APPROVED [2020] IEHC 383

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 76 J.R.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

MINISTER FOR COMMUNICATIONS CLIMATE ACTION AND THE ENVIRONMENT IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

SHANNON LNG LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 14 September 2020

INTRODUCTION

1. The applicant in these judicial review proceedings seeks to challenge the establishment, by the European Commission, of a list of "projects of common interest" (as defined). The list purports to have been established pursuant to powers delegated to the European Commission under a basic legislative act, namely Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure.

2. The applicant is an environmental non-governmental organisation ("***ENGO***"). It is opposed to the inclusion, on the list of projects of common interest, of the proposed Shannon LNG terminal (and connecting pipeline). The applicant contends that the European Commission exceeded the limits of the powers delegated to it. In particular, it is contended that the European Commission failed to ensure that only those projects that fulfil the criteria prescribed under the basic legislative act were included on the list of projects of common interest. It is said that the European Commission itself has since accepted, in open correspondence, that the available data was not sufficient to allow consideration of the "sustainability" criteria in a meaningful manner.

3. The applicant acknowledges, as it must, that only the Court of Justice of the European Union has jurisdiction to invalidate the delegated regulation. A national court, such as the High Court, does not have jurisdiction to do so.

4. An action for annulment is normally brought before the General Court pursuant to Article 263 TFEU, with a right of appeal thereafter to the Court of Justice. The applicant did not pursue this route, saying that it would not be able to satisfy the standing (*locus standi*) requirements. Instead, the applicant seeks to bring the matter before the Court of Justice by way of the reference procedure provided for under Article 267 TFEU. More specifically, the applicant is requesting the High Court to make a reference to the Court

of Justice pursuant to Article 267 TFEU for a preliminary ruling on the validity of the delegated regulation.

TRANS EUROPEAN ENERGY NETWORKS REGULATION

5. It may assist the reader in better understanding the discussion of the jurisdictional issue which arises in these proceedings to pause now, and to provide a brief overview of the EU legislation at issue. The delegated regulation which the applicant seeks to have annulled has been made pursuant to Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure. This regulation is sometimes referred to as the "***Trans European Energy Networks Regulation***" or the "***TEN-E Regulation***". The latter term will be used throughout the remainder of this judgment. The delegated regulation is entitled Commission Delegated Regulation (EU) 2020/389, and is dated 31 October 2019 ("***the delegated regulation***").

6. The TEN-E Regulation lays down rules for the timely development and interoperability of trans-European energy networks. This is intended to achieve the energy policy objectives of the Treaty on the Functioning of the European Union ("***TFEU***"); to ensure the functioning of the internal energy market and security of supply in the Union; to promote energy efficiency and energy saving and the development of new and renewable forms of energy; and to promote the interconnection of energy networks.

7. The TEN-E Regulation addresses the identification of "projects of common interest" or "PCIs". These are projects which are necessary to implement priority corridors and areas falling under the energy infrastructure categories in electricity, gas, oil, and carbon dioxide set out in Annex II of the Regulation.

8. The legal effects of a project being designated as a project of common interest include *inter alia* the following. First, the "most rapid treatment legally possible" is to be given to the permit granting process for projects of common interest. The timely implementation of projects of common interest is to be facilitated by streamlining, coordinating more closely, and accelerating permit granting processes; and by enhancing public participation. The Irish State has designated An Bord Pleanála as the national competent authority in this regard. See *North East Pylon Pressure Campaign Ltd v. An Bord Pleanála* [2019] IESC 8.

9. Secondly, a project of common interest has a particular status for the purposes of the Habitats Directive (Directive 92/43/EC). More specifically, such a project shall be considered as being of public interest from an energy policy perspective, and may be considered as being of overriding public interest, provided that all the conditions set out in the Habitats Directive are fulfilled.

10. Thirdly, projects of common interest are eligible for European Union financial assistance in the form of grants for studies and financial instruments.

11. The TEN-E Regulation has delegated the power to adopt and review the Union list of PCIs to the European Commission. This is provided for, in particular, at articles 3, 4 and 16. The TEN-E Regulation establishes twelve regional groups which are to adopt a regional list of *proposed* projects of common interest. Relevantly, the European Commission participates in the decision-making of the regional groups.

12. Article 3(4) of the TEN-E Regulation provides as follows.

> 4. The Commission shall be empowered to adopt delegated acts in accordance with Article 16 that establish the Union list of projects of common interest ('Union list'), subject to the second paragraph of Article 172 of the TFEU. The Union list shall take the form of an annex to this Regulation.
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> In exercising its power, the Commission shall ensure that the Union list is established every two years, on the basis of the regional lists

> adopted by the decision-making bodies of the Groups as established in Annex III.1(2), following the procedure set out in paragraph 3 of this Article.
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> The first Union list shall be adopted by 30 September 2013.

13. Article 3(5) of the TEN-E Regulation provides that the European Commission, when adopting the Union list on the basis of the regional lists, shall ensure *inter alia* that only those projects that fulfil the criteria referred to in article 4 are included. These criteria include "sustainability". Sustainability shall be measured as the contribution of a project to reduce emissions, to support the back-up of renewable electricity generation or power-to-gas and biogas transportation, taking into account expected changes in climatic conditions.

14. It appears from the supplemental affidavit sworn on behalf of the State respondents by Mr Caoimhín Smith on 29 July 2020 that the initial draft ranking indicated that the cost/benefit ratio for the Shannon LNG terminal was <u>not</u> sufficient for it to be included on the draft list. However, following representations by the Irish State, the cost/benefit ratio of this project had been recomputed. See paragraphs 5 and 6 of the affidavit, as follows.

> "5. Against this background, at the meeting of 28 June 2019 the European Commission presented an initial draft ranking list of projects, for further discussion within the meeting, which was based on the aforementioned methodology as validated by the Regional Group, as previously set out to the Court. The initial draft ranking presented for discussion at this meeting indicated that the cost-benefit ratio for the Shannon LNG project was not sufficient to be included on the draft list. At this meeting, Ireland's needs and the benefits of the Shannon LNG project in the context of these needs were re-iterated by Ireland's representative. Following this meeting, Ireland's representative at the meeting sent an email on 2 July 2020 (*sic*) to the European Commission highlighting the important issues for Ireland in relation to peripherality and Brexit.
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> 6. In advance of the meeting of the Technical Decision Making Body of 5 July 2019, an updated draft ranking list of projects was provided by the European Commission. This updated draft ranking resulted in updated cost-benefit ratios for a number of projects, including the

> Shannon LNG project. In relation to Shannon LNG, the updated draft ranking document stated that '*The cost- benefit ratio of this project was recomputed taking into account also the isolation benefit, which was missing from the previous computation*.' I say that physical isolation benefits are provided for in the 'Methodology for assessing the gas candidate PCI projects' dated 27 June 2019, Exhibit CS1-3, at p. 188 of the paginated bundle of Exhibits (at benefit (g)). The updated ranking resulted in the Shannon LNG project and a number of other projects having cost-benefit ratios sufficient for inclusion on the draft list."

15. The solicitor acting on behalf of the applicant, Mr Fred Logue, has made an objection, in an affidavit delivered on 7 September 2020, to the late disclosure of this information. Objection is also taken that the email cited (which presumably had been sent on 2 July 2019 and not 2020) has not been exhibited. Mr Logue states that it remains unclear on what basis the physical isolation criteria, which were previously not validated for the Shannon LNG project and Ireland, became accepted as validated.

DELEGATION OF POWERS TO THE EUROPEAN COMMISSION

16. The jurisdiction to delegate powers to the European Commission is expressly provided for under Article 290 TFEU as follows.

> Article 290
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> 1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.
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> The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.
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> 2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:
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> (a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective 'delegated' shall be inserted in the title of delegated acts.

17. As appears, a power to adopt "non-legislative acts of general application" may be delegated to the European Commission. The phrase "non-legislative acts of general application" is used in contradistinction to a legislative act, i.e. a basic legislative act, adopted under the ordinary legislative procedure. The former may nevertheless represent a form of legislation in the general sense of that term. The delegated regulation impugned in this case has the effect of *amending* the TEN-E Regulation.

18. The basic legislative act must explicitly define the objectives, content, scope and duration of the delegation of power. The adoption of a delegated regulation is amenable to judicial review before the Court of Justice of the European Union. In particular, if the European Commission exceeds the discretion afforded to it under the basic legislative act, then the delegated regulation may be annulled.

19. This point is illustrated by the *Dyson* case law, which was cited by counsel on behalf of the applicant. This case law concerned the energy rating of vacuum cleaners. The manufacturer of the Dyson brand successfully challenged a delegated regulation which prescribed requirements for the labelling and the provision of supplementary product information for vacuum cleaners. The delegated regulation had purportedly been made pursuant to a Directive establishing a framework for the harmonisation of national measures on end-user information on the consumption of energy. The objective of the Directive had been to promote energy efficiency by providing end-users with accurate

information relating to the consumption of energy and other essential resources "during use" of the labelled products.

20. The delegated regulation required that the energy efficiency tests for vacuum cleaners be carried out with an empty receptacle, not a dust-loaded one. In Case T-544/13 RENV, *Dyson*, EU:T:2018:761, the General Court held that the delegated regulation was invalid in that it disregarded an "essential element" of the Directive. The Commission was obliged to adopt a method of calculation which made it possible to measure the energy performance of vacuum cleaners in conditions as close as possible to actual conditions of use. This required that the tests be carried out on the basis of the vacuum cleaner's receptacle being filled to a certain level, rather than on the basis of an empty receptacle.

21. For present purposes, it is the earlier judgment of the Court of Justice which is of more immediate relevance: Case C-44/16 P., *Dyson*, EU:C:2017:357. There, the Court of Justice confirmed that a delegated regulation is amenable to judicial review. See paragraphs 58 to 62 of the judgment as follows.

> "58. It must be recalled, first, that the possibility of delegating powers provided for in Article 290 TFEU aims to enable the legislature to concentrate on the essential elements of a piece of legislation and on the non-essential elements in respect of which it finds it appropriate to legislate, while entrusting the Commission with the task of 'supplementing' certain non-essential elements of the legislative act adopted or 'amending' such elements within the framework of the power delegated to it (judgment of 17 March 2016, *Parliament v Commission*, C-286/14, EU:C:2016:183, paragraph 54).
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> 59. It follows that the essential rules on the matter in question must be laid down in the basic legislation and cannot be delegated (see, to that effect, judgments of 5 September 2012, *Parliament v Council*, C-355/10, EU:C:2012:516, paragraph 64, and of 10 September 2015, *Parliament v Council*, C-363/14, EU:C:2015:579, paragraph 46).
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> […]
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> 61. The essential elements of basic legislation are those which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature (judgment of 5 September 2012, *Parliament v Council*, C-355/10, EU:C:2012:516, paragraph 65).

> 62. Identifying the elements of a matter which must be categorised as essential must be based on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned (judgment of 22 June 2016, *DK Recycling und Roheisen v Commission*, C-540/14 P, EU:C:2016:469, paragraph 48 and the case-law cited)."

22. The applicant in the present case similarly seeks judicial review of the decision to adopt the delegated regulation. The ultimate objective of the applicant is to have the delegated regulation annulled on the grounds, *inter alia*, that the European Commission exceeded the limits of the power delegated to it. More specifically, it is alleged that the Shannon LNG terminal does not satisfy the criteria prescribed under article 4 of the TEN-E Regulation. In consequence, it is said, the European Commission did not have power to include the project on the Union List of PCIs.

THE APPLICANT'S CLAIM AS PLEADED

23. The principal relief sought in these proceedings is to have the High Court make a reference to the Court of Justice pursuant to Article 267 TFEU to determine the validity of the delegated regulation adopting the 4th Union list of Projects of Common Interest insofar as it includes the proposed Shannon LNG terminal and connecting pipeline.

24. A related declaration is sought to the effect that Ireland and the Attorney General are in breach of an (alleged) obligation to provide a "clear mechanism" to allow the applicant to contest the validity of a decision of the European Commission for the purposes of Article 267 TFEU. It is pleaded that the Irish State is under an obligation to provide a dedicated and suitable mechanism by which the validity of a decision of the European Commission can be raised, irrespective of whether there is also an infringement by the national authorities.

25. Separately, it is alleged that the Irish State itself failed to conduct any or any adequate assessment for the purposes of articles 3 and 4 of the TEN-E Regulation. This obligation is said to be imposed upon the Irish State, in its capacity as a constituent part of the decision-making body for the purpose of the Union PCI list, i.e. as a member of the relevant regional group. It is further said that the project could not have been placed on the Union PCI list without the approval of the Irish State pursuant to articles 3(3)(a) and 3(4) of the TEN-E Regulation and pursuant to Article 172(2) TFEU. This was described in the course of argument as a form of "veto" over the inclusion of the Shannon LNG terminal in the Union PCI list.

26. For the sake of completeness, it should be noted that there are a number of additional grounds pleaded in the statement of grounds which have not yet been fully argued, and, accordingly, do not fall for determination in this judgment. For example, it is pleaded that there has been a failure to comply with the Climate Action and Low Carbon Development Act 2015. These grounds are to be the subject of a further hearing following the delivery of this judgment.

PROCEDURAL HISTORY

27. An earlier application on the part of the State respondents to adjourn these proceedings was refused for the reasons set out in a written judgment delivered on 3 April 2020, *Friends of the Irish Environment clg v. An Bord Pleanála* [2020] IEHC 159.

28. The substantive hearing of the application for judicial review took place over four days in June and July 2020. It became apparent during the course of the hearing that one of the principal issues in dispute between the parties was whether a national court has jurisdiction to make a reference for a preliminary ruling *in the absence of* a challenge to a national implementing measure or decision. The resolution of this dispute turns, in

large part, on the interaction between the procedures under Articles 263 and 267 TFEU. The interaction of these provisions has been discussed in detail in Hedemann-Robinson, *Enforcement of European Union Environmental Law* (2nd edition, Routledge, 2015). One of the limitations upon the preliminary reference procedure is summarised as follows at page 448.

> "First, utilisation of the [preliminary reference procedure] mechanism is dependent upon the ability of a private litigant to take legal action against another entity at national level involved in some way regarding the application or implementation of the contested EU act, typically a national authority. Notably, where the EU act does not involve the intervention of such an entity at national level, then it will not be possible to utilise the [preliminary reference procedure] with a view to seeking review of the legality of the act."

29. At the conclusion of the hearing on 3 July 2020, the court made an order giving the parties liberty to file written legal submissions addressing the discussion of these issues in Hedemann-Robinson's text. Both parties delivered very helpful written submissions on 20 July 2020. These submissions also make reference to more recent case law, which postdates the publication of *Enforcement of European Union Environmental Law* in 2015.

30. Thereafter, counsel on behalf of the applicant applied for leave to file a supplemental submission replying to that of the State respondents. This submission was filed on 31 July 2020. The State respondents subsequently filed a submission in rejoinder on 7 September 2020.

31. (As appears from paragraphs 14 and 15 above, the parties also filed supplemental affidavits).

32. Finally, it should be noted that the applicant has been granted leave to make a minor amendment to its statement of grounds in the following circumstances. As of the date when these judicial review proceedings were instituted on 30 January 2020, the delegated regulation had not yet come into force. This is because, under the provisions of

article 16(5) of the TEN-E Regulation as follows, a delegated act only comes into force after a period for objection has passed.

> 5. A delegated act adopted pursuant to Article 3 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

33. The period for objection had been extended, and the delegated regulation did not come into effect until 11 March 2020, when it was published in the Official Journal of the European Union (OJ L 74, 11.3.2020, p. 1–19).

34. The State respondents had taken a point in their statement of opposition to the effect that the judicial review proceedings were moot in that they had been overtaken by events, i.e. the coming into force of the draft regulation on 11 March 2020. At the hearing, it was suggested that the proceedings might have been premature. The argument that the proceedings were premature would only have been made out had the delegated regulation been objected to by either the European Parliament or the European Council, with the consequence that it never entered into force. Whereas the possibility of such an objection existed at the time the judicial review proceedings were instituted on 30 January 2020, in the events that transpired, no objection was, in fact, taken. This has the consequence that the delegated regulation is now in force.

35. Given this chronology, the State respondents, very sensibly, withdrew the plea that the proceedings were moot and/or premature at the hearing in July 2020. The applicant was granted leave to amend the statement of grounds so as to reflect that the delegated regulation only came into force in March 2020. An amended statement of grounds was duly filed on 15 July 2020.

ARTICLE 263 TFEU

36. As discussed presently, much of the dispute between the parties centres on the interaction between (i) the preliminary reference procedure under Article 267 TFEU, and (ii) the direct action procedure under Article 263 TFEU. The applicant argues that—in order to avoid a "gap" in judicial protection—the preliminary reference procedure must compensate for the restrictions inherent in the direct action procedure. To assist the reader in understanding the discussion of this issue which follows, it is proposed to pause briefly to explain the latter procedure.

37. Article 263 TFEU provides that the Court of Justice of the European Union shall review the legality of *inter alia* acts of the European Commission. An action for annulment may be brought by a Member State, the European Parliament, the Council or the Commission. An action may also be brought by individuals who meet the following standing (*locus standi*) requirement.

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

38. Proceedings under Article 263 must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

39. It is well established that a person, who would have had *locus standi* to bring a direct action under Article 263 TFEU, is not entitled to circumvent the two month time-limit by seeking instead to invalidate the act by the use of the preliminary reference procedure in national law proceedings taken after the expiry of the time-limit. (Case C-370/12, *Pringle*, EU:C:2012:756, at paragraphs 38 to 44). Put otherwise, if a person would

beyond doubt have had standing to bring a direct action for annulment pursuant to Article 263 TFEU, that person is confined to that remedy; and cannot instead bring proceedings before a national court and seek to rely on Article 267.

40. It does not, however, follow as a corollary that a person who does not have standing under Article 263 TFEU is automatically entitled to rely on Article 267 TFEU. As discussed below, the possibility of a reference is contingent always on the national court having jurisdiction to make a preliminary reference in the particular circumstances of the case.

41. The standing requirement under what is now Article 263 TFEU, and its precursor, Article 230 TEC, has been much discussed in the case law. In particular, there have been a number of attempts to give a broader interpretation to the concept of "direct and individual concern". The traditional view, as set out in Case 25/62, *Plaumann & Co. v Commission*, EU:C:1963:17, is that a person—other than those to whom a decision is addressed—may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons.

42. An unsuccessful attempt to argue for a different standard in the context of environmental litigation had been made in Case 321/95 P, *Stichting Greenpeace Council (Greenpeace International)*, EU:C:1998:153. Greenpeace International had sought to annul a decision of the European Commission to provide financial assistance for the construction of two electricity-power stations in the Canary Islands. The legality of the decision was challenged on the basis that the projects had not been properly assessed for the purposes of the Environmental Impact Assessment Directive (Directive 85/337/EEC) ("***the EIA Directive***").

43. It had been argued that the traditional case-law, i.e. to the effect that an act must be of *individual concern* to an applicant, would have the practical effect of never allowing individuals to challenge measures which affect their environmental interests. It was said that an interest in environmental protection is common to and is shared by all citizens, and that there cannot, therefore, be a closed class of persons affected by harm to the environment.

44. The applicants proposed that the following *locus standi* requirement should apply in proceedings where it is pleaded that damage to the environment has been caused by an infringement by the EU institutions of their obligations under EU law. An applicant would be required to demonstrate that:

    (a) he/she has personally suffered (or is likely to suffer) some actual or threatened detriment as a result of the allegedly illegal conduct of the EU institution concerned, such as a violation of his or her environmental rights or interference with his or her environmental interests;

    (b) the detriment can be traced to the act challenged; and

    (c) the detriment is capable of being redressed by a favourable judgment.

45. These arguments were rejected by the Court of Justice. Relevantly, the Court held that Greenpeace International's rights derived under the EIA Directive would be fully protected by proceedings before the national courts challenging the development consents in respect of the project. The national courts could, if need be, refer a question to the Court of Justice for a preliminary ruling.

46. The Court of Justice returned to consider the question of standing in direct actions a short number of years later in *Jégo-Quéré & Cie SA*. The Court of First Instance had held that the strict interpretation of the standing requirement must be reconsidered (Case T-177/01, *Commission v. Jégo-Quéré & Cie SA*, EU:T:2002:112). A new standard was formulated

whereby a natural or legal person would be regarded as individually concerned by a measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The Court of First Instance held that this expanded formulation was necessary in order to ensure effective judicial protection for individuals. In reaching this conclusion, the Court of First Instance emphasised the limitations of the preliminary reference procedure. See paragraph 45 of the judgment as follows.

> "However, as regards proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC, it should be noted that, in a case such as the present, there are no acts of implementation capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice (see [paragraph] 43 of the Opinion of Advocate General Jacobs delivered on 21 March 2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, I-6681)."

47. The passage from the Opinion of Advocate General Jacobs, cited by the Court of First Instance, reads as follows.

> "Third, it may be difficult, and in some cases perhaps impossible, for individual applicants to challenge Community measures which - as appears to be the case for the contested regulation - do not require any acts of implementation by national authorities. In that situation, there may be no measure which is capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure might, in some instances, be able to bring the validity of a Community measure before the national courts by violating the rules laid down by the measures and rely on the invalidity of those rules as a defence in criminal or civil proceedings directed against him does not offer the individual an adequate means of judicial protection. Individuals clearly cannot be required to breach the law in order to gain access to justice."

48. On appeal, the Court of Justice set aside the judgment of the Court of First Instance, and the application for an annulment was declared to be inadmissible. (Case C-263/02 P., *Commission v. Jégo-Quéré & Cie SA*, EU:C:2004:210). The Court of Justice held that the extended interpretation of the standing requirement which had been adopted by the Court of First Instance would have had the effect of removing all meaning from the requirement of "individual concern" set out in the fourth paragraph of what was then Article 230 TEC.

49. Relevantly, the Court of Justice held that the limitations on the preliminary reference procedure could not be relied upon to expand the jurisdiction under Article 230 TEC. See paragraphs 32 to 34 of the judgment as follows.

> "32. In that context, in accordance with the principle of sincere cooperation laid down in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act (see *Unión de Pequeños Agricultores v Council*, paragraph 42).
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> 33. However, it is not appropriate for an action for annulment before the Community Court to be available to an individual who contests the validity of a measure of general application, such as a regulation, which does not distinguish him individually in the same way as an addressee, even if it could be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures (see *Unión de Pequeños Agricultores v Council*, paragraphs 37 and 43).
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> 34. Accordingly, an action for annulment before the Community Court should not on any view be available, even where it is apparent that the national procedural rules do not allow the individual to contest the validity of the Community measure at issue unless he has first contravened it."

50. The Court of Justice had reached a similar conclusion in its earlier judgment in Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462, and had declined to follow the approach advanced by Advocate General Jacobs. See paragraphs 40 to 42 of the judgment as follows.

> "40. By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, *Les Verts v Parliament*, paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity.
>
> 41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.
>
> 42. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act."

51. The applicant in the present case has placed emphasis on the requirement for "effective judicial protection" in paragraph 41. This requirement has to be read, however, in conjunction with the next paragraph, and, in particular, the qualifying words "the legality of any decision or other national measure".

52. The case law discussed thus far had all been decided in the context of Article 230 TEC (or its precursor). It is next necessary to consider the *modified* standing requirement

introduced under the Treaty on the Functioning of the European Union. Article 263 TFEU now provides that, in the case of proceedings taken against a regulatory act which does not entail implementing measures, it is sufficient that the regulatory act is of "direct concern" to an applicant. It is not necessary that it also be of "individual" concern.

53. The Court of Justice has since explained that a "regulatory act" does not encompass legislative acts within the meaning of Article 289(3) TFEU. (Case C-583/11 P, *Inuit Tapiriit Kanatami*, EU:C:2013:625, paragraphs 60 and 61). It would seem to follow that an action for annulment of a *delegated* regulation would be subject to the more relaxed standing requirement. This is because Article 290 TFEU characterises delegated regulations as *non-legislative* acts of general application which supplement or amend certain non-essential elements of a legislative act.

54. The Court of Justice took the opportunity in *Inuit Tapiriit Kanatami* to confirm that the modification of the standing requirement for regulatory acts did not affect the standing requirement *other than* for regulatory acts. The established case law on the "individual concern" requirement thus continues to apply.

55. The interaction between the preliminary reference procedure and the direct action procedure is addressed as part of the discussion at paragraphs 89 to 107 of the judgment in *Inuit Tapiriit Kanatami*. It is reiterated there that the Court of Justice alone has jurisdiction to declare a European Union act invalid. However, where the *implementation* of a European Union act of general application is a matter for the Member States, then the invalidity of the European Union act at issue may be raised before the national courts, and the latter may request a preliminary ruling from the Court of Justice pursuant to Article 267 TFEU. Individual parties have the right, in proceedings before the national courts, to challenge the legality of *any decision or other national measure* relative to the application to them of a European Union act of general application.

56. The Court of Justice further held that EU law does not require that an individual should be entitled to bring annulment actions against *legislative acts*, as their primary subject matter, before the national courts.

57. The State respondents have identified, in their supplemental written legal submissions of 20 July 2020, a very recent Advocate General's Opinion on the issue of standing, Case C-352/19 P, *Région de Bruxelles-Capitale*. The proceedings involved a challenge to a regulatory act not entailing implementing measures. As such, the less stringent requirement of "direct concern" applied. The Advocate General, in concluding that the applicant met this standing requirement, emphasised that the absence of national implementing measures had the consequence that the possibility of raising the validity of the EU act in proceedings before the national courts were limited. In effect, the applicants would have to infringe the provisions of national law, and then plead invalidity in response to proceedings taken *against* them.

> "168. According to settled case-law, the expression 'does not entail implementing measures' must be interpreted in the light of the objective of that provision, which, as is apparent from its drafting history, is to ensure that individuals do not have to break the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he or she did not have a direct legal remedy before the EU Courts for the purpose of challenging the lawfulness of the regulatory act. In the absence of implementing measures, a natural or legal person, although directly concerned by the act in question, would be able to obtain judicial review of the act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national court."*
>
> *Footnote omitted.

58. The Advocate General adopts the approach that the standing rules under Article 263 TFEU should be interpreted so as to fill the gap in the system of judicial remedies with regard to those cases where the indirect review of European Union acts, *i.e.* via the

preliminary reference procedure; is impossible or would be artificial. Applicants should not be expected to create artificial litigation, i.e. by breaching national law, in order to challenge national acts that, if it were not for the breach of law, would have never come into existence. Rather, they should be able to invoke Article 263 TFEU.

Summary

59. As appears from the foregoing discussion of the case law, the limitation upon the use of the preliminary reference procedure to question the validity of EU measures has long since been recognised. The procedure will not be available in the absence of national implementing measures or decisions which are capable of forming the basis of an action before the national court. The approach adopted to any "gap" in effective judicial protection arising has been to advocate for a less stringent application of the standing requirement under Article 263 (as opposed to a wider availability of the preliminary reference procedure under Article 267 TFEU).

DETAILED DISCUSSION

JURISDICTION OF NATIONAL COURT

60. The gravamen of the applicant's complaint is that the delegated regulation is invalid in circumstances where, or so it is said, the European Commission did not ensure compliance with the criteria specified under the TEN-E Regulation.

61. As discussed earlier, a delegated regulation can, in principle, be annulled if it is established that the European Commission exceeded the discretion afforded to it under the basic legislative act. This follows from Article 290 TFEU which provides that the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. A delegated power must comply with the essential elements of the enabling act, and come within the regulatory framework as defined by the basic legislative act (Case C-44/16 P, *Dyson*, EU:C:2017:357, at paragraph 53). If it fails to do so, then it can be annulled.

62. Crucially, however, a national court does not have jurisdiction to declare a regulatory act, such as the delegated regulation at issue in this case, to be invalid. Rather, such a declaration may only be made by the Court of Justice of the European Union ("***the CJEU***"). There are two routes by which proceedings seeking to invalidate a regulatory act can be brought before the CJEU. First, proceedings may be instituted pursuant to Article 263 TFEU ("***direct action***"). The proceedings are brought, in the first instance, before the General Court, with a right of appeal thereafter to the Court of Justice. Secondly, the question of the validity of a regulatory act may be raised by a national court in the context of a reference for a preliminary ruling pursuant to Article 267 TFEU ("***preliminary reference procedure***"). Such a reference is made to the Court of Justice.

63. On the facts of the present case, the applicant has not attempted to institute proceedings pursuant to Article 263 TFEU. The explanation offered for this omission is that any such

proceedings would inevitably have been dismissed as inadmissible in circumstances where, or so it is said, the applicant would not satisfy the standing requirement, namely that the regulatory act be of "direct concern" to it.

64. The applicant chose instead to institute these judicial review proceedings before the national court. The principal relief sought in these proceedings is to have the High Court make a reference to the Court of Justice pursuant to Article 267 TFEU, and to invite that court to determine the validity of the delegated regulation insofar as it includes the proposed Shannon LNG terminal and connecting pipeline in the Union List of PCIs.

65. Logically, the first issue to be addressed in this judgment is whether the High Court has jurisdiction to make a reference for a preliminary ruling in the circumstances of this case. It is only if the High Court does have jurisdiction that it would then become necessary to consider the grounds upon which the applicant seeks to challenge the delegated regulation, with a view to determining whether there is sufficient doubt as to its validity to justify the making of a reference.

66. The starting point of the analysis of the jurisdictional issue must be the text of Article 267 TFEU, as follows.

> Article 267
> (ex Article 234 TEC)
>
> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

67. As appears, it is a condition precedent to the making of a reference that an answer to the question raised must be necessary to enable the national court to give judgment in the proceedings before it. This presupposes that there is a controversy pending before the national court, the resolution of which is dependent on the response to the reference.

68. A practical example of the operation of the preliminary reference procedure is provided by earlier proceedings taken by the applicant in respect of the Shannon LNG terminal, namely, *Friends of the Irish Environment v. An Bord Pleanála* (High Court 2018 No. 734 J.R.). Those proceedings seek to challenge a decision of An Bord Pleanála to amend the terms of a planning permission which authorised the construction of the gas terminal, by extending the duration of the planning permission. Those proceedings were heard by this court over four days in January and February 2019. A number of issues arose in respect of the interpretation of the Habitats Directive, and this court made a preliminary reference to the Court of Justice (Case C-254/19, *Friends of the Irish Environment*). The Advocate General delivered her opinion on 30 April 2020, and the Court of Justice delivered its judgment on 9 September 2020. Now that judgment has been delivered by the Court of Justice, the matter will return to the High Court with a view to its determining the proceedings before it. This court will have to make a final determination, in the light of the ruling of the Court of Justice and having heard further submissions from the parties, as to whether An Bord Pleanála's decision should be set aside or not.

69. By contrast, on the facts of the present case, the sole function of the national court would be to refer the question of the validity of the delegated regulation to the Court of Justice. The Court of Justice would then determine that issue itself. Thereafter, there would be no outstanding issue remaining to be determined by the national court. This is because there is no underlying dispute before the High Court, the outcome of which turns on the validity of the delegated regulation. The applicant has not identified any implementing measure or decision on the part of any national authority which gives effect to the delegated regulation. Rather, the entire purpose of the judicial review proceedings is to seek to have the delegated regulation annulled by the Court of Justice. The proceedings are intended merely as a vehicle by which to bring this issue before the Court of Justice.

70. That this is so is evident from the terms of the declaration sought by the applicant at paragraph (d)(2) of the statement of grounds. It is pleaded that the Irish State is under an obligation to provide a dedicated and suitable mechanism by which the validity of a decision of the European Commission can be raised irrespective of whether there is also an infringement by the national authorities.

71. The fatal flaw in the applicant's argument is that a reference pursuant to Article 267 TFEU is not "necessary" to enable the High Court to give judgment. The High Court is not seised of any underlying dispute in respect of which it has jurisdiction to deliver judgment. In truth, the only issue in controversy is the validity of the delegated regulation. This is not a controversy which the High Court has jurisdiction to determine, and, in any event, the *legitimus contradictor* to this controversy, the European Commission, is not a party to these proceedings. There is simply nothing of substance in these proceedings in respect of which the High Court could deliver judgment.

72. There is nothing novel in this analysis. As discussed at paragraphs 36 to 58 above, the limitation upon the use of the preliminary reference procedure to question the validity of

EU measures has long since been recognised. The procedure will not be available in the absence of national implementing measures or decisions which are capable of forming the basis of an action before the national court. This limitation had been expressly cited by the General Court in its unsuccessful attempt to liberalise the standing rules for direct actions under what is now Article 263 TFEU. See Case C-177/01, *Jégo-Quéré*, EU:T:2002:112.

73. The principal argument advanced by counsel in support of the application for the making of a reference to the Court of Justice is to say that the European Union is founded on the rule of law, and that this implies that there must be a procedure available to allow a legal challenge to be brought against the validity of a regulatory act. This argument continues to the effect that the limitations on the right of direct action under Article 263 TFEU must be compensated for by a more expansive use of the procedure under Article 267 TFEU.

74. This argument is inconsistent with the case law discussed at paragraphs 36 to 59 above. Whereas there has been much discussion in the case law of the limitations upon the availability of the preliminary reference procedure, and the direct action procedure, respectively, the case law does not allow for a freestanding procedure whereby an applicant can utilise the preliminary reference procedure to launch a challenge to a piece of EU legislation notwithstanding the absence of any national implementing measures or decisions.

75. The applicant, in its supplemental submissions of 31 July 2020, has drawn attention to the judgment in Case C-644/17, *Eurobolt BV*, EU:C:2019:555. Particular reliance is placed on the Court of Justice's response to the first two questions referred by the national court, as follows.

> 1. Article 267 TFEU must be interpreted as meaning that, in order to contest the validity of a piece of secondary EU legislation, an individual may rely before a national court or tribunal on complaints that could be put forward in the context of an action for annulment

under Article 263 TFEU, including complaints alleging a failure to satisfy the conditions for adopting such a piece of legislation.

2. Article 267 TFEU, read in conjunction with Article 4(3) TEU, must be interpreted as meaning that a national court or tribunal is entitled, prior to bringing proceedings before the Court of Justice, to approach the EU institutions that have taken part in drawing up a piece of secondary EU legislation, the validity of which is being contested before that court or tribunal, in order to obtain specific information and evidence from those institutions which it considers essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned and so that it may avoid referring a question to the Court of Justice for a preliminary ruling for the purpose of assessing the validity of that act.

76. With respect, reliance on this judgment does not advance the applicant's position. It is not in dispute that—provided the national court has *jurisdiction* to make a reference in the particular case—the preliminary reference procedure can be used to challenge the validity of secondary legislation on the grounds *inter alia* that the secondary legislation failed to satisfy the conditions for adopting such a piece of legislation. As already discussed at paragraphs 16 to 22 above, a delegated regulation can, in principle, be invalidated by the use of the preliminary reference procedure on the grounds that the conditions to which the delegation is subject have not been complied with. The difficulty which the applicant faces is its inability to identify any acts of implementation by any national authority capable of forming the basis of an action before the High Court. The judgment in *Eurobolt BV* does not speak to this issue.

77. It remains the position, therefore, that there may be circumstances in which a particular individual will neither have standing to pursue a direct action pursuant to Article 263 TFEU nor be able to identify a national implementing measure or decision which might ground the making of an application for a preliminary reference. This does not—contrary to the implication of the applicant's submissions—represent a breach of the rule of law. It will always be open to an applicant directly concerned with a regulatory act to bring a direct action pursuant to Article 263 TFEU. The rule of law does not require that a party

who does not meet the *locus standi* requirements under Article 263 TFEU must always be afforded a remedy.

SCHREMS V. DATA PROTECTION COMMISSIONER

78. Counsel on behalf of the applicant also sought to argue that the traditional understanding that there was no freestanding right to make a reference pursuant to Article 267 TFEU, i.e. in the absence of national implementing measures or decisions, may no longer be correct following on from the judgment in Case C-362/14, *Schrems*, EU:C:2015:650 ("***Schrems I***"). In particular, it is said that the Court of Justice expressly envisaged that a preliminary reference might be made for the sole purpose of having a decision of the European Commission invalidated, with no further step required thereafter by the national court. Counsel described this as a "bespoke" procedure, borrowing from the language of Clarke C.J. in *Data Protection Commissioner v. Facebook Ireland Ltd* [2019] IESC 46.

79. This case law is relied upon in support of the applicant's plea that the Irish State is under an obligation to provide a dedicated and suitable mechanism by which the validity of a decision of the European Commission can be raised irrespective of whether there is also an infringement by the national authorities.

80. With respect, these submissions are not well founded, and ignore the specific legislative context against which the judgment in *Schrems I* came to be delivered. The judgment concerned the transfer of personal data to a third country, the United States of America, by Facebook Ireland. This transfer was subject to Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("***the Data Protection Directive***"). Under article 28 of the Data Protection Directive, each Member State had been required to designate a supervisory authority

which would be responsible for monitoring the application within its territory of the provisions adopted pursuant to the Directive. A national supervisory authority is required to act with complete independence in exercising the functions entrusted to it. Relevantly, one of the functions of a national supervisory authority is to examine and determine a claim made by an individual concerning the protection of his rights and freedoms in regard to the processing of personal data. The decision by the national supervisory authority must be amenable to an appeal through the courts.

81. One of the principal issues for resolution in *Schrems I* had been whether a national supervisory authority's competence to examine a complaint by an individual, to the effect that his data had been transferred in breach of the requirements of the Data Protection Directive, is *excluded* where the European Commission has previously made a decision which finds that a third country ensures an adequate level of protection.

82. The Court of Justice held that the existence of a decision by the European Commission did not oust the national supervisory authority's obligation to examine and determine the claim with all due diligence. Rather, the Data Protection Directive envisaged that a national supervisory authority, when hearing a claim lodged by a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him, must be able to examine, *with complete independence*, whether the transfer of that data complies with the requirements laid down by the Directive.

83. This finding by the Court of Justice gave rise to the following conundrum. Neither the national supervisory authority nor the national courts have jurisdiction to invalidate a decision of the European Commission. This lies within the exclusive jurisdiction of the Court of Justice. This guarantees legal certainty by ensuring that EU law is applied uniformly. Yet, the national supervisory authority is obliged to examine *independently* whether the impugned transfer of data complies with the requirements laid down by the

Data Protection Directive, notwithstanding the existence of a decision of the European Commission on the precise point.

84. The solution to this conundrum is for the Member States to ensure that there is a procedure in place whereby any well-founded concern as to the validity of the European Commission's decision can be brought before the Court of Justice. See paragraphs 63 to 65 of the judgment in *Schrems I* as follows.

> "Having regard to those considerations, where a person whose personal data has been or could be transferred to a third country which has been the subject of a Commission decision pursuant to Article 25(6) of Directive 95/46 lodges with a national supervisory authority a claim concerning the protection of his rights and freedoms in regard to the processing of that data and contests, in bringing the claim, as in the main proceedings, the compatibility of that decision with the protection of the privacy and of the fundamental rights and freedoms of individuals, it is incumbent upon the national supervisory authority to examine the claim with all due diligence.
>
> In a situation where the national supervisory authority comes to the conclusion that the arguments put forward in support of such a claim are unfounded and therefore rejects it, the person who lodged the claim must, as is apparent from the second subparagraph of Article 28(3) of Directive 95/46, read in the light of Article 47 of the Charter, have access to judicial remedies enabling him to challenge such a decision adversely affecting him before the national courts. Having regard to the case-law cited in paragraphs 61 and 62 of the present judgment, those courts must stay proceedings and make a reference to the Court for a preliminary ruling on validity where they consider that one or more grounds for invalidity put forward by the parties or, as the case may be, raised by them of their own motion are well founded (see, to this effect, judgment in *T & L Sugars and Sidul Açúcares v Commission*, C-456/13 P, EU:C:2015:284, paragraph 48 and the case-law cited).
>
> In the converse situation, where the national supervisory authority considers that the objections advanced by the person who has lodged with it a claim concerning the protection of his rights and freedoms in regard to the processing of his personal data are well founded, that authority must, in accordance with the third indent of the first subparagraph of Article 28(3) of Directive 95/46, read in the light in particular of Article 8(3) of the Charter, be able to engage in legal proceedings. It is incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned to put forward the objections which it considers well founded before the national courts in order for them, if they share its

> doubts as to the validity of the Commission decision, to make a reference for a preliminary ruling for the purpose of examination of the decision's validity."

85. The form of Article 267 reference envisaged by *Schrems I* is highly unusual in that the response of the Court of Justice will be largely dispositive of the national proceedings. The principal issue for determination on the preliminary reference will be the validity of the European Commission's decision. Once that issue has been determined, there will be little of substance left over for the national court to determine.

86. The unconventional nature of a reference of this type has been commented upon by the Supreme Court in its judgment in *Data Protection Commissioner v. Facebook Ireland Ltd* [2019] IESC 46. Clarke C.J. described the procedure as "bespoke" and "sui generis". The principal relief sought in the proceedings was the making of a preliminary reference, seeking to invalidate the European Commission's decision.

87. The applicant has sought to seize upon the judgment in *Schrems I* to advance an argument that there is an obligation upon a Member State to provide a freestanding procedure in all instances where it is alleged that an act of an EU institution is invalid. The case law does not, however, support this argument.

88. First, as the discussion of the judgment in *Schrems I* above indicates, the obligation to provide the "bespoke" procedure arises as a result of the very particular requirements of the Data Protection Directive.

89. Secondly, although there may, ultimately, be little of substance left over to the national court once a preliminary reference pursuant to the Data Protection Directive has been determined, the reference will, crucially, have been made in the context of a dispute between (i) the individual asserting a breach of his data protection rights, and (ii) the national supervisory authority. The existence of this dispute, at the national level, is the critical distinction between the circumstances of the present case and those of *Schrems I*.

The precise purpose of making a preliminary reference in the former context is to vindicate the rights of the individual, not only as expressly provided for under the Data Protection Directive itself, but also under the Charter of Fundamental Rights. The absence of a procedure whereby the individual could, in effect, challenge the validity of the European Commission's decision under the Data Protection Directive would be to leave him without a lawful remedy.

90. By contrast, in the present case, not only is there no dispute at the national level, the applicant is not in a position to assert any right of its which is said to be infringed, whether by reference to the TEN-E Regulation or the Charter of Fundamental Rights.

91. If and insofar as the applicant wishes to maintain that its status as an ENGO should allow it to challenge what it alleges is a breach of the requirements of the TEN-E Regulation, this is something which could only be done in the context of proceedings under Article 263 TFEU. It cannot be relied upon as a basis for enlarging the jurisdiction to make a preliminary reference under Article 267 TFEU, so as to encompass cases where there is no dispute at the national level.

IRELAND'S ROLE UNDER TEN-E REGULATION

92. In an attempt to identify a dispute between the applicant and a national competent authority which might ground this court's jurisdiction, counsel on behalf of the applicant has sought to emphasise the role which Ireland, as Member State, plays under the TEN-E Regulation. This court is invited to rule on the legality of the Irish State's actions as a member of the regional group which included the Shannon LNG terminal in the regional list of proposed projects of common interest.

93. It is alleged that the Irish State itself failed to conduct any or any adequate assessment for the purposes of articles 3 and 4 of the TEN-E Regulation. More specifically, it is

pleaded that the Irish State was obliged to carry out a sustainability assessment prior to its recommendation to approve the inclusion of the Shannon LNG terminal in the Union PCI list. This obligation is said to be imposed upon the Irish State in its capacity as a constituent part of the decision-making body for the purpose of the Union PCI list, i.e. as a member of the relevant regional group. It is further said that the project could not have been placed on the Union PCI list without the approval of the Irish State pursuant to articles 3(3)(a) and 3(4) of the TEN-E Regulation and pursuant to Article 172(2) TFEU.

94. In the course of argument before me, it was suggested that the Irish State holds a form of "veto" over the inclusion of the Shannon LNG terminal in the Union PCI list. The argument is summarised as follows in the supplemental written submissions of 31 July 2020 (at paragraph 9).

> "As already noted, the Shannon LNG project could not be placed on the PCI list without the positive approval of the State, pursuant to Article 172(2) TFEU and Article 3(3)(a) of the TEN-E Regulation. This gives the Respondents an effective veto power over projects relating to its territory. No fetter is placed on the Member State as to the basis on which approval can be withheld i.e the Member State is not confined to the reasons contained in the Regulation – the only requirement placed on the Member State is that it is obliged to present 'substantiated reasons' to the Regional Group if it exercises its veto."

95. It has also been submitted that, insofar as "implementing measures" or "measures of application" are necessary for a reference under Article 267 TFEU (which is disputed by the applicant), then there is no reason to treat the failure by the Irish State to exercise its so-called veto under Article 172(2) TFEU and/or the TEN-E Regulation as falling outside this concept. (See paragraph 28 of the supplemental written submissions).

96. With respect, these arguments are premised on a mischaracterisation of the legal status of the procedural steps which occur prior to the adoption of a delegated regulation by the European Commission. The procedural steps, such as the decision-making by the regional group, may not themselves be the subject of an application for an annulment.

Rather, if and insofar as it is alleged that there has been a legal defect in the procedures *leading up to* the amendment of the TEN-E Regulation by the delegated regulation of 31 October 2019, then this is something which can only be relied upon in a challenge to the validity of the delegated regulation itself.

97. The applicant, by inviting this court to review the validity of the decision-making procedures leading up to the adoption of the delegated regulation by the European Commission is, in truth, engaged in a collateral challenge to the validity of the delegated regulation itself. This court does not have jurisdiction to rule on the validity of the delegated regulation. This court cannot disregard the division of competences as between the national courts and the Court of Justice of the European Union, as prescribed under the TFEU, by purporting to rule on the validity of an earlier stage of the decision-making process. It would be entirely artificial to attempt to parse out the decision-making process in this way. Were this court to purport to find that the regional group (which included the Irish State and European Commission) had erred in its assessment of the projects, this would be to question the validity of the ultimate decision to adopt the delegated regulation. One cannot condemn the earlier procedural step without also condemning the ultimate decision which follows on from that step.

98. The actions of the Irish State as a member of the regional group and as the Member State upon whose territory the proposed project is to be located cannot be viewed in isolation, capable of being reviewed separately from the ultimate decision to adopt the delegated regulation. These actions do not involve distinct national measures which implement a previously adopted European Union measure. Rather, the actions of the Member State are performed *in advance of* the adoption of the delegated regulation. As such, they are incapable of being challenged independently of the European Union measure.

AARHUS CONVENTION ON ACCESS TO ENVIRONMENTAL JUSTICE

99. The applicant submits that—in order to give effect to the Aarhus Convention on Access to Justice in Environmental Matters—an ENGO must have an entitlement to seek a preliminary reference even in the absence of a challenge to a national implementing measure or decision.

100. Counsel on behalf of the applicant places much emphasis on the *Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters* (SWD (2019) 378 final). This is a Commission Staff Working Document prepared in October 2019 ("***the Staff Working Document***"). It had been prepared in response to concerns raised by the Aarhus Convention Compliance Committee ("***the Compliance Committee***") in respect of a complaint made by ClientEarth. The Compliance Committee published its findings in respect of that complaint in two parts. Part I had been adopted on 14 April 2011 (ECE/MP.PP/C.1/2011/4/Add.1), and Part II on 17 March 2017 (ECE/MP.PP/C.1/2017/7).

101. Insofar as relevant to the issue which arises in the present proceedings, the Compliance Committee did not consider that the difficulties presented by the standing requirements governing direct actions were compensated for by the potential availability of the preliminary reference procedure. See page 21 of the report of 14 April 2011 as follows.

> "Review procedures before the European Union Courts through national courts of member States
>
> 89. The Party concerned has referred to the possibility for members of the public to request national courts to ask for a preliminary ruling of the ECJ on the basis of TEC article 234. Under EU law, while it is not possible to contest directly an EU act before the courts of the member States, individuals and NGOs may in some States be able to challenge an implementing measure, and thus pursue the annulment by asking the national court to request a preliminary ruling of the ECJ. Yet, such a procedure requires that the NGO is granted standing in the EU member State concerned. It also requires that the national

court decides to bring the case to the ECJ under the conditions set out in TEC article 234.

90. While the system of judicial review in the national courts of the EU member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its member States, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies; nor does the system of preliminary review amount to an appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts, examined in paragraphs 76–88 above."

102. The Compliance Committee has reiterated this finding in Part II of its findings. See report of 17 March 2017 as follows at page 14.

"57. The Committee reiterates its above finding that judicial review in the national courts of European Union member States cannot compensate for the strict jurisprudence of the European Union courts examined in part I, and notes that the CJEU itself has held that the system of preliminary ruling does not constitute a means of redress available to the parties to a case pending before a national court or tribunal."

*Footnote omitted.

103. This characterisation is disputed in the Staff Working Document (page 4).

"The primacy of the Treaties over the Aarhus Convention equally implies that the fundamentals and the logic of the Union system of judicial redress have to be preserved. The ACCC findings focus on administrative review under the Aarhus Regulation and on direct access to the CJEU, dismissing the role of redress via the courts of the Member States. The national courts are, however, an integral part of the Union system of judicial redress: they are ordinary courts of Union law, and linked to the CJEU within the system of references established under Article 267 TFEU. They are accessible by both individuals and environmental NGOs. In that framework, the national courts can ask the CJEU to rule on the validity of acts of EU institutions, bodies, offices or agencies. This system is a cornerstone of Union law and part of the 'legal context' to which the Declarations refer. Therefore, this report needs to look at the Union system of judicial redress as a whole, taking account of the national courts as well as the CJEU."

*Footnotes omitted.

104. The Staff Working Document addresses the implications of an absence of implementing measures at national level as follows (at page 15).

> "The validity reference under Article 267 TFEU generally applies where an act implementing a Union act has been adopted at national level. Here, the question of the validity of the Union act on which it is based arises incidentally.
>
> In cases where there is no implementing act, two different situations can be envisaged: first, the third limb of Article 263(4) TFEU caters for situations where there is no implementing measure, either at national or Union institutional level, and provides for the possibility to challenge the act directly before the CJEU by those having a direct concern; second, a direct challenge to the Union act in front of national courts with a reference to the Court of Justice for a ruling on validity is also possible. Case-law shows that the issue of the validity of a Union implementing act without national measures can be raised under Article 267 TFEU.[46]
>
> [46] Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, para. 37ff., and Case C-308/06 *International Association of Independent Tanker Owners and Others*, para. 33-34."

105. As appears from footnote 46 (above), the two judgments cited in support of the proposition that the validity of a Union act can be raised under Article 267 TFEU even in the absence of implementing national measures were both concerned with *Directives* rather than Regulations. National implementing measures would, therefore, be required ultimately, and the Court of Justice was satisfied that the questions submitted by way of preliminary reference were relevant to the outcome of the main proceedings. This was so notwithstanding that the implementing measures had not yet been adopted. By contrast, on the facts of the present case, no implementing measures will ever be required to give effect to the delegated regulation. Further, and as explained earlier, the High Court is not seised of any underlying dispute in respect of which it has jurisdiction to deliver judgment.

106. In conclusion, therefore, reliance on the Staff Working Document does not advance the applicant's argument to the effect that the availability of the preliminary reference procedure is not confined to proceedings which challenge the legality of a decision or implementing measure at national level. The two judgments cited in the Staff Working Document do not support this argument. Rather, the legal position is as set out in the case law discussed at paragraphs 36 to 59 above. This case law expressly recognises that the Article 267 procedure is unavailable in circumstances where, such as in the present case, there are no implementing measures at national level which might form the subject-matter of proceedings before the national court.

107. As correctly observed by the State respondents in their supplemental submissions of 20 July 2020, the Staff Working Document is not an act of EU law or legally binding, and could not, irrespective of its content, change the position clearly set out in the case law.

CONCLUSION

108. The principal relief sought in these proceedings is to have the High Court make a reference to the Court of Justice pursuant to Article 267 TFEU to determine the validity of the 4th Union list of Projects of Common Interest insofar as it includes the proposed Shannon LNG terminal and connecting pipeline. The list of projects of common interest had been adopted by the EU Commission by way of delegated regulation: Commission Delegated Regulation (EU) 2020/389.

109. The fatal flaw in the proceedings, however, is that the applicant has been unable to identify any decision or implementing measure at *national level* which is capable of forming the basis of an action before the High Court.

110. In truth, the only issue in controversy is the validity of the delegated regulation. This is not a controversy which the High Court has jurisdiction to determine, and, in any event, the *legitimus contradictor* to this controversy, the European Commission, is not a party to these proceedings. The High Court is not seised of any underlying dispute in respect of which it has jurisdiction to deliver judgment. In all the circumstances, a preliminary reference pursuant to Article 267 TFEU cannot be said to be "necessary" to enable the High Court to give judgment.

111. The application for a preliminary reference is therefore refused. The associated declaratory relief, to the effect that the Irish State is under an obligation to provide a dedicated and suitable mechanism by which the validity of a decision of the European Commission can be raised, irrespective of whether there is also an infringement by the national authorities, is also refused.

112. The remaining issues in the case, including, in particular, the issues under the Climate Action and Low Carbon Development Act 2015, will be fixed for hearing on a date convenient to the parties. To this end, the case will be listed, for directions only, on Friday 16 October 2020 at 10.30 am.

Appearances

James Devlin, SC and John Kenny for the applicant instructed by FP Logue Solicitors
Patrick McCann, SC and Suzanne Kingston for the respondents instructed by the Chief State Solicitor
No appearance on behalf of the notice party

Approved Garrett Simons