THE COURT OF APPEAL
UNAPPROVED

Record Number: 2021/130
High Court Record Number: 2020/76JR

Murray J. **Neutral Citation Number [2022] IECA 298**

Costello J.

Noonan J.

BETWEEN/

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT/APPELLANT

-AND-

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

RESPONDENTS/RESPONDENTS

-AND-

SHANNON LNG LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered on the 21st day of December, 2022

1. The primary issue arising in this appeal relates to the circumstances in which the court may refer a question of European law for determination by the Court of Justice of the European Union ("CJEU") pursuant to Art. 267 of the Treaty on the Functioning of the European Union ("TFEU").

Background

2. The appellant ("FIE") describes itself as an environmental non-governmental organisation ("ENGO"). It is opposed on environmental grounds to a development by the notice party ("Shannon LNG") of a proposed liquified natural gas terminal in Shannon. The specific issue arising in these proceedings concerns the inclusion of this proposed development in a list of projects of common interest ("PCI's") by the European Commission ("the Commission") pursuant to delegated legislation. FIE considers that this delegated legislation is unlawful, insofar as it concerns the Shannon LNG terminal, which it contends does not satisfy the criteria for inclusion in the list. The primary relief FIE seeks in these proceedings is a referral to the CJEU so that the regulation may be annulled.

3. FIE acknowledges that there is an alternative procedure available by way of action for annulment pursuant to Art. 263 TFEU but it says that it does not have *locus standi* to pursue an annulment action under this Article. It says that no ENGO has been found to date to enjoy such standing.

4. In its judgment, the High Court (Simons J.) helpfully set out the background to the Trans-European Energy Networks Regulation and the relevant delegation of powers to the European Commission ("the Commission") which I gratefully adopt.

5. Regulation (EU) No. 347/2013 of the European Parliament and of the Council of the 17 April 2013 on Guidelines for Trans-European Energy Infrastructure is generally known as the "TEN-E" regulation. Article 1 defines the subject matter and scope of the regulation in the following terms:

> *"1. This Regulation lays down guidelines for the timely development and inter-operability of priority corridors and areas of trans-European energy infrastructure set out in Annex I ('energy infrastructure priority corridors and areas').*
>
> *2. In particular, this Regulation:*
>
> *(a) addresses the identification of projects of common interest 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 ("energy infrastructure categories");*
>
> *(b) facilitates the timely implementation of projects of common interest by streamlining, coordinating more closely, and accelerating permanent granting processes and by enhancing public participation;*
>
> *(c) provides rules and guidance for the cross-border allocation of costs and risk-related incentives for projects of common interest;*
>
> *(d) determines the conditions for eligibility for projects of common interest for Union financial assistance."*

6. Thus, TEN-E is concerned with identifying PCI's which give effect to priority energy infrastructure corridors between Member States, facilitating the fast tracking of such PCI's and providing for the possibility of financial assistance.

7. Article 3 establishes a Union list of PCI's and for that purpose, establishes 12 Regional Groups. For gas projects, each Regional Group is composed of representatives of the relevant Member States, national regulatory authorities, transmission system operators ("TSO's"), as well as the Commission, the Agency for the co-operation of Energy Regulators, and the European network of transmissions system operators for gas ("ENTSOG"). Each regional group prepares a regional list of CPI's and in that regard, the decision making powers of the Regional Groups are restricted to the Member States and the Commission only. Relevant to this appeal, Art. 3 para. 3 provides, *inter alia*:

> *"When a* [Regional Group] *draws up its regional list:*
>
> > *(a) each individual proposal for a project of common interest shall require the approval of the Member States, to whose territory the project relates; if a Member State decides not to give its approval, it shall present its substantiated reasons for doing so to the group concerned;"*

8. Thus, each Member State, and in this case Ireland, has what FIE described as a "veto" over the inclusion of any project on the regional list including, in this case, the Shannon LNG Terminal.

9. Article 16 of TEN-E confers the power to adopt delegated acts on the Commission. Article 3, para. 4 provides in that regard:

> *"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* [which provides that where a project relates to the territory of a Member State, the approval of the Member

State concerned is required]. *The Union List will take the form of an annex to this regulation."*

It goes on to provide that the Union List is established every two years. Para. 5 requires the Commission, when adopting the Union List, to ensure that only projects that fulfil the criteria in Article 4 are included. Article 4 provides that PCI's must satisfy criteria which include that the potential overall benefit outweighs the costs. For gas projects, the criteria that must be satisfied appear in Article 4 para. 2(b) which provides:

"For gas projects falling under the energy infrastructure categories set out in Annex II.2, the project is to contribute significantly to at least one of the following criteria:

(i) Market integration, inter alia through lifting the isolation of at least one Member State in reducing energy infrastructure bottlenecks; interoperability and system flexibility;

(ii) security of supply, inter alia through appropriate connections and diversification of supply sources, supplying counterparts and routes;

(iii) competition, inter alia through diversification of supply sources, supplying counterparts and routes;

(iv) sustainability, inter alia through reducing emissions, supporting intermittent renewable generation and enhancing deployment of renewable gas;"

10. FIE makes the point that while only one of these latter criteria has to be satisfied by a relevant PCI, the cost benefit analysis that must be carried out under Art. 4 1(b) must be by reference to <u>all</u> these criteria including the last one, sustainability. The gravamen of FIE's objection to the inclusion of the Shannon LNG project in the Union List is that no sustainability assessment of the Shannon LNG Terminal was in fact carried out and consequently, it contends, its inclusion in the Union List is unlawful.

11. The power of the Commission to adopt the Union List is to be found in Commission Delegated Regulation (EU) 2020/389 of the 31st October, 2019. In its recitals, this delegated regulation notes that the Commission is empowered to establish the Union List of PCI's every two years. It notes that projects proposed for inclusion in the Union List have been assessed by the regional groups referred to in TEN-E who have confirmed that they meet the criteria laid down in Art. 4 of TEN-E. The delegated regulation sets out the principles applied in establishing the Union List and then sets out the list.

12. During the course of this appeal, the Court was informed that since the inception of the Union List, which as noted requires revision every two years, there have been four such Lists including the current one. Each of those lists included the Shannon LNG Terminal. However, in an affidavit filed subsequent to the hearing of the appeal with the Court's permission, the respondents ("the State") have confirmed that the fifth Union List was due to be published in March 2022 and does not include the Shannon LNG Terminal. This obviously gives rise to a potential mootness issue which will be considered later.

13. It is also relevant to note that planning permission in respect of the Shannon LNG Terminal was first granted as far back as 2007 and accordingly, pre-dates any of the Union Lists. The inclusion of a particular project on the Union List does not of itself necessarily confer any particular advantage on the project in question. While it may potentially do so, in the case of the Shannon LNG Terminal there is no evidence to suggest any advantage accruing to the notice party herein as a result of the inclusion of the project on the Union List, and similarly there is no evidence before the Court of any disadvantage suffered by any party, including FIE. Any necessary permissions, permits or licences that are required by the notice party will be governed by national law in the normal way and such rights as FIE may have to object to the same remain unaffected by the Union List.

FIE's Claim

14. As already noted, the primary relief sought by FIE is a reference to the CJEU pursuant to Art. 267 TFEU, to determine the validity of the delegated regulation insofar as the Union List includes the Shannon LNG Terminal. FIE claims that it cannot bring annulment proceedings pursuant to Art. 263 because it does not enjoy *locus standi* to do so. It claims therefore that it has no alternative but to seek a reference under Art. 267 and says that it is entitled to seek such a reference by virtue of the obligation on the State to provide a complete system of remedies that enables FIE to challenge what it claims to be an unlawful decision of the Commission.

15. In addition to that primary relief, FIE seeks an order of certiorari quashing what is said to be a decision of the State to include the Shannon LNG terminal in the Union List as a PCI. In effect, FIE claims that the State enjoys what is described as a right of "veto" over the project and failed to exercise it, as it was obliged to do. Ancillary reliefs are also sought.

The First Judgment of the High Court

16. The first judgment of the High Court was delivered on the 14th September, 2020. This judgment is primarily concerned with whether or not the High Court has jurisdiction to make a reference under Art. 267 in the circumstances of this case. The second judgment was delivered on the 30th March, 2021 and was concerned with FIE's secondary argument that the failure of the Irish State to "veto" the inclusion of the Shannon LNG Terminal on the Union List amounts to a breach of the State's obligations under the Climate Action and Low Carbon Development Act, 2015 ("the 2015 Act").

17. In the first judgment, the court provided a comprehensive and helpful summary of TEN-E and the delegated regulation. The court also summarised the relevant Treaty

provisions in relation to the delegation of powers to the Commission. I do not think it is necessary to repeat this detail for the purposes of this judgment save to say that I gratefully adopt the High Court's summary. The judge also set out the relevant procedural history to these proceedings and equally, it is unnecessary to replicate that. The judge then went on to consider the provisions of Art. 263, noting that the dispute between the parties centres on the interaction between the preliminary reference procedure under Art. 267, and the direct action procedure under Art. 263.

18. Art. 263 provides that the CJEU may review the legality of, *inter alia*, acts of the Commission and an action for annulment may be brought by a Member State, the European Parliament, the Council or the Commission. In addition, an individual who meets the following criteria may also bring annulment proceedings.

> *"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."*

19. The judge explained that Art. 263 proceedings must be instituted within two months of the publication of the relevant measure and that time limit cannot be circumvented by a person having *locus standi* to bring direct action under Art. 263 subsequently seeking a preliminary reference under Art. 267.

20. The judge then turned to a consideration of the standing requirement under Art. 263 and the case law discussing the concept of *"direct and individual concern"*. He said that the traditional view is that a person may only claim to be individually concerned if the decision in question affects that person by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons.

This approach has been challenged in several cases before the CJEU on the basis that if an act is required to be of individual concern, the practical consequence is that individuals would never be permitted to challenge measures affecting their environmental interests. A broader approach was advocated by applicants in *Stichting Greenpeace Council (Greenpeace International)*, EU:C:1998:153 and *Commission v Jégo-Quéré* and *C CIE SA*, EU:T:2002:112.

21. In *Jégo-Quéré*, the applicant was a fishing company that sought to challenge a Council regulation reducing juvenile hake catches, which it claimed affected its business. It sought annulment under Art. 230 EC, the predecessor to Art. 263 TFEU. It claimed it could not sue in the national courts because the regulation did not provide for any implementing measures by Member States and therefore, if its claim was inadmissible, it would be denied any legal remedy as it could not satisfy the "*individually concerned*" test.

22. At first instance, the General Court was of the view that the standing requirement as expressed in the earlier case law should be reconsidered so as to permit a party such as *Jégo-Quéré* to challenge measures affecting its legal position in a manner which is both definite and immediate by restricting its rights or imposing obligations on it. The General Court agreed with the views expressed by Advocate General Jacobs in an earlier case to the effect that individuals could not be required to breach the law in order to gain access to justice. However, the CJEU set aside the judgment of the General Court and declared Jégo-Quéré's application for annulment inadmissible - Case C-263/02 P., *Commission v Jégo-Quéré* and *C CIE SA*, EU:C:2004:2010.

23. The Court of Justice essentially held that the effect of the judgment of the General Court would be to remove all meaning from the requirement of "*individual concern*" in Art. 230, in effect re-writing the Treaty.

24. The judge noted that the standing requirement of "*individual*" concern has been modified by Art. 263 TFEU which 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 the applicant. The additional requirement for it also to be of "*individual*" concern no longer arises in this category of claim but it is important to note that the CJEU subsequently explained that a "*regulatory act*" does not encompass legislative acts under Art. 289(3) – See Case C-583:11P., *Inuit Tapiriit Kanatami*, EU: C:2013:625.

25. Since however delegated regulations appear to be non-legislative acts, the less stringent standing requirement appears to apply to a delegated regulation. In *Inuit*, while the CJEU confirmed that it alone has jurisdiction to declare a European Union act invalid, where the implementation of a European Union act of general application is a matter for Member States, then invalidity may be raised before the national court in a challenge to national implementation measures and the national court may then refer the matter to the CJEU for a preliminary ruling under Art. 267.

26. The judge summarised his analysis of the case law on Art. 263 in concluding that the annulment procedure under that Article is not available in the absence of national implementing measures or decisions which are capable of forming the basis of an action before the national court. Insofar as this gives rise to any "*gap*" in effective judicial protection, the approach has been to advocate for a less stringent application of the standing requirement under Art. 263 as opposed to a wider availability of the preliminary reference procedure under Art. 267.

27. The High Court next considered the jurisdiction of the national court in a claim such as the present where the applicant complained that the delegated regulation is *ultra vires* the

Commission. Such a regulation can in principle be annulled by the General Court subject to the standing requirement being satisfied. As noted earlier, the national court does not have jurisdiction to declare a regulatory act invalid. The judge noted that FIE had chosen not to mount a challenge under Art. 263 for the reasons already explained and instead chose to institute the index judicial review proceedings which, in substance, seek a reference under Art. 267 so that the CJEU may annul the delegated regulation.

28. The High Court was thus of the view that the first issue to be addressed is whether that court has jurisdiction in the present case to make a reference for a preliminary ruling. The starting point is the text of Art. 267:

> *"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;*
>
> *(c) 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."*

29. The judge said it was clear from the Article that it is a condition precedent to the making of 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 in turn presupposes that there is a controversy pending before the national court, the resolution of which is dependent on the response to the reference.

30. Having given a concrete example of how such a reference arose in earlier litigation involving the same applicant, the judge went on to say (at para. 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."*

31. The judge then identified what he saw as the difficulty with that contention (at para. 71):

> *"The fatal flaw in the applicant's argument is that a reference pursuant to Art. 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."*

32. The judge noted that the principal argument advanced by the applicant is that the European Union is founded on the rule of law and it follows that there must be a procedure available to allow a legal challenge to be brought against the validity of a regulatory act. Thus, the limitations imposed from the perspective of standing under Art. 263 must be compensated for by a more expansive use of the procedure under Art. 267. However, the judge said that this argument was inconsistent with the case law to which he had previously referred, which does not allow for a freestanding procedure whereby an applicant can utilise the preliminary reference procedure to challenge a piece of EU legislation notwithstanding the absence of any national implementing measures or decisions.

33. Here, he said, the applicant was unable to identify any acts of implementation by any national authority capable of forming the basis of an action before the High Court. The judge considered in some detail the judgment of the CJEU in Case C – 362/14, *Schrems*, EU:C:2015:650. He was of the opinion that this decision did not assist FIE in circumstances where what had arisen in that case was a bespoke procedure which appeared on the facts to be *sui generis*.

34. The judge then examined FIE's argument that Ireland, as a Member State, had a function under TEN-E and had acted unlawfully in failing to veto the Shannon LNG project. This is because, it is said, of Ireland's failure to conduct any adequate assessment of the project for the purpose of Arts. 3 and 4 of TEN-E, and in particular a sustainability assessment as mentioned previously. The judge also referred to the applicant's argument that Ireland's failure to exercise the veto could itself be regarded as an "implementing measure". However, the court held that this was a mischaracterisation of the legal status of the procedural steps which occurred prior to the adoption of the delegated regulation by the

Commission. Those procedural steps may not themselves be the subject of an application for annulment.

35. In truth, he considered that what FIE was advancing was a collateral challenge to the validity of the delegated regulation by suggesting that the steps that led up to its adoption were invalid. A challenge to the procedural steps leading to the adoption of the delegated regulation is in substance and effect a challenge to the regulation itself, something in respect of which only the Court of Justice has jurisdiction. The judge also pointed out that Ireland's alleged failure to exercise a "veto" could not be an implementing measure, as such a measure could only come after the adoption of the regulation rather than before it.

36. Further, the judge considered, and dismissed, a further argument advanced by FIE pursuant to the Aarhus Convention on Access to Environmental Justice.

37. Finally, in concluding his judgment, the judge summarised the findings to which I have already alluded and refused FIE's application for a preliminary reference. He also refused the associated declaratory relief sought 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 Commission can be raised, irrespective of whether there is also an infringement by the national authorities.

38. The remaining issue thereafter was that arising under the terms of the Climate Action and Low Carbon Development Act, 2015 which is the subject matter of the High Court's second judgment delivered on the 30th March, 2021.

The Second Judgment

39. In his introduction to the second judgment, the judge said that this was FIE's second attempt to seek a reference to the CJEU for a preliminary ruling, in this instance, on the

implications of an alleged breach of domestic law for the validity of the Union list. In tracing the procedural history up to that point, the judge summarised FIE's secondary argument based on Ireland's so-called "veto" over the inclusion of the Shannon LNG Terminal in the Union list. FIE argued that the failure of Ireland to veto the inclusion of the project was a breach of the requirements of the 2015 Act and that the Irish State, as a *"relevant body"* failed to have regard to a mandatory statutory consideration under s. 15 of the Act. That section imposes an obligation on a *"relevant body"* to have regard to the furtherance of *"the national transition objective"* in performing its functions. That objective is defined in the Act as the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050.

40. In the following discussion and decision section of the judgment, the court described the gravamen of FIE's secondary argument as having the legal consequence that the decision of the Commission to adopt the Union List of PCI's should be set aside insofar as it relates to the Shannon LNG Terminal. However, this argument cuts across the finding in the earlier principal judgment that a national court does not have jurisdiction to entertain a collateral challenge to the validity of the delegated regulation.

41. The judge considered that it was next to impossible to separate out the domestic law issue from the EU law issues and the logic of the applicant's argument concerning Ireland's alleged failure to discharge its domestic legislation obligations is that the Commission similarly failed to discharge its assessment obligations under TEN-E. The court summarised its conclusion as being that it is not possible to consider the merits of the secondary argument without in effect engaging in the collateral challenge to the assessment carried out at EU level and that in turn amounts to an indirect attack on the validity of the delegated regulation.

42. The judge also noted that FIE had failed to identify any authority in support of the proposition that a delegated regulation adopted by the Commission can be invalidated because of what is said to have been an earlier breach of domestic law by a Member State. Such a proposition would be difficult to reconcile with the principle of the supremacy of EU law.

43. The judge separately considered FIE's argument that s. 15 of the 2015 Act applies to the Government. In its submissions, FIE expanded its argument to include a contention that there was a failure by the respondent Minister to *"have regard to"* the national mitigation plan under s. 4(12) of the 2015 Act.

44. The judge said that the fundamental difficulty faced by FIE is that the *"function"* which it seeks to impugn is that of the Government, not of the respondent Minister. The 2015 Act does not purport to restrict the exercise by the Government of its executive powers under Art. 28 of the Constitution. The judge noted at s. 2 of the 2015 Act expressly provides that nothing in the Act shall operate to affect *inter alia* existing or future obligations of the State under the law of the European Union.

45. There is no statutory obligation on the Government in exercising its executive power to have regard to a national mitigation plan nor to the furtherance of the national transition objective. The judge concluded that this follows from the fact that the definition of *"relevant body"* for the purposes of s. 15 does not include the Government. The Government is not a *"relevant body"* because it is neither a *"prescribed body"* or a *"public body"* under the Freedom of Information Act, 2014, being the relevant definition for the purposes of the 2015 Act. The court held accordingly that the Government is not subject to s. 4(12) or s. 15 of the 2015 Act in exercising its function under Art. 172 TFEU.

46. The court's conclusion therefore was that the applicant had not established any legal basis for the relief sought and dismissed the application for judicial review in its entirety.

The Appeal

47. I think it is fair to say that the applicant's notice of appeal, in respect of both judgments, is essentially a re-agitation of the arguments that were advanced in the High Court.

48. FIE contends that the High Court erred in concluding that a reference under Art. 267 could not be sought in the absence of national implementing measures. In particular, it relied on two judgments of the CJEU in Case C – 491/01 *British American Tobacco ('BAT')* and Case C-308/06 *Intertanko*. The appellant contends that both of these cases demonstrate that the Art. 267 reference procedure may be deployed even where there are no national implementing measures. FIE further relies on Case C-362/14 *Schrems* in support of its submission.

49. Without prejudice to that argument, FIE says that if implementing measures are in fact necessary, then the failure by Ireland to veto the project should be regarded as an implementing measure. It suggests alternatively that the existence of a PCI process to which the Shannon LNG Project is capable of submission can be regarded as an implementing measure. It further suggests that the designation by the State of An Bord Pleanála as the competent authority for the purposes of TEN-E is a further implementing measure.

50. FIE also contends that Case C-644/17 *Eurobolt BV* is authority for the proposition that the national courts in this State can approach the EU institutions involved in drawing up a piece of secondary EU legislation, in this case the Commission, and seek clarification

concerning any doubts the national court may entertain about the validity of the secondary EU legislation so as to avoid an Article 267 reference.

51. In oral submissions before this Court, counsel for FIE posed three questions which he said were central to the resolution of the appeal:

(1) Is there a dispute at national level?

(2) Are there implementing measures?

(3) Are implementing measures necessary for a reference?

In answering these questions, counsel submitted that there is a domestic dispute arising here and that is the failure of the State to exercise its veto over the Shannon LNG Project. That, it is said, is an act of the Irish Government which it is for the national court to review, not the CJEU, relying on Case C-97/91 *Oleificio Borelli SpA*.

52. In answer to the second question, counsel submitted, as previously outlined, that the implementing measures here included the appointment of An Bord Pleanála as the relevant national authority, the PCI process itself at national level and the non-exercise of the veto. It was contended further that the answer to the third question is no, in reliance on the authorities to which I have referred above.

53. In response, the State respondents posited three alternative issues to be decided on the appeal:

(1) whether the High Court erred in determining that an Art. 267 reference was not necessary;

(2) whether the relief sought would constitute a collateral attack on the delegated regulation;

(3) whether the High Court erred in its interpretation of the 2015 Act.

54. In considering each of these issues in turn, the State's contention is that there is no underlying dispute between the parties concerning any national decision or implementing measure and thus no basis for seeking a reference. The State's fundamental submission is that FIE's entire case is purely hypothetical and premature. It has suffered no detriment by the adoption of the delegated regulation, which does not affect its rights in any way or indeed those of the notice party. Accordingly, there are no rights of FIE that could be vindicated, even were the delegated regulation to be declared invalid.

55. In a process such as that arising under the delegated regulation, where preparatory steps are taken at national level, ultimately leading to a final binding step at EU level, it is only the latter that may be challenged before the European Court and that only one court can have jurisdiction in any given scenario. On the other hand, had Ireland exercised a veto over the Shannon LNG Project, then that would have been the final determinative measure and it could in turn be challenged in the national court by the developer. Counsel for the State submitted that the *Borelli* line of jurisprudence consequently did not apply but rather that arising under Case C-64/05 *Kingdom of Sweden*.

56. The State says that judicial review is only available where there are legal effects arising from the decision sought to be reviewed. Here, it contends that the decision not to exercise the veto did not give rise to any legal effects but rather the process moved into another stream where the matter was finally determined by the Commission. Anything done by the Irish State in this connection was subsidiary, preparatory and prior in time to the adoption by the Commission of the delegated regulation.

57. Finally, the State respondents submit that as the issue raised by FIE is now in effect moot, it is well settled that the CJEU will not entertain a reference in such circumstances – see Case C-409/06 *Winner Wetten GmbH*.

Discussion

58. The central question arising in this appeal is whether there is in truth any real dispute between the parties at national level, because if not, then it cannot be said that a reference is necessary to enable the court to determine that dispute. FIE says that the dispute at national level here is Ireland's failure to veto the project because it did not comply with the sustainability criterion, an essential constituent of the cost benefit analysis required by TEN-E.

59. The effect of the State not exercising its veto, as FIE puts it, was to allow the Shannon LNG Project to go forward from the Regional Group for consideration by the Commission. It is not in dispute that it then became a matter for the Commission, and the Commission alone, to decide whether it should be included on the Union list of PCI's. The Irish State had by then no other function in the eventual adoption of the delegated regulation by the Commission.

60. The Commission was not bound to include the Shannon LNG project because Ireland had allowed it to go forward. On the other hand, had Ireland in fact vetoed the project's inclusion, then the Commission would have been bound by that. The question that thus arises in that scenario, is which court has jurisdiction, the domestic or European court? It is common case that it must be one or the other. The proper approach to this issue has been considered a number of times by the Court of Justice.

61. In *Borelli*, the applicant had applied for EU financial aid to assist with the construction of an oil mill for its business. The Italian authorities issued an unfavourable opinion on the aid application. The relevant regulations provided that the Commission was bound by that opinion and the General Court held that it had no jurisdiction to review it. In effect, the determinative decision was the national one and therefore the national courts had exclusive jurisdiction. In its judgment, the General Court said:

> *"9. It should be pointed out that in an action brought under Article 173 of the Treaty the court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority.*
>
> *10. That position cannot be altered by the fact that the measure in question forms part of a Community decision making procedure, since it clearly follows from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision taking authority and therefore determines the terms of the Community decision to be adopted.*
>
> *11. That is so where the competent national authority issues an unfavourable opinion on an application for aid from the Fund. It follows from Article 13 (3) of Regulation no. 355/77 that a project may receive aid from the Fund only if it is approved by the Member State on whose territory it is to be carried out and that, consequently, where the opinion is unfavourable the Commission can neither follow the procedure for the examination of the project in accordance with the rules laid down in that regulation nor a fortiori review the lawfulness of the opinion thus issued."*

62. *Borelli* was subsequently applied by Court of Justice in *Sweden*, the court observing:

> *"91. It is true that, according to settled case law, in an action brought under Article 230 EC* [the predecessor of Art. 263 here] *the Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority* [citing Borelli at para. 9].
>
> *92. It is also settled case law that that position cannot be altered by the fact that the measure in question forms part of a Community decision making procedure, where it is clear from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision taking authority and therefore determines the terms of the Community decision to be adopted* [Borelli para. 10]*."*

63. In both of these cases, the European court took the view that the issue that determined the relevant jurisdiction was where the final binding decision was made. If it occurred at national level, as it did in *Borelli* and *Sweden*, then the national courts had jurisdiction. The same would appear to follow here in the event that, for example, Ireland did in fact exercise a veto over the Shannon LNG project.

64. The converse position is evident from two other judgments of the European court. In Case T-123/03 *Pfizer v Commission*, the General Court said:

> *"22. Furthermore, it is also settled case law that, in the case of acts or decisions adopted by a procedure involving several stages, and particularly where they are the culmination of an internal procedure, it is in principle only those measures which definitively determine the position of the institution upon the conclusion of that procedure which are open to challenge, and not intermediate measures whose purpose is to prepare for the final decision (IBM v Commission, para. 10; Case C-*

147/96 Netherlands v Commission [2000] ECR 1-4723, para. 26; Case T-326/99 Olivieri v Commission and EMEA, judgment of 18 December 2003, ECR II – 6053, paragraphs 51 – 53)."

65. This issue again came sharply into focus in *Berlusconi*. The facts were that by virtue of a 2013 Directive, persons acquiring a qualifying holding in a credit institution were required to provide information to the competent national authorities of their intentions and the competent authority may decide to approve or oppose the proposal on grounds including the reputation and suitability of the acquirer.

66. In the 1990's Mr. Berlusconi acquired, though his investment vehicle, an approximately 30% stake in an Italian bank, Banca Mediolanum. In 2013, Mr. Berlusconi was found guilty of tax fraud before an Italian court. The competent Italian supervisory authorities, which included Bank of Italy, conducted a procedure which resulted in a decision determining that Mr. Berlusconi had ceased to fulfil the reputation requirement laid down by the applicable legislation and accordingly he would be required to divest himself of that part of his stake which exceeded the limit of 9.999%. However, before this decision became binding and enforceable, it had to be approved by the European Central Bank, which approval it gave in final form in 2016.

67. As a result, Mr. Berlusconi challenged the ECB's decision in an action for annulment before the General Court of the European Union. At the same time, he brought separate proceedings before Italian courts seeking to have Bank of Italy's recommendation to the ECB declared void on various legal grounds. Bank of Italy's defence is explained in the judgment of the Court of Justice at para. 37:

"37. … By way of defence, the Bank of Italy pleaded in particular that the national courts lacked jurisdiction to hear the action, as it concerns preparatory acts,

containing nothing in the nature of a decision, which are directed at the adoption of a decision falling within the exclusive competence of an EU institution and which, just like the final decision, come under the jurisdiction of the EU courts alone."

68. Arising from this plea before the national court, the Italian court made a reference to the CJEU of, *inter alia*, the following question as set out in the judgment:

"39. It was in that context that the Consiglio di Stato (Council of State) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'(1) Are the first, second and fifth paragraphs of Article 263 of the Treaty on the Functioning of the European Union, read in conjunction with Article 256(1) thereof, to be interpreted as meaning that the EU courts have jurisdiction, or that the national courts have jurisdiction, in an action challenging decisions to initiate procedures, preparatory acts and non-binding proposals …' "

69. The Court of Justice then turned to an analysis of the legal position obtaining in circumstances where both Member States and EU institutions participated in a process culminating in an EU act.

"41. It is necessary, first of all, to explain the effects on the division of jurisdiction between EU courts and courts of the Member States that result from the involvement of national authorities in the course of a procedure, such as that at issue in the main proceedings, which leads to the adoption of an EU act.

42. Article 263 TFEU confers upon the Court of Justice of the European Union exclusive jurisdiction to review the legality of acts adopted by the EU institution, one of which is the ECB.

43. Any involvement of the national authorities in the course of the procedure leading to the adoption of such acts cannot affect their classification as EU acts where the acts of the national authorities constitute a stage of a procedure in which an EU institution exercises, alone, the final decision making power without being bound by the preparatory acts or the proposals of the national authorities [citing *Sweden* paras. 93 and 94].

44. In such a situation, where EU law does not aim to establish a division between two powers – one national and the other of the European Union – with separate purposes, but, on the contrary, lays down that an EU institution is to have an exclusive decision making power, it falls to the EU courts by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU… to rule on the legality of the final decision adopted by the EU institution at issue and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.

45. Nonetheless, an act of a national authority as is part of a decision making process of the European Union does not fall within the exclusive jurisdiction of the EU courts where it is apparent from the division of powers in the field in question between the national authorities and the EU institutions that the act adopted by the national authority is a necessary stage of a procedure for adopting an EU act in

which the EU institutions have only a limited or no discretion, so that the national act is binding on the EU institution [citing Borelli at paras 9 and 10].

46. It then falls to the national courts to rule on any irregularities that may vitiate such a national act – making a reference to the court for a preliminary ruling where appropriate – on the same terms as those on which they review any definitive act adopted by the same national authority which is capable of adversely affecting third parties and moreover, in the light of the principle of effective judicial protection, to regard an action brought for that purpose as admissible even if the national rules of procedure do not so provide [citing inter alia Borelli at paras 11 – 13]*."*

70. The court went on to say of acts adopted by national authorities in a procedure such as that identified in paras. 43 and 44 above, *i.e.* where the EU institution has exclusive decision-making power, that those acts adopted by national authorities as part of that procedure leading up to the final decision of the EU institution cannot be subject to review by the courts of the Member States. In such circumstances, the court held that there could only be a single judicial review by the EU courts alone.

71. In this regard, the court said that the decision of the EU institution under challenge must be one capable of producing binding legal effects so as to affect the applicant's interest by bringing about a distinct change in his legal position. As previously noted, in the present case there is no evidence that this has occurred, either from the perspective of FIE or indeed the notice party. Since in *Berlusconi*, only the ECB enjoyed the power to make a binding decision, thus only the EU court had jurisdiction.

72. Accordingly, the Court of Justice answered the question referred by the Italian court by stating that Art. 263 must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals

adopted by competent national authorities as part of a process concluding with a binding decision of the ECB.

73. In the present case, it cannot be doubted that the inclusion by the Irish State of the Shannon LNG project in the regional list sent forward to the Commission was a step that was preparatory and ancillary to the decision ultimately made by the Commission in adopting the delegated regulation. It seems to me that the authorities I have outlined earlier make clear that in such circumstances, the EU courts have exclusive jurisdiction and such preparatory and ancillary steps cannot be challenged at national level. If that were permissible, it would, as the trial judge said, amount to a clear collateral attack on the validity of the delegated regulation itself, in circumstances where it is clear that only the EU court has jurisdiction. It must follow, as the judge found, that the Irish courts have no jurisdiction to entertain a challenge to Ireland's decision to include, or not to veto the inclusion of, the Shannon LNG project on the Regional List.

74. Further, it seems to me that the judge was correct to hold that this result also ensued from the terms of Art. 267 itself which requires as a prerequisite to a reference that it must be necessary to enable the national court to give judgment in a dispute at national level. The following passage from the judgment of the Court of Justice in *Intertanko* reflects that fact:

> *"In that regard, it is to be remembered that, when a question on the validity of a measure adopted by the institutions of the European Community is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and, consequently, whether it should request the Court to rule on that question. Accordingly, where the national court's questions relate to the validity of a provision of Community law, the Court is obliged in principle to give a ruling (BAT at para. 34)."*

75. Here, there is plainly no such dispute. Again, as the trial judge found, if the Irish court were to refer the matter to the CJEU for a ruling on validity and the Court of Justice decided that it was invalid, there would be no residual dispute remaining to be determined by the national court. At the hearing of the appeal, counsel for FIE sought to suggest that the residual dispute that would fall to be determined was the Irish decision not to veto the Shannon LNG project. That appears to me, with respect, to be an entirely circular argument, the artificiality of which is demonstrated by the fact that if the Court of Justice quashed the delegated regulation, then all preparatory and preliminary steps leading up to the adoption of the regulation cease to have any relevance or effect and fall away.

76. In *BAT*, relied upon by FIE in the context here of its submission that implementing measures are not required to enable an EU measure to be challenged in national proceedings leading to a reference, the Court of Justice said (at para. 40):

> *"The opportunity open to individuals to plead the invalidity of a Community act of general application before national courts is not conditional upon that act actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is called upon to hear a* ***genuine dispute*** *in which the question of the validity of such an act is raised indirectly."* (My emphasis).

77. This in my view comes back to the same point, there is no genuine dispute here in which the validity of the delegated regulation is raised indirectly. The validity itself is raised directly as the only dispute in these proceedings. In *BAT*, the applicant sought to challenge the validity of a Directive regulating the tobacco industry before it had been implemented in the United Kingdom. The Commission argued that the claim was inadmissible, but the Court of Justice disagreed. In similar vein, FIE relies on *Intertanko* where a group of shipping

organisations challenged the implementation by the UK of a Directive regarding ship source pollution and infringement penalties by way of seeking a reference to the CJEU.

78. In that case the Directive had not been implemented and the time for doing so had not yet expired, but the Court of Justice held that this did not preclude the application. Again, I am in agreement with the High Court that the critical distinction here is that in both cases, the Directives concerned would ultimately require implementing measures in contrast to the delegated regulation here, which requires none and has direct effect.

79. Insofar as FIE argues that the designation of An Bord Pleanála as the competent national authority under the delegated regulation is an implementing measure, even if that were so, there is no challenge against An Bord Pleanála in these proceedings in relation to that measure which could form part of the "dispute" claimed to exist here by FIE. In any event, I cannot see how Ireland's alleged failure to exercise a veto can logically be described as a measure which implemented a regulation which did not yet exist. The argument that it did appears little more than an artifice which attempts to found a national jurisdiction.

80. The real dispute in this case, if there is one, is with the Commission, which is not party to these proceedings and over which the Irish court has no jurisdiction. The bedrock of the appellant's case is its claim that the rule of law requires that it must be able to challenge a European measure with environmental impacts which it says is plainly unlawful. This, it is said, amounts to a failure to provide a complete system of remedies. This is similar to the argument advanced by the applicant in *Jégo-Quéré* which claimed that it could not sue in the national courts because the relevant regulation did not, as here, provide for any implementing measures by Member States and therefore, if its claim was inadmissible, it would be denied any legal remedy.

81. The General Court agreed, holding that although Jégo-Quéré could not satisfy the requirement to be *"individually concerned"*, this requirement should be reconsidered and it deemed the claim admissible. It considered, as had the Advocate General, that an applicant could not be required to break the law in order to bring a claim challenging that law. The Court of Justice however was of the view that the decision of the General Court amounted to an attempt to rewrite Art. 230 EC. Allowing the appeal, the Court of Justice said:

> *"30. By Articles 230 EC and Article 241 EC, on the one hand, and by Article 234, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions, and has entrusted such review to the Community courts. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, 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 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity (see Union de Pequenos Agricultores v Council, para. 40)."*

82. As regards the argument accepted by the General Court that the applicant would be required to break the law before it could challenge that law, the Court of Justice said (at para. 35):

> *"In the present case, it should be pointed out that the fact that Regulation No. 1162/2001 applies directly, without intervention by the national authorities, does not mean that a party who is directly concerned by it can only contest the validity of that*

regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by Regulation No. 1162/2001 may seek from the national courts a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly."

83. In the present case, FIE is not in dispute with any national body because its rights have been infringed. Since its legal position is not in any way affected by the delegated regulation, it cannot, as suggested by the CJEU in *Jégo-Quéré*, seek a measure from the national authority which it can then challenge. This again brings one back to the same starting point, i.e. that there is in fact no genuine dispute here with a national authority or anyone else which requires to be ventilated in order to vindicate the rule of law. It seems to me that the same considerations inevitably apply in the context of the following passage from the judgment of the Court of Justice in *Eurobolt* upon which reliance is placed by FIE:

"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 [which FIE say is this case].

> *2. Article 267 TFEU read in conjunction with Art. 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."*

84. The same infirmity in FIE's fundamental case applies here also in that the court is clearly referring to a request for information being made by the national court in circumstances where clarification from an EU institution is necessary in order to enable the national court to give judgment in a dispute at national level. Here there is none.

85. Before the High Court, FIE placed reliance on the judgment in *Schrems_v. Data Protection Commissioner* Case C-362/14 in support of its submission that a more expansive approach to Art. 267 was appropriate where it did not enjoy standing under Art. 263 for the purposes of annulment proceedings. The judge devoted a section of his judgment to a detailed analysis of *Schrems*, with which I fully agree.

86. For completeness, I agree with the views of the trial judge that the Art. 267 procedure arising in *Schrems* was, as described by the Supreme Court in *Data Protection Commissioner v Facebook Ireland Limited* [2019] IESC 46, a procedure that was *"bespoke"* and "*sui generis*". It seems to me that in any event it does not assist FIE's position for the additional reason that in *Schrems*, a genuine dispute did exist concerning an alleged infringement of the applicant's data protection rights.

87. The final issue raised by FIE and dealt with in a separate section at the end of the judgment concerns a submission based on the Aarhus Convention on Access to Justice in Environmental Matters. Counsel for FIE in argument relied upon extracts from a Commission Staff Working Document prepared in response to certain concerns raised by the Aarhus Convention Compliance Committee. The Staff Working Document expressed the view that an absence of implementing measures at national level should not be seen as a barrier to an Article 267 reference and relied for that conclusion on the judgments in *BAT* and *Intertanko.* The judge however was of the view that these judgments did not in fact support the proposition advanced in the document for reasons already explained. He also pointed to the fact that this document has no legal binding force.

88. While this argument is briefly referred to in the grounds of appeal, it was not pursued with any vigour in the oral or written submissions. Suffice it to say, I am in agreement with the views of the judge on this point.

89. In my view, it is unnecessary to consider the second judgment in detail because, as the judge ultimately found, the first judgment, which I would uphold, was dispositive of the claim. I agree with the findings of the trial judge that, as he explained, the claim that Ireland had failed to comply with its obligations under the 2015 Act could only ever amount to a collateral challenge to the delegated regulation. This is particularly so in circumstances where, as the judge found, Ireland's obligations under the 2015 Act were in fact less onerous than those arising under the TEN-E Regulation and, as the judge put it, since the greater includes the lesser, a challenge under the 2015 Act can only be equated with a challenge to TEN-E itself.

90. Again, for completeness, I propose to briefly deal with this. There is no dispute that the respondent Minister is bound by the 2015 Act. The High Court however found that the

Government was not so bound because it is not a *"relevant body"* for the purposes of s. 15 or s. 4. As previously noted, the definition of *"relevant body"* references the definition of, *inter alia*, *"public body"* under the Freedom of Information Act, 2014. The Government is not identified as a *"public body"* under s. 6 of that Act which must be assumed to be a deliberate choice by the Oireachtas. I agree with the judge's reasoning and conclusion that simply because the Minister is bound by the 2015 Act, it cannot mean that the Government, of which the Minister is member, is equally bound.

91. As the trial judge put it, the Minister is bound by virtue of being identified as a "*persona designata*" under the terms of the 2015 Act rather than because he is a member of the Government. The powers and duties conferred on the Minister by the 2015 Act are so conferred *qua* Minister and do not amount to an exercise of the executive power of the State under the Constitution. I therefore agree with the trial judge's analysis in this regard. The Government exercises its power in fulfilling its role under Art. 172 TFEU and TEN-E and the 2015 Act does not affect that exercise, because it does not apply to the Government as explained. This finding however is incidental to the essential conclusion that even were FIE's argument in this regard well founded, it would still amount to a collateral attack on the delegated regulation which is, for the reasons already explained, impermissible.

92. Finally, I should refer briefly to the mootness issue. As indicated earlier in this judgment, evidence received on affidavit subsequent to the hearing of the appeal indicates that the Shannon LNG project no longer appears on the current Union List. Assuming that to be the position, then while the issue arising in these proceedings was not moot at the time that the High Court heard the matter, it clearly now is. That being the case, it would appear that a reference to the CJEU is, in any event, no longer available as the question to be referred has now become hypothetical.

93. That the Court of Justice will not entertain such a reference is clear from the judgment in *Winner Wetten GmbH*. The court said:

> *"37. The court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite clear that the interpretation of Union law that is sought bears no relation to the actual facts of the main action or its purpose,* ***where the problem is hypothetical****, or where the court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Preussen Elektra, para. 39, and Hartlauer, para. 25).*
>
> *38. The justification for a reference for preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, in particular, Case C-459/07 Elshani [2009] ECR I-2759, para. 42 and case law cited)."* (My emphasis).

94. Notwithstanding the foregoing, it of course remains the position that FIE is entitled to bring proceedings in the Irish courts it wishes to challenge any necessary permission or licence that may be required by the notice party for the purpose of the Shannon LNG Terminal, noting as I have that planning permission for this project was granted prior to the enactment of TEN-E or the delegated regulation with the first and successive Union lists. However, unless and until such a challenge arises, these proceedings are in substance and effect premature.

95. I would accordingly dismiss this appeal and affirm the orders of the High Court.

96. With regard to the question of costs, the parties will have liberty to make a written submission not exceeding 1,000 words within 28 days of the date of this judgment as to the appropriate form of order.

97. As this judgment is delivered remotely, Murray and Costello JJ have authorised me to record their agreement with it.