received by the Commission as part of complaints submitted in relation to Ireland's implementation of Directive 2011/92/EU, such 'own costs' may still be substantial. It follows that even under the more favourable costs regime provided for in the 2000 Act, individuals or organisations in the situation of the Applicants in the main proceedings may nevertheless remain liable to discharge significant costs, including in circumstances where such costs result directly from the absence of national measures implementing Article 11(2) of the Directive.

IV. CONCLUSION

43. The Commission therefore proposes the following answers to the questions referred by the High Court (Ireland):

The requirement laid down in Article 11(4) of Directive 2011/92/EU that procedures seeking to challenge decisions falling within the scope of that Article not be 'prohibitively expensive', is not, in principle, limited to procedures challenging decisions that have already been taken, but may also apply to procedures challenging the process leading to a decision on an application for development consent that has not yet been adopted.

While the stage at which a decision, act or omission within the meaning of Article 11(1) of Directive 2011/92/EU may be challenged is to be determined by Member States in accordance with Article 11(2) of that Directive, where a Member State has failed to determine, in advance, the stage at which a procedure may be initiated, the principle of effectiveness precludes Applicants from being deprived of the protection against incurring prohibitive costs provided for in Article 11(4), on the grounds that their proceedings were instituted at an incorrect stage.



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