

Eve O'Sullivan

Subject: New Third Party objection entered for Reg no: P0943-01. (Reference Number: P0943-01-120507011729)
Attachments: P0943-01 appeal.pdf
Importance: High

From: Peter Sweetman [<mailto:sweetmanplannig@gmail.com>]

Sent: 07 May 2012 13:18

To: Licensing Staff

Subject: New Third Party objection entered for Reg no: P0943-01. (Reference Number: P0943-01-120507011729)

Importance: High

Title:

First Name: Peter

SurName: Sweetman

**Organisation
Name:**

Address Line 1: Rossport South

Address Line 2:

Address Line 3:

County: Mayo

Post Code: 0000

Email: sweetmanplannig@gmail.com

Objector Type: Third Party

Oral Hearing: No

For inspection purposes only.
Consent of copyright owner required for any other use.

This email has been scanned by the Symantec Email Security.cloud service.
For more information please visit <http://www.symanteccloud.com>

PETER SWEETMAN & ASSOCIATES
14 POSTNET
113 LOWER RATHMINES ROAD
DUBLIN 6
sweetmanplanning@gmail.com

EPA
Johnstown Castle
Wexford

info@epa.ie

2012-05-08

Appeal re;

P0943-01, Mr Nigel Sweetnam, Knockduff, Kinsale, County Cork

Dear Sir/Madam

We have been instructed by the Directors of the Swans and the Snails Ltd c/o Monica Muller, Rosspoint South, Ballina, County Mayo to appeal the above Proposed Determination.

It is settled case law of the European Court of Justice that Plans/Projects which exceed the thresholds for Environmental Impact Assessment must be subject to Environmental Impact Assessment.

The application is for 116,000 places for broilers.

The inspector states;

The total capacity permissible under the approved planning permissions is 94,000 places for broilers.

ANNEX I of EIA Directive 85/337/EEC as amended by 97/11/EC and 2003/35/EC states at;

PROJECTS SUBJECT TO ARTICLE 4 (1)

17. Installations for the intensive rearing of poultry or pigs with more than:
(a) 85 000 places for broilers,

This is a plan/project which requires Environmental Impact Assessment under Annex I of the Directive.

Article 3 of the Environmental Impact Assessment Directive states:

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora;
- soil, water, air, climate and the landscape;
- material assets and the cultural heritage;
- the interaction between the factors mentioned in the first, second and third indents.

Planning And Development (Amendment) Act 2010 states;

4.—Section 2(1) of the Principal Act is amended—
'environmental impact assessment' has the meaning given to it by section 171A;

53.—The Principal Act is amended in Part X by the insertion of the following section before section 172:

"171A.—(1) In this Part—

'environmental impact assessment' means an assessment carried out by a planning authority or the Board, as the case may be, in accordance with this Part and regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:

- (a) human beings, flora and fauna,
- (b) soil, water, air, climate and the landscape,
- (c) material assets and the cultural heritage, and
- (d) the interaction between the factors mentioned in paragraphs (a), (b) and (c).

(2) Subject to this Part, a word or expression that is used in the Part and that is also used in the Environmental Impact Assessment Directive has, unless the context otherwise requires, the same meaning in this Part as it has in the Environmental Impact Assessment Directive."

It is our submission that no Environmental Impact Assessment as required by the Directive and the Planning & Development Act 2010 has ever been carried out on this development.

Neither the planner in Cork County Council or the inspector in the EPA even assessed as whether the Environmental Impact Statement complied with the requirements of the law.

The EPA Inspector in the report states;

Environment Impact Assessment Directive (85/337/EEC)

Under Annex I(17) of European Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC an EIA is required for "Installations for the intensive rearing of poultry or pigs with more than: (a) 85,000 places for broilers, 60,000 places for hens". Under Article 24 Part I1 (i) of the European Communities (Environmental Impact Assessment) (Amendment Regulations 1999 (S.I. No. 93 of 1999) an EIA is required for "Installations for intensive rearing of poultry not included in Part 1 of this Schedule which would have more than 40,000 places for poultry".

Planning permission was granted on 21/08/2003 (03/1955) for the erection of two no. poultry houses, and condition seven of the permission limited the number of broiler chickens to 48,000. An Environmental Impact Statement (EIS) was not required or submitted in support of this planning application.

The most recent planning permission (10/8094) was granted by Cork County Council on 19/07/2011 for the construction of an additional two no. poultry houses and associated works, allowing an additional 46,000 places for broilers. An Environmental Impact Statement (EIS) was submitted in support of this planning application.

The EIS refers to a capacity of 96,000 broiler places (50,000 existing and 46,000 proposed). The licence application, however, states that the installation has a current capacity of approximately 70,000 which exceeds the planning condition attached to 03/1955. Together with the permitted new sheds, this results in a total of 116,000 places - 20,000 more than the capacity assessed in the submitted EIS.

It would appear that the development for which the licence is sought is not in compliance with the relevant planning permissions. Planning Permission in effect limits the capacity for the whole site to 94,000 places for broilers (48,000 plus 46,000). It is recommended that the RD limits the capacity of the site to 94,000 places in line with the planning permissions granted.

*A licence with a capacity in line with the licence application would require a further application and grant of planning permission, which would require screening for EIA. Having regard to the foregoing, **it is concluded that an EIA has been undertaken where the capacity of the installation is limited to 94,000 places for broilers.** If the applicant decides to alter the planning permission in line with their preferred stocking levels, then screening for EIA will be necessary and an IPPC licence review will be necessary to increase the maximum places for birds.*

The inspector states *"it is concluded that an EIA has been undertaken where the capacity of the installation is limited to 94,000 places for broilers."*

There is absolutely no evidence in either the EPA file or that of Cork County Council that an Environmental Impact Assessment has been undertaken.

Under Environmental Impact Statement the inspector states:

Environmental Impact Statement

An Environmental Impact Statement (EIS) was prepared in support of planning application Ref. No. 10/8094 and has been submitted with the IPPC licence application. I have examined and assessed the EIS and having regard to the statutory responsibilities of the EPA, I am satisfied that it complies with Article 94 and Schedule 6 of the Planning and Development Regulations 2001 (SI 600 of 2001) and EPA Licensing Regulations (SI 85 of 1994, as amended).

The EIS, planning permission and planning inspector's report have been considered and the EIS has been assessed in relation to the environmental impacts of the operation of the activity. It identifies, describes and assesses in an appropriate manner, the direct and indirect effects of the project on the factors as required in Article 3 of the EIA Directive.

The inspectors have clearly misdirected themselves as to the meaning of Environmental Impact Assessment when they state under the heading, **Environmental Impact Statement** "The EIS, planning permission and planning inspector's report have been considered and the EIS has been assessed in relation to the environmental impacts of the operation of the activity. It identifies, describes and assesses in an appropriate manner, the direct and indirect effects of the project on the factors as required in Article 3 of the EIA Directive."

As the meaning of Article 3 is set out in the Planning And Development (Amendment) Act 2010 "environmental impact assessment" means an assessment carried out by a planning authority or the Board...." **It is not the contents of the EIS.**

The section in the inspectors' report referring to our submission which refers to our submission as stating "The submission concludes that it is not legally possible for the EPA to grant a licence for this development without an Environmental Impact Assessment."

That is exactly what the Environmental Protection Agency has done.

The attached case law of the European Court of Justice supports our appeal. It is necessary for the Environmental Protection Agency as an emanation of the State to fully comply with the requirements of Community Law.

Circular PD 6/08 states:

The case law of the European Court of Justice makes it clear that administrative bodies such as planning authorities and An Bord Pleanála, being emanations of the State, are bound to comply with Community law and if necessary to disapply national law.

As the proposed decision of the Environmental Protection Agency is '*ultra vires*' the law we request that our fee be returned and our clients costs be awarded.

We attach the following:

The planner's report on 10/08094

Circular PD 6/08

European Court of Justice Judgement in Case C - 66/06

European Court of Justice Judgement in Case C- 50/09

European Court of Justice Judgement in Case C- 332/04

Yours faithfully

A handwritten signature in black ink, appearing to read 'Peter Sweetman', with a stylized flourish at the end.

Peter Sweetman
and on behalf of
The Swans & The Snails Ltd.

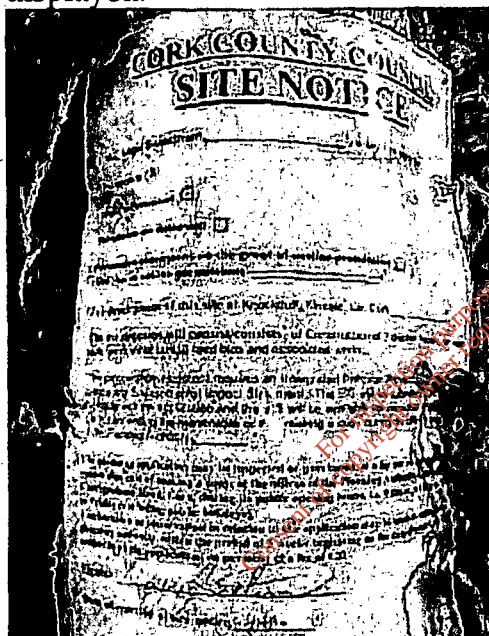
For inspection only.
Consent of copyright owner required for any other use.

PLANNER'S REPORT
PRIMARY

APPLICATION NO.	10/08094
APPLICANT	Nigel Sweetnam
DESCRIPTION	Construction of 2 no. chicken houses, rain water tank, wash water tank, 3 no. feed bins and associated works
LOCATION	Knockduff Kinsale
DECISION DUE DATE	25/11/2010

1. **Site Notice and Date of Inspection**

The site notice was inspected on 19/10/2010 and deemed adequately displayed.



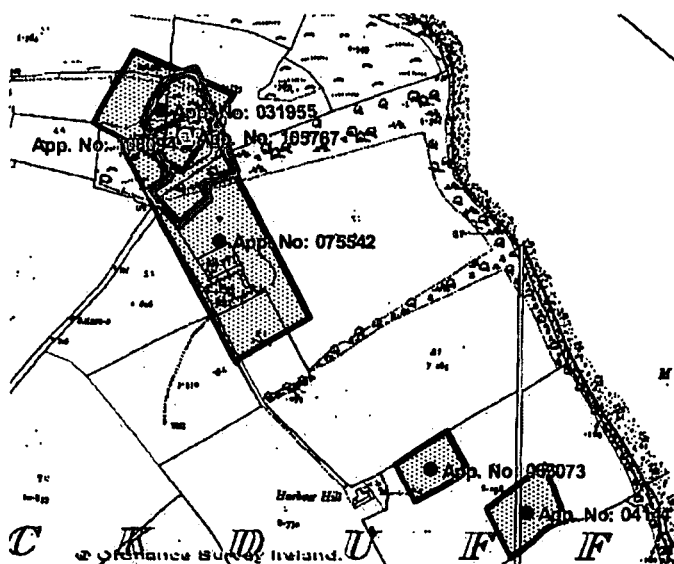
2. **Site Description**

The site is located in the townland of Knockduff, Kinsale. This area is east of Kinsale beyond Summercove and north of Clonleigh. The site is over 1km to the east of Cove Crossroads. The landholding is particularly visible from areas across the creek to the east such as Oysterhaven, Ringville and Kinure. There is a long driveway up to the site from the public road. There are existing agricultural structures adjoining the site and within the complex including two chicken houses. There is an existing chicken and dairy farm at this location.

3. **History**

PLANNER'S REPORT

PRIMARY



10/5767- incomplete.

07/5542

Nigel Sweetnam was granted planning permission for the construction of a covered easy feed area, open slurry tank, dungstead, silage slab, concrete aprons, dairy, dairy washings tank, manure store/straw store and associated works.

03/1955

Harbour Hill Farm limited were granted planning permission for 2 no. poultry houses to replace existing units adjacent to the proposed site but still within the landholding

10/5964

Ronald and Eleanor Sweetnam were refused planning permission for dwelling, garage, septic tank & associated site works on a site on landholding.

Nearby sites

04/141

Philip and Ursula Cunningham were granted planning permission for a bungalow to the south east of the site. 03/3073 was withdrawn (P and U Cunningham on a different site).

4. **Proposed Development (including supporting material)**
The development will consist of the construction of 2 chicken houses, rain water tank, wash water tank, 3 feed bins and associated works.
5. **Pre-Planning**
The applicant undertook pre planning with the Area Planner.

PLANNER'S REPORT
PRIMARY

6. **EIS**

Schedule 5, Part 2, (1) (e) (i) outlines that

"Installations for intensive rearing of poultry not included in Part 1 of this Schedule which would have more than 40,000 places for poultry" is development for the purposes of Part 10.

An EIA has been submitted.

7. **Policy Context**

The site is located in the Rural Housing Control Zone.

The site is located in the Scenic and Coastal Area.

The site is located in the Scenic Landscape where policy objectives ENV 2-7 and ENV 2-9 apply.

8. **Internal Consultants**

Area Engineer: No report published in Odyssey at the time of writing.

Environment: Deferral is recommended as there are a number of significant inconsistencies between the information provided in the EIA & the information supplied in the planning application documents & drawings.

Fire Service: No report published in Odyssey at the time of writing.

9. **External Consultants**

An Taisce: No report published in Odyssey at the time of writing but there is a report on the paper copy as follows: Information is required on all issues of compliance with existing poultry development on the site.

EPA: An IPPC Licence is required.

10. **Public Submissions**

None published in Odyssey at the time of writing.

11. **Public Representative Submissions**

Batt O Keffe TD has made a representation on this file.

12. **Assessment and Conclusion**

Area of site: 0.79 hectares.

PLANNER'S REPORT

PRIMARY

Existing gross floor area:	7725.6 sqm.
Proposed gross floor area:	2336.9 sqm.
Water:	Existing connection to private well.
Wastewater:	New on site treatment in tank.
Surface water:	Rain water collected in tank. Overflow to soakaways.

Principle of Development

The proposed development is located in a rural area in an existing agricultural complex which operates a dairy farm (135 dairy, 44 cattle over 18 months and 50 cattle between 6 to 18 months) and chicken farm. There are two existing chicken houses which accommodate 50,000 broiler hens. It is proposed to add another 46,000 broiler hens. This would be a total of 96,000 broiler hens.

Given the existing use on site, the proposed development is acceptable in principle subject to meeting all environmental and engineering requirements.

It should be noted that the red line boundary on the site location map 1:2500 is not drawn correctly and does not correspond to other drawings such as 'Proposed Site Plan 1'.

The applicant received planning permission for a large store under 07/5542 which would have been located on the current site. The current application if granted will supersede the development permitted under 07/5542 which has not been constructed yet.

Proposed Structures and Visual Impact

The two proposed chicken houses are located to the west of the existing two chicken houses. The height of the chicken houses is 4.3m and is similar to the height of the existing chicken houses. The houses are 15.2m in width and 76.2m in length.

Three feed bins are located in between the sheds and two tanks (one rain water and one wash water tank) are located to the north of existing chicken shed S.

The applicant has submitted photographs of the existing farm. I consider that these structures may be partially hidden by the existing chicken houses but generally will be visible on the landscape particularly from the east. This is a Scenic Landscape but while I consider the structures will be visible I don't consider they will be overly prominent to such a degree that they would detract from the

PLANNER'S REPORT

PRIMARY

scenic character of the area. This is an area with an agricultural landscape, the proposed chicken houses are of similar height to existing structures and there is some mounding around the structures which helps integrate them better into the landscape. I have no objection to same from a visual impact point of view.

Water

There are two wells on site - one adjacent to Office J and one adjacent to store P.

Wastewater

Waste wash water will be collected in tank AH for later landspreading. The chicken houses are washed after each batch of chickens is finished and manure is removed.

It worth noting that the chicken litter is disposed of through on site burning of the litter which provides sufficient heat for the broiler chicken operation to be heated without the use of natural gas with additional heat being used to generate sufficient electricity to supply the needs of the entire broiler operation.

Surface Water

Rain water is collected in tank AJ, AK for use in chicken houses and existing dairy farm yard. The overflow is diverted to existing soakaways.

Environmental Impact

A short EIA has been submitted. The Environment Dept is unaware of any history of environmental complaints regarding this site. The report from the Environment Dept also notes:

- The ash from this system is taken to the Biomass Heating Solutions Limited (BHSL) plant at Kantoher, Co. Limerick, where it is processed into a fertilizer. (BHSL supplied & maintain the combustion unit).
- There is no direct landspreading of poultry litter on the applicants lands at present & the applicant does not propose to landspread any poultry manure from the proposed extended development.
- The poultry houses are cleaned out after each batch of chickens, approx. every 8-9 weeks, & the EIA states that poultry litter will be stored in a proposed new litter storage shed prior to use in the combustion unit.
- The applicant proposes to install a larger combustion unit to handle all litter generated on site, which will produce heat for

PLANNER'S REPORT
PRIMARY

the poultry houses & electricity for the poultry houses & the dairy unit.

Deferral is required to clarify a number of items.

Traffic/Access

The EIA notes that with the proposed sheds there would be an increase in traffic coming onto the site with 10 deliveries of feed during an 8 week cycle and 8 loads of chickens being exported every 8 weeks or so.

The applicant should submit proposals to prevent surface water from flowing out onto the road during periods of heavy rain.

Conclusion

The Environment Dept has noted a number of significant inconsistencies which need to be clarified by further information. The issue of surface water flowing out onto the road also needs to be addressed. Further information should be sought as follows:

1. Confirm if a new poultry litter storage shed is to be constructed on site, & show clearly on drawings & include on Farm Structures List. Confirm if store will have 26 weeks storage capacity for all litter generated on site.
2. Confirm if a new poultry litter combustion system is to be constructed on site, & show clearly on drawings & include on Farm Structures List.
3. Confirm if there is an existing storm water storage tank on site as per page 8 of EIA, & show clearly on drawings & include on Farm Structures List.
4. Show location of existing poultry litter store & combustion unit on drawings & include on Farm Structures List. If it is not proposed to construct a new litter store & combustion unit confirm that the existing store has capacity for 26 weeks storage of litter & that the existing combustion unit can handle all poultry litter generated on site from the existing & proposed poultry units.
5. Confirm capacity of the proposed combustion unit if it is to be constructed, & confirm if electricity will be generated on site.
6. Submit a copy of the Department of Agriculture licence/approval for the combustion unit as referred to on P. 4 of the EIA.

PLANNER'S REPORT

PRIMARY

7. Submit details of the air emission data from the combustion unit which has been submitted to the EPA, & any acknowledgment or approval issued by the EPA for this facility.
8. Confirm how ash from combustion unit will be collected & stored on site, & what measures will be taken to minimise dust emissions from ash.
9. Submit letter from BHSL confirming that they will accept all ash generated on site for processing at their plant in Kantoher, Co. Limerick, & subsequent recovery as a fertiliser.
10. Please submit proposals to prevent surface water from flowing out onto the public road.

Defer Application

Conditions/Reasons



Susan Hurley

08/11/2010

For inspection purposes only.
Consent of copyright owner required for any other use.

PLANNER'S REPORT
PRIMARY

For inspection purposes only.
Consent of copyright owner required for any other use.

PLANNER'S REPORT
FURTHER INFORMATION ASSESSMENT

APPLICATION NO.	08094/10
APPLICANT	Nigel Sweetnam
DESCRIPTION	Construction of 2 no. chicken houses, rain water tank, wash water tank, 3 no. feed bins and associated works
LOCATION	Knockduff Kinsale
DUE DATE	14/06/2011

Report on Further Information Submitted on 18/05/2011

Item 1

It is intended to apply for planning permission for a new poultry litter storage shed. It will have a capacity of 200 t. Each cycle of chickens grown will produce approx. 120 tonnes of litter per cycle. As the proposed new combustion unit will be capable of consuming 5 tonnes of litter per day, all litter will be combusted in the subsequent cycle thus removing the need for 26 week storage.

The site layout plan shows a new store labelled 'AM' located north of the proposed sheds. This does not have planning permission. The location of the shed shown on the plan is not necessarily an acceptable location for a shed of this size as this is a particularly visible and prominent location. If this litter store/combustion unit is essential to the operation of this development then it should have been included as part of this planning application/permission.

It could be argued that permitting the proposed development is premature pending the permission of the litter store/combustion unit. However, the applicant has a large landholding and sufficient space for the required store/unit and while that may not be as indicated on the site layout plan submitted on 18/05/2011 it could if necessary be constructed elsewhere. Therefore, the proposed development can proceed.

Item 2

A larger litter combustion system will be installed temporarily in the existing store AI replacing the existing combustion system. This system will be skid mounted so can be moved when planning permission has been granted for the proposed new poultry litter storage shed.

Item 3

An existing storm water storage tank is in place on site as shown on enclosed drawings marked as AL- storm water tank.

Item 4

PLANNER'S REPORT
FURTHER INFORMATION ASSESSMENT

The existing poultry litter store and combustion unit are housed in store AI.

Item 5

The proposed new combustion unit will be a 5 tonne per day unit with capabilities to produce 500kW of heat or 75 kVA of electricity or a combination of both. This will allow for growing of chickens with a zero carbon foot print as the unit will be a net exporter of energy.

Item 6

A copy of the Dept of Agriculture licence (approval no.: 03/09) for the combustion unit is enclosed.

Item 7

Air emission data and EPA details from BHSL enclosed.

Item 8

Details of ash storage, collection and dust minimisation enclosed.

Item 9

Confirmation of ash storage of BHSL accepting all ash generated for processing enclosed.

Item 10

Surface water will be prevented from flowing onto the public road by the slope of the land on which the proposed units will be constructed as the slope is downwards away from the road. Surface water will be directed to surrounding fields to be soaked away as is currently the practice in the farmyard.

Environment Dept

The report from the Environment Dept outlines that the information submitted deals satisfactorily with the queries raised but notes that the activity proposed requires an Integrated Pollution Prevention Control Licence. A recommendation to grant has been made.

Conclusion

PLANNER'S REPORT
FURTHER INFORMATION ASSESSMENT

The applicant has replied to further information in a satisfactory manner.

Recommendation

I recommend that planning permission be granted.

Conclusion

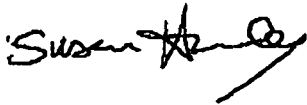
Grant Application

Conditions/Reasons

No.	Condition	Reason
1	The development shall be carried out in accordance with the plans and particulars lodged with the application as amended by the documents/drawings received by the planning authority on the 18/05/2011 except as may otherwise be required in order to comply with the conditions herein.	In the interests of clarity.
2	The roof and side cladding of the proposed structures shall be coloured green to match the existing farm complex.	In the interest of visual amenity.
3	During the course of construction of work the developer shall provide on site a covered skip or other such receptacle for the deposit therein of all rubbish, litter, packaging, rubble and other such materials arising from the works. The developer shall ensure that the site and its environs are maintained at all times in a clean and tidy condition.	To protect the amenities of the area.
4	No dust, mud or debris from the site shall be carried onto or deposited on the public road/footpath. Public roads and footpaths in the vicinity of the site	To protect the amenities of the area and in the interests of road safety.

PLANNER'S REPORT
FURTHER INFORMATION ASSESSMENT

	shall be maintained in a tidy condition by the developer during the construction phase.	
5	Prior to the commencement of development details shall be submitted for written agreement of the Planning Authority of a landscaping proposal for planting of shrubs/hedging on the mounding along the northern site boundary.	In the interests of visual amenity.
6	Faces of cuttings and embankments shall be landscaped to the satisfaction of the Planning Authority.	In the interests of visual amenity.
7	Surface water shall not be permitted to flow onto the public road from the site.	To prevent the flooding of the public road.



Susan Hurley
01/06/2011

For inspection purposes only.
Consent of copyright owner required for any other use.

**CORK COUNTY COUNCIL
PLANNING & DEVELOPMENT ACTS 2000 - 2010
NOTIFICATION OF DECISION TO GRANT Permission
(with conditions)**

Reference No. in Planning Register 10/08094

Nigel Sweetnam
Knockduff,
Kinsale,
Co. Cork

In pursuance of the powers conferred upon them by the above mentioned Act and for the reason set out in the First Schedule hereto, the Council of the County of Cork has by Order dated 13th June 2011 decided to GRANT Permission for the development of land namely:

Construction of 2 no. chicken houses, rain water tank, wash water tank, 3 no. feed bins and associated works

At: Knockduff, Kinsale,

In accordance with the plans and particulars submitted by the applicant

On: 01/10/2010

And subject to the conditions (7no.) set out in Column 1 of the Second Schedule attached hereto. The reasons for the imposition of the said conditions are set out in Column 2 of the schedule.

An appeal against a decision of the Planning Authority may be made to An Bord Pleanála by any authorised person before the EXPIRATION of the period of FOUR WEEKS beginning on the day of the giving (i.e. Date of Order) of the decision of the Planning Authority. (SEE NOTES ATTACHED)

If there is no appeal against the said decision, a grant of Permission in accordance with the decision will be issued after the expiration of the period within which an appeal may be made to An Bord Pleanála. It should be noted that until a grant of Permission has been issued the development in question is NOT AUTHORISED.

Signed on behalf of the said Council



Peter Varian

Date: 15/06/2011

SEE NOTES ATTACHED

Please note that pursuant to S.34(3) of the Act, the Planning Authority has had regard to submissions or observations received in accordance with these Regulations.

In accordance with Article 20, site notice shall be removed on receipt of this notification.

FIRST SCHEDULE

Planning Ref. No. 10/08094

Having regard to the development plan objectives for the area and the pattern of development in this rural area, it is considered that subject to compliance with conditions attached in the Second Schedule, the proposed development would not seriously injure the amenities of the area and would not be prejudicial to public health and, therefore, would be in accordance with the proper planning and sustainable development of the area.

*For inspection purposes only.
Consent of copyright owner required for any other use.*

SECOND SCHEDULE

No.	Condition	Reason
1	The development shall be carried out in accordance with the plans and particulars lodged with the application as amended by the documents/drawings received by the planning authority on the 18/05/2011 except as may otherwise be required in order to comply with the conditions herein.	In the interests of clarity.
2	The roof and side cladding of the proposed structures shall be coloured green to match the existing farm complex.	In the interest of visual amenity.
3	During the course of construction of work the developer shall provide on site a covered skip or other such receptacle for the deposit therein of all rubbish, litter, packaging, rubble and other such materials arising from the works. The developer shall ensure that the site and its environs are maintained at all times in a clean and tidy condition.	To protect the amenities of the area.
4	No dust, mud or debris from the site shall be carried onto or deposited on the public road/footpath. Public roads and footpaths in the vicinity of the site shall be maintained in a tidy condition by the developer during the construction phase.	To protect the amenities of the area and in the interests of road safety.
5	Prior to the commencement of development details shall be submitted for written agreement of the Planning Authority of a landscaping proposal for planting of shrubs/hedging on the mounding along the northern site boundary.	In the interests of visual amenity.
6	Faces of cuttings and embankments shall be landscaped to the satisfaction of the Planning Authority.	In the interests of visual amenity.
7	Surface water shall not be permitted to flow onto the public road from the site.	To prevent the flooding of the public road.

JUDGEMENT OF THE COURT (Third Chamber)

March 16, 2006 (*)

"Failure to fulfill obligations - Directive 85/337/EEC as amended by Directive 97/11/EC - Assessment of the effects of projects on the environment - Interaction of factors likely to be affected directly or indirectly - Obligation to publish the impact statement - Assessment limited to urban development projects outside urban areas - Project to build a recreation center in Paterna "

In Case C-332/04,

aimed infringement proceedings under Article 226 EC, brought on 28 July 2004

Commission of the European Communities, represented by G. Valero Jordana M and ^{me} F. Simonetti, acting as Agents, with an address for service in Luxembourg,

applicant,

against

Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Third Chamber)

composed of A. Rosas, President of the Chamber, A. Borg Barthet and U. Löhms (Rapporteur), Judges,

Advocate General: ¹ C. Stix-Hackl,

Registrar: R. Grass,

seen the written procedure,

having decided, the Advocate-General, to decide the case without an Opinion,

gives the following

Stop

1 By its application, the Commission of the European Communities asks the Court to declare that:

- Having partially transposed Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, p. 40, hereinafter "Directive 85/337, in its original"), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ L 73, p. 5, hereinafter the "Directive 85/337 as amended")
- By failing to transpose Article 9, paragraph 1, of Directive 85/337 as amended,
- By failing to comply with the transitional arrangements provided for in Article 3 of Directive 97/11/EC

- By failing to correctly transpose the combined provisions of point 10 b) of Annex II as well as articles 2, paragraph 1 and 4, paragraph 2 of Directive 85/337 as amended, and
- By failing to undergo the procedure for evaluating environmental impacts of the project to build a recreation center in Paterna, and therefore, by failing to apply the provisions of Article 2, paragraph 1, 3, 4, paragraph 2, 8 and 9 of Directive 85/337 as amended,

the Kingdom of Spain has failed to fulfill its obligations under these guidelines.

2 The Kingdom of Spain seeks the dismissal of the appeal and the conviction of the costs.

The legal framework

Community rules

3 Article 2, paragraph 1 of Directive 85/337 as amended provides:

"Member States shall take the necessary steps to ensure that, before consent is given, projects likely to have significant effects on the environment, particularly because of their nature, size or location are subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4. "

4 Article 3 of Directive 85/337 as amended provides:

"The assessment of environmental impacts identify, describe and assess appropriately, depending on each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- Man, fauna and flora,
- Soil, water, air, climate and landscape,
- Material assets and cultural heritage,
- The interaction between the factors in the first, second and third indents. "

5 The two items above apply to projects listed in Annexes I and II to Directive 85/337 as amended. The point 10 b) of Annex II of the Directive refers to urban development projects, including the construction of shopping centers and parking lots.

6 Under Article 4 of Directive 85/337 as amended:

"1. Subject to Article 2, paragraph 3, the projects listed in Annex I are subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2, paragraph 3, shall determine, for projects listed in Annex II:

a) based on a case by case

or

b) based on thresholds or criteria set by the Member State,

whether the project should be subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in points a) and b).

3. In considering individual cases or thresholds or criteria established pursuant to paragraph 2, it is considered the relevant selection criteria set out in Annex III.

[...] "

7 Article 5, paragraph 3 of Directive 85/337 as amended lists the information to be provided by the client. This information shall include at least:

- "- A description of the project comprising information on the site, design and size of the project,
- A description of measures envisaged to prevent and reduce significant adverse effects and, if possible, remedy,
- The data required to identify and assess the main effects which the project may have on the environment,
- An outline of the main alternatives that were considered by the developer and an indication of the main reasons for his choice, given the effects on the environment,
- A non-technical summary of the information referred to above indents. "

8 Article 6, paragraph 2 of Directive 85/337 as amended states:

"Member States shall ensure that any request for authorization and the information collected pursuant to Article 5 are made available to the public within a reasonable time to give the public concerned the opportunity to express an opinion before that the consent is granted. "

9 Article 8 of Directive 85/337 as amended, reads as follows:

"The results of consultations and information gathered pursuant to Articles 5, 6 and 7 must be considered as part of the licensing process."

10 Under Article 9, paragraph 1 of Directive 85/337 as amended:

"When a decision to grant or refuse permission has been taken, the competent authority or authorities shall inform the public in the manner appropriate and shall make available the following information:

- The content of the decision and the conditions in which it is attached thereto,
- The main reasons and considerations that the decision was based,
- A description, if any, of the main measures to avoid, reduce and where possible offset any significant adverse effects. "

11 Article 3 of Directive 97/11 provides:

"1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 March 1999. [...]

[...]

2. If an application has been submitted to a competent authority before the end of the period specified in paragraph 1, the provisions of Directive 85/337/EEC, as it read prior to these amendments shall continue to apply. "

National legislation

12 Directive 85/337 in its original version has been transposed into Spanish law by means of Legislative Royal Decree 1302/1986 of 28 June 1986 on the assessment of environmental impact (BOE No 155 of June 30, 1986, p. 23733). The provisions for the implementation of Royal Decree-Law approved by Royal Decree 1131/1988 of 30 September 1988 (BOE No 239 of October 5, 1988, p. 28911).

13 To ensure the implementation of Directive 97/11, Royal Legislative Decree 1302/1986 has been amended twice, namely by the Royal Decree Law 9 / 2000 of 6 October 2000 (BOE No 241 of October 7, 2000, p. 34608), then by law 6 / 2001 of 8 May 2001 (BOE No 111 of May 9, 2001, p. 16607), hereinafter the "Royal Legislative Decree 1302/1986 as amended."

14 According to Article 2, paragraph 1, of Legislative Royal Decree 1302/1986 amended

"Projects that, under Article 1st of this Royal Decree-Law shall be subject to assessment of environmental impact, must have an environmental impact statement containing at least the following data:

[...]

c) Evaluation of the foreseeable direct or indirect project on population, fauna, flora, soil, air, water, climatic factors, landscape and material assets, including the artistic and historical heritage Archaeological.

[...]»

15 According to Article 4 of Legislative Royal Decree 1302/1986 amended

"1. Prior to the administrative resolution to be adopted for implementation or, where appropriate, the authorization of the project, the facility or the activity, the competent body transmits the file to the agency responsible for the environment, accompanied, where appropriate, comments that it deems relevant, so that it makes an impact statement setting out the conditions to be imposed to ensure adequate protection of the environment and natural resources.

2. In case of disagreement between the two organizations, it is, according to the administration which has referred the case to the Council of Ministers or the Government of the Autonomous Community concerned or, where appropriate, the body designated by Community said, making a decision.

3. The impact statement is published in all cases. "

16 According to Article 18, paragraphs 1 and 2 of Royal Decree 1131/1988:

"1. The environmental impact statement shall, solely for environmental purposes, whether or not to carry out the project and, if so, determine the conditions under which it must be realized.

2. Conditions contain specific requirements concerning the protection of the environment and form a coherent whole with the conditions for the authorization of the project, if any, will be incorporated into the forecasts contained in existing environmental projects and will be referred to the need safeguard ecosystems and their ability to reconstitution. "

17 Under Article 19 of Royal Decree 1131/1988:

"Within thirty days after receipt of the file referred to by Article 16, the environmental impact statement is submitted to the administrative body must make the resolution of administrative approval of the project."

18 The single transitional provision of Royal Decree Law 9 / 2000 states:

"This Royal Decree Law does not apply to private projects for which the administrative authorization procedure began before its entry into force.

Similarly, it does not apply to public projects that have already been disclosed to the public or to public projects that should be of such a procedure and have already been approved. "

19 The Law 6 / 2001 contains the same transitional provision.

20 Annex I, Group 9, c), paragraph 3, of Legislative Royal Decree 1302/1986 modified mentions, among the projects to be an impact assessment, projects that "are in particularly sensitive areas designated pursuant to Directives 79/409/EEC and 92/43/EEC, or wetlands listed in the Ramsar Convention "and especially" the urban development projects and complex hotel outside of urban areas and construction related, including the construction of shopping centers and parking lots. "

21 Annex II, Group 7, b) of Legislative Royal Decree 1302/1986 modified mentions, among the projects to be submitted to an impact assessment, the "urban development projects and resorts located outside the urban and related constructions, including the construction of shopping centers and car parks (projects not included in Annex I). "

Pre-litigation procedure

22 This appeal concerns two infringement proceedings by the Commission against the Kingdom of Spain in 2001. The first, introduced under the reference No. 2001/2210, was to examine the conformity of national provisions transposing Directive 85/337 as amended. The second, reference No. 2001/2257, was to determine whether, by not having agreed on the need to submit an environmental impact assessment of the project to build a recreation center in Paterna, that Member State had correctly applied the provisions of that Directive.

23 As part of the infringement procedure No. 2001/2210, the Commission, December 21, 2001, sent a letter of formal notice to the Member State concerned. The Spanish authorities have responded to this notice by letter of March 27, 2002, in which it states that the Directive 85/337 as amended had been correctly transposed into national legal systems.

24 Not satisfied with the explanations provided by the Kingdom of Spain, the Commission, July 11, 2003, sent a reasoned opinion requesting that Member State to take the measures necessary to comply within two months of notification of that opinion. On July 16, 2003, the Kingdom of Spain asked the Commission an additional period of one month to respond, a period which has not been granted. The reasoned opinion has remained unanswered.

25 As part of the infringement procedure No. 2001/2257, the Commission, December 13, 2001, sent a letter to the Spanish authorities by which it invited them to submit their comments on the allegations. On January 23, 2002, the authorities sent the Commission a report by the Community of Valencia concluding that the proposed recreation center in question should not be subject to an assessment of its environmental impact under the provisions in force in the Autonomous Community, on the grounds that it would be built in an urban area that does not fall within one of the spots mentioned in Annex I, Group 9, c), paragraph 3, of Royal Decree 1302/1986 legislative changes or Annex II, Group 7, b) of that Royal Decree-Law.

26 After analyzing the information received, the Commission considered that the provisions of Article 2, paragraph 1, 3 and 4, paragraph 2 of Directive 85/337 as amended combined with point 10, b), the Annex II and those in Annex III and Articles 8 and 9 of the Directive had been applied incorrectly, to the extent that the need to submit the project to the impact assessment procedure provided for in Articles 5 to 10 of that Directive had not been established.

27 Consequently, by letter of formal notice dated 18 July 2002, the Commission invited the Spanish government to comment on this matter within two months.

- 28 Having received no response to the letter of formal notice, the Commission, December 19, 2002, issued a reasoned opinion in which it invited the Kingdom of Spain to adopt, within two months the giving of such notice, the necessary steps to comply. On February 24, 2003, the Spanish authorities responded by stating that the provisions of point 10 b) of Annex II to Directive 85/337 as amended were not violated.
- 29 Considering that the information provided by the Spanish authorities showed that certain provisions of Directive 85/337 as amended were not properly implemented or enforced, the Commission decided to bring this action.

The action

30 In support of its application, the Commission relies on five complaints, alleging:

- Incomplete transposition of Article 3 of Directive 85/337 as amended;
- The non-implementation of Article 9, paragraph 1 of Directive 85/337 as amended;
- The breach of Article 3, paragraph 1 of Directive 97/11;
- The incorrect transposition of the combined provisions of point 10 b) of Annex II as well as articles 2, paragraph 1 and 4, paragraph 2 of Directive 85/337 as amended, and
- The lack of evaluation of the environmental impact of the proposed construction of a recreation center in Paterna.

The first complaint alleging incomplete transposition of Article 3 of Directive 85/337 as amended

- 31 The Commission argues that even if Article 2, paragraph 1, sub c) of Legislative Royal Decree 1302/1986 transposes changed almost the entire contents of Article 3 of Directive 85/337 as amended, it does not mention not, however, the interaction between the factors listed in first to third indents of Article 3, interaction is expected in the fourth indent. Similarly, Article 9 of Royal Decree 1131/1988 would not impose the consideration of the interaction of all factors listed in Article 3, whereas this requirement should be expressly stated in the Spanish legislation for it clearly imposes various agents and authorities.
- 32 The Spanish Government considers that the reference to the evaluation of foreseeable effects of direct and indirect project, which was already foreseen in the original wording of Article 2, paragraph 1, of Legislative Royal Decree 1302/1986, made specific reference to interaction between all factors that must be included in the declaration of environmental impact, which explains that Article 7 of Royal Decree 1131/1988, expected to apply Royal Legislative Decree 1302/1986, mentions Among the components of the study of environmental impact, the "environmental inventory and description of the major ecological or environmental interactions."
- 33 It should be noted, first, that Article 3 of Directive 85/337 as amended refers to the content of the assessment of environmental impacts, which includes a description of direct and indirect effects of a project factors listed on the first three indents of this article and the interaction between them. It is the competent environmental authority to carry out such an assessment.
- 34 With regard to Spanish law, it should be noted, firstly, that Article 2, paragraph 1, of Legislative Royal Decree 1302/1986 as amended does not mention the interaction between the factors set out in the first third indents of Article 3 of Directive 85/337 as amended.
- 35 Second, Article 7 of Royal Decree 1131/1988 establishes a list of documents that must include the study of environmental impacts, whose implementation is entrusted to the client, which include an inventory environmental, not provided in the disclosure required under Article 5,

paragraph 3 of Directive 85/337 as amended. This document, whose contents are specified in section 9 of this Royal Decree, must actually describe the key environmental and ecological interactions.

- 36 However, it is true that the environmental inventory is to describe the condition of the site on which the project must be built and environmental features, including key ecological interactions, it does not measure provided impacts of the project on various environmental factors specifically mentioned in Article 3 of Directive 85/337 as amended and the interaction between them.
- 37 It follows that the provisions of national law cited by the Spanish Government does not guarantee that the competent administrative authority is evaluating the impact of a project on the interaction between environmental factors listed in Article 3 of Directive 85/337 as amended.
- 38 It appears that, as argued by the Commission with good reason, even if there is an administrative practice of evaluation of such an interaction, this would not consider that Article 3 of Directive 85/337 as amended has been implemented correctly. According to a law that transpose a directive into domestic law must be completed by provisions capable of creating a situation sufficiently precise, clear and transparent to enable individuals to know their rights and obligations (see In particular, in effect, May 30, 1991, Commission / Germany C-361/88, Rec. p. I-2567, paragraph 24 of November 7, 1996, Commission / Luxembourg C-221/94, ECR . p. I-5669, paragraph 22, and September 13, 2001, Commission / Spain C-417/99, Rec. p. I-6015, paragraph 38).
- 39 Finally, Spain argues that Article 127, paragraph 1 of Law 62/2003 of 30 December 2003 (BOE No 313 of December 31, 2003, p. 46874), amended section 2, paragraph 1, sub c) of Legislative Royal Decree 1302/1986 before the action was brought by the Commission so that, at present this provision, specifically, the assessment of environmental impacts shall be directed also the interaction between all the factors listed in Article 3 of Directive 85/337 as amended.
- 40 Suffice it to say here that, according to settled case, the existence of a breach must be determined by reference to the situation of the Member State as it was within the period specified in the notice motivated and that the changes thereafter can not be taken into account by the Court (see, inter alia, of January 30, 2002, Commission / Greece C-103/00, Rec. p. I-1147, paragraph 23; May 30, 2002, Commission / Italy C-323/01, Rec. p. I-4711, paragraph 8, and September 15, 2005, Commission / Germany C-372/03, not yet reported, paragraph 51).
- 41 In this case, it is clear that at the expiration of the period prescribed in the reasoned opinion sent July 11, 2003, the necessary measures to ensure the correct implementation of Directive 85/337 as amended, particularly Article 3, fourth indent of the Directive had not been adopted.
- 42 In those circumstances, it is necessary to be well founded the first complaint raised by the Commission in support of his appeal.

The second complaint alleging non-implementation of Article 9, paragraph 1 of Directive 85/337 as amended

- 43 In support of this complaint, the Commission maintains that, although since its adoption in 1986, Royal Legislative Decree 1302/1986, requires on the one hand, Article 3, paragraph 1, the obligation to inform the public about the environmental impact and, secondly, in its Article 4, paragraph 3, that of publishing the environmental impact statement, the same Royal Decree-Law does not mean the publication of the decision to grant or refuse permission to carry out the project. It is precisely the public communication of such a decision is imposed by Article 9, paragraph 1 of Directive 85/337 as amended.
- 44 The Spanish Government, Article 2 of Directive 85/337 as amended would require the adoption of a system like that provided by Royal Legislative Decree 1302/1986 as a whole, which,

before the competent authority authorizes the project, would provide that the competent authority decides on the environmental impacts that this project would result in environmental matters, as well as the conditions would be attached to protect the environment adequately. The authorization to implement the project, referred to in Article 9, paragraph 1 of Directive 85/337 as amended, could not, contrary to the assertions of the Commission, be treated as a project authorization by the competent authority .

- 45 It follows from the documents submitted to the Court that, under Article 18, paragraph 1, of Royal Decree 1131/1988, the environmental impact statement shall, solely for environmental purposes, the opportunity to complete a project and determine the conditions of the license. Such a declaration is made by the relevant authority for the protection of the environment and in accordance with Article 19 of Royal Decree, it is then forwarded to the administrative body responsible for granting or refusing the decision to carry out the project and, in case of discrepancy, the decision is adopted by a superior body.
- 46 The mere fact that it has proved necessary, the eyes of the Spanish legislature, to arrange several steps in front of various government, the procedure for approval of a project likely to have significant effects on the environment itself is not objectionable from the perspective of Community law. The making available of the impact statement made by the competent environmental can not however justify the lack of publication of the decision to grant or refuse the project, imposed by Article 9 , paragraph 1 of Directive 85/337 as amended.
- 47 The Spanish Government also argues that Article 9 of Directive 85/337 as amended must be interpreted in the light of other provisions, particularly Article 2, paragraph 1 of the directive under which the Community legislature distinguishes between "authorization of the project" ("Autorización") and "authorization to implement the project" ("su desarrollo Autorización"), so the first can not be granted without that the project has been previously subject to the second. Indeed, if the authorization to implement the project, to be made available to the public in accordance with Article 9, paragraph 1 of Directive 85/337 as amended, to coincide with the authorization of the project the competent authority, it would be illogical that Article 2, paragraph 1 of the Directive requires that "authorization of the project" should be preceded by "authorization to implement the project."
- 48 This argument, based on a misreading of Article 9, paragraph 1 of Directive 85/337 as amended, also can not be accepted.
- 49 Contrary to the view expressed by the Spanish Government, Directive 85/337 as amended does not make a distinction between project approval and authorization to implement the project. It is apparent from the wording of the directive as its context and its objectives that both expressions refer to the same administrative act.
- 50 While it is true that in English and Spanish language versions of Directive 85/337 as amended, Article 2, paragraph 1, has two different expressions in that it requires Member States the obligation to take the necessary steps to ensure that, before consent is given ("consent" in the English version and "Autorización" in Spanish), projects likely to have significant effects on the environment, particularly because of nature of their size or location are made subject, inter alia, an application process for authorization of implementation ("development consent" in the English version and "su desarrollo Autorización" in Spanish) this is not the same in all other language versions.
- 51 Thus, multiple language versions use the same single term for a concept which, in English and Spanish, is translated by two different expressions. The single term "authorization" is the French version, as well as "aprovação" in the Portuguese version, "lupa" in the Finnish version, "tillstånd" in the Swedish version, "vergunning" in the Dutch version, "Genehmigung" in the German version, "autorizzazione" in the Italian version, "tilladelse" in the Danish version and "άδεια" in the Greek version.
- 52 However, under a law that the different language versions of Community provisions must be interpreted consistently and therefore in case of differences between these versions, the provision in question must be interpreted in light of general scheme and purpose of the rules of which it forms part (see Case October 27, 1977, Bouchereau, 30/77, Rec. p. 1999,

paragraph 14 of December 7, 1995, Rockfon, C-449/93 , Rec. p. I-4291, paragraph 28, of 17 December 1998, Codan, C-236/97, Rec. p. I-8679, paragraph 28, and April 13, 2000, WN, C-420/98, Rec. p. I-2847, paragraph 21).

- 53 It should be noted that Article 1st, paragraph 2 of Directive 85/337 as amended defines only one type of authorization, namely the decision of the authority or authorities which entitles the owner of the project.
- 54 While Article 6, paragraphs 1 and 2 of Directive 85/337 as amended requires Member States the obligation to hold a consultation in which respectively the authorities likely to be affected by such project and the public are invited to give their opinion, the fact remains that such a procedure takes place, necessarily, before permission is granted. Such notices and other notices further that Member States may provide, are part of the licensing process and are intended to assist the competent authority in its decision to grant or refuse permission. They, therefore, a preparatory and, in general, are not subject to appeal.
- 55 In contrast, public information under Article 9 of Directive 85/337 as amended takes place once the decision to grant or refuse has been adopted. The objective of using this information is not only to inform the public, but also to allow person aggrieved by the project to exercise their right of appeal on time.
- 56 It follows from the foregoing that the fact that a Member State to publish the environmental impact statement prepared by the competent administrative authority in environmental matters, a publication that is not imposed by Community law, does not replace the obligation under Article 9 of Directive 85/337 as amended to provide the public approval or refusal to complete the project within the meaning of Article 1st, paragraph 2 of that directive.
- 57 This interpretation is supported by the purpose of Directive 85/337, in its original version, which is, according to the first recital, to avoid from the outset, the creation of pollution or nuisance rather than fight later effects. This aim was confirmed by Directive 97/11, which recalls, in the second recital, which, under Article 130 R, paragraph 2 of the EC Treaty (now, after amendment, Article 174, paragraph 2, EC) The Community policy in the field of the environment is based on the principles of precaution and preventive action, the principle of priority be rectified at source of environmental damage and the principle of "polluter pays".
- 58 By establishing, in Article 9, the obligation for Member States to inform the public when a decision granting or refusal is adopted, the Directive 85/337 as amended heard involve the public concerned to a monitoring implementation of these principles. The fact that the public is only aware of the contents of a notice to be considered by the competent authority before adopting its decision does not associate to any such monitoring as effectively as when the information transmitted to him concerns the final decision that terminates the authorization process.
- 59 To the extent that national law does not require the publication of the decision to grant or refuse permission to carry out the project, Article 9, paragraph 1 of Directive 85/337 as amended does not been properly transposed.
- 60 It follows that the second complaint raised by the Commission in support of its action is based.

The third complaint alleging a breach of Article 3, paragraph 1 of Directive 97/11

- 61 The Commission notes that the Royal Decree Law 9 / 2000, adopted in order to implement the amendments made to Directive 85/337 by Directive 97/11 entered into force October 8, 2000, contained a single transitional provision as that "this Royal Decree-Law does not apply to private projects for which the administrative authorization procedure began before its entry into force. Similarly, it does not apply to public projects that have already been disclosed to the public or to public projects that should be of such a procedure and have already been approved. " Law 6 / 2001, which repealed the Royal Decree Law, contain the same provision. It would be effective May 10, 2001.

62 According to the Commission, Article 3, paragraph 1 of Directive 97/11 requires Member States the obligation to adapt their legislation on or before March 14, 1999 and paragraph 2 of that Article establish that the provisions of Directive 85/337, in its original form, are applicable to applications for authorization submitted before that date. Therefore, the provisions of Directive 85/337 as amended would have been applicable to all requests for authorization submitted after March 14, 1999, that does not provide the Spanish legislation.

63 The Spanish Government relies on the principles of legal certainty and protection of legitimate expectations to justify the measure. Indeed, a regulatory change that was applicable at the time of submission of an application for authorization, if it imposes new conditions, involve a violation of these principles to the prejudice of those who have made a record in accordance with the previous regulations.

64 According to the Commission, these two principles, however, could be invoked to justify the fact that the new regulation does not apply to projects under review or approval. Indeed, as long as no administrative decision has been taken on the projects presented, the promoters could not have acquired any right.

65 As regards the obligation to conduct the environmental impact assessment, the Court held, on several occasions, it applies to all projects covered by Directive 85/337, in its original for which the authorization request was submitted after the deadline for transposition. In this sense, the Court held that the directive does not allow a Member State which has implemented it in national law after the date of expiry of the deadline for implementation, to provide, for a transitional provision, obligations on the assessment of environmental impacts required by the Directive projects with the approval process was initiated before the entry into force of the national transposition law, but after the deadline for the transposition (see, Case 9 August 1994, Bund Naturschutz in Bayern and Others, C-396/92, Rec. p. I-3717, paragraph 20, of 22 October 1998, Commission / Germany C-301/95, Rec. p. I-6135, paragraph 29, and January 21, 1999, Commission / Portugal, C-150/97, Rec. p. I-259, paragraph 23).

66 As rightly pointed out by the Commission, this case law applies, mutatis mutandis, to interpret the transitional arrangements established by Article 3 of Directive 97/11. It follows that a Member State is not authorized by the late adoption of provisions for the implementation of the changes introduced by Directive 97/11 in Directive 85/337 in its original form, to defer such provisions beyond the date set by Directive 97/11. A contrary interpretation would lead to a postponement of the deadline and would be contrary to the obligations under Directive 97/11 (see, to that effect, Bund Naturschutz in Bayern and Others, paragraphs 19 and 20).

67 The risk, according to the Spanish Government, by individuals who have applied for permission before October 8, 2000, date of entry into force of Royal Decree Law 9 / 2000, to be harmed in their rights not relieve the Member State to take, in accordance with the objective of Directive 97/11, the measures to ensure that, firstly, the projects for which an assessment is required are subject to an application for leave and, secondly, from March 14, 1999, new categories of projects added to Annex I to Directive 85/337 as amended, be subject, in principle, a systematic evaluation.

68 Furthermore, it should be noted that demand for its failure, as formulated by the Commission, does not affect claims with the appropriate national authority after March 14, 1999 and for which an authorization decision would have occurred.

69 It is therefore necessary to consider also the third complaint is well founded.

The fourth complaint alleging incorrect transposition of the combined provisions of point 10 b) of Annex II as well as articles 2, paragraph 1 and 4, paragraph 2 of Directive 85/337 as amended

70 The Commission notes that the law 6 / 2001 provides, in Group 7, b) of Annex II to the EIA only for urban development projects and construction of resorts located outside the urban areas as well as related constructions, including the construction of shopping centers and car parks (projects not included in Annex I of the Law 6 / 2001).

- 71 Therefore, the Commission believes would be excluded from the procedure provided for projects listed in Annex II of Directive 85/337 as amended for such development projects when they are located in urban areas. This situation, arising from national legislation, would not be corrected, except in rare exceptions, the regional legislation on urban planning, complemented by regional legislation regarding impact assessment. Indeed, the latter does not impose an assessment of environmental impact in terms of urban planning instruments.
- 72 The Spanish Government submits that Directive 85/337 as amended allows Member States to decide that some projects listed in Annex II will not be subject to an assessment of environmental impacts.
- 73 According to that Government, it would be by using this power that the Spanish legislation would subject all urban development projects and construction of hotel complexes outside urban areas and the related constructions, including the construction of shopping commercial and parking, the requirement to provide a statement of environmental impact when they are in especially sensitive areas.
- 74 The Spanish Government adds that, in this way, the only urbanization projects that are not subject to a declaration of environmental impact are those that are urban areas where the impact on it are virtually nil since it is land within an urban area.
- 75 This government believes that, therefore, it did not exceed the discretionary powers entrusted to him under Articles 2 and 4 of Directive 85/337 as amended.
- 76 Although the Court has already noted, in this regard, Member States have the option to set the criteria and / or thresholds for determining which projects listed in Annex II to Directive 85/337, as amended original, must be assessed (Judgement of 24 October 1996, Kraaijeveld and Others C-72/95, Rec. p. I-5403, paragraphs 49-53). However, in setting these thresholds and / or criteria, Member States should consider not only the size of projects, but also their nature and their location (see, to that effect, the September 21, 1999, Commission / Ireland C-392/96, Rec. p. I-5901, paragraphs 65-67, and June 13, 2002, Commission / Spain C-474/99, Rec. p. I-5293, paragraph 31).
- 77 However, by limiting the evaluation of the environmental impact of urbanization projects only to projects located on non-urban land, the Spanish government is limited to apply the criterion of the location, which is only one of three criteria set out in Article 2, paragraph 1 of Directive 85/337 as amended, regardless of the other two criteria, namely the nature and size of the project.
- 78 Furthermore, since it provides for the assessment of the environmental impact only for projects of urban development projects outside urban areas, the Spanish legislation is an incomplete application of the criterion of localization.
- 79 Indeed, areas with high population density, and landscapes important points of historical, cultural and archaeological heritage, listed in Section 2, g) and h) of Annex III of Directive 85/337 amended, are among the selection criteria which Member States must take account, in accordance with Article 4, paragraph 3 of that directive, to consider individual cases or thresholds or criteria set out in paragraph 2 of this article to determine whether a project should be subject to evaluation. However, as rightly pointed out the Commission, these selection criteria include, most often in urban areas.
- 80 The argument put forward by the Spanish Government that, in urban areas, the environmental impact of urban development projects would be virtually non-existent nor can be accepted given the list of factors that may be directly or indirectly affected by projects covered by Directive 85/337 as amended.
- 81 Indeed, those factors listed in Article 3 of Directive 85/337 as amended, are found both inside and outside of urban areas and the likelihood that they are affected by one of above projects do not necessarily vary depending on the situation of these areas. In any event, neither the preamble nor the provisions of Directive 85/337 as amended does not confirm the interpretation that all projects for urban development projects in urban areas are not likely

to have significant effects on the environment within the meaning of Article 1st, paragraph 1 of this directive and could therefore be excluded from the process of applying for authorization and evaluation with respect to their effects.

82 In those circumstances, the fourth complaint raised by the Commission should be allowed.

The fifth complaint alleging a lack of evaluation of the environmental impact of the proposed construction of a recreation center in Paterna

83 The Commission argues here that the Spanish Government has made an incorrect application of the combined provisions of Article 2, paragraph 1, 3 and 4, paragraph 2 of Directive 85/337 as amended, the point 10 b), of Annex II and Articles 8 and 9 of the directive, since it has taken no steps to verify if the proposed recreation center located in Paterna could have a significant impact on the environment, particularly because of its nature, its size or location.

84 The Commission believes this finding can not be undermined by the fact that the project was presented as the second largest cinema complex in Europe, it would be located in urban areas adjacent to existing urbanization and near areas of urban development, and for which the scheduled weekly attendance is 60 000.

85 The Spanish Government justifies the lack of evaluation of environmental impacts of the project, arguing that because the center will be built on urban land, that is to say on land totally transformed either because they have at least one access road, a water supply, a sewage disposal and electricity supply, either because they are bound by a construction that meets the formal requirements and specifications established by the planning regulations applicable, or because they were urbanized in accordance with this regulation. Since this is a project that is intended to be run on a field completely transformed, the environmental impact would not be significant.

86 The alleged breach by the Commission in this complaint is the result of the application to a particular case of legislation that has already been considered contrary to Community law when considering the fourth complaint. Indeed, the application of national legislation which excludes from the submission to the process of applying for approval and environmental impact assessment works projects of urban development in urban areas, has resulted exemption from such obligations with respect to the construction of the recreation center in question.

87 However, on the one hand, given the size, nature and location of the project, it can not be excluded from the outset, it is likely to have significant impact on the environment. On the other hand, as was demonstrated when considering the fourth complaint, the Spanish legislation on the environment, applied to the construction of a recreation center in Paterna, does not comply with the Directive 85/337 as amended, to the extent that the competent authorities are not required to determine whether the implementation of urban development projects, including the construction of shopping centers and parking in urban areas, may cause significant effects on the environment and, if so, to submit these projects to an environmental impact assessment.

88 It is therefore necessary to consider the fifth complaint is well founded.

89 In light of all of the foregoing, the Court finds that:

- Having partially transposed Article 3 of Directive 85/337 as amended;
- By failing to transpose Article 9, paragraph 1, of Directive 85/337 as amended;
- By failing to comply with the transitional arrangements provided for in Article 3 of Directive 97/11;

- By failing to correctly transpose the combined provisions of point 10 b) of Annex II as well as articles 2, paragraph 1 and 4, paragraph 2 of Directive 85/337 as amended, and
- By failing to undergo the procedure for evaluating environmental impacts of the project to build a recreation center in Paterna, and therefore, by failing to apply the provisions of Article 2, paragraph 1, 3, 4, paragraph 2, 8 and 9 of Directive 85/337 as amended,

the Kingdom of Spain has failed to fulfill its obligations under these guidelines.

On costs

90 Under Article 69, paragraph 2 of the Rules of Procedure, the unsuccessful party to pay the costs if pleadings. The Commission has applied for costs against the Kingdom of Spain and the latter has been unsuccessful, it must be ordered to pay costs.

For these reasons, the Court (Third Chamber) hereby:

- 1) Having partially transposed Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, by failing to transpose Article 9, paragraph 1, of Directive 85/337, as amended by Directive 97/11, by not complied with the transitional arrangements provided for in Article 3 of Directive 97/11, by failing to transpose correctly the combined provisions of point 10 b) of Annex II as well as articles 2, paragraph 1, and 4, paragraph 2 of Directive 85/337, as amended by Directive 97/11, and not subject to the procedure for assessing the environmental impact the proposed construction of a center Leisure in Paterna, and therefore, by failing to apply the provisions of articles 2, paragraph 1, 3, 4, paragraph 2, 8 and 9 of Directive 85/337, as amended by Directive 97/11, the Kingdom of Spain has failed to fulfill its obligations under these guidelines.**
- 2) The Kingdom of Spain to pay the costs.**

Signatures

JUDGMENT OF THE COURT (Second Chamber)

20 November 2008 (*)

(Failure of a Member State to fulfil obligations – Directive 85/337/EEC –
Assessment of the effects of projects on the environment – Consent given without
an assessment)

In Case C-66/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 6 February
2006,

Commission of the European Communities, represented by F. Simonetti and
X. Lewis, acting as Agents, F. Louis, avocat, and C. O'Daly, Solicitor, with an
address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, J. Connolly SC and
G. Simons BL, with an address for service in Luxembourg,

defendant,

supported by:

Republic of Poland, represented by E. Ośniecka-Tamecka, acting as Agent,

intervener,

THE COURT (Second Chamber),

composed of K. Schieman, acting for the President of the Second Chamber,
J. Makarczyk (Rapporteur), P. Küris, L. Bay Larsen and C. Toader, Judges,

Advocate General: J. Mazák,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 May 2008,

having decided, after hearing the Advocate General, to proceed to judgment
without an Opinion,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities requests the Court to declare that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337'), all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the category of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive.

Legal context

Community legislation

- 2 In accordance with Article 1(2) of Directive 85/337:

'...

"project" means:

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

...

"development consent" means

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

- 3 Article 2(1) and (3) of Directive 85/337 provide:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

...

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

...'

- 4 Article 4 of the directive provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

5 Annex II to the directive lists the projects subject to Article 4(2).

6 Point 1 of Annex II is worded as follows:

'Agriculture, silviculture and aquaculture

(a) Projects for the restructuring of rural land holdings;

(b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;

(c) Water management projects for agriculture, including irrigation and land drainage projects;

(d) Initial afforestation and deforestation for the purposes of conversion to another type of land use;

(e) Intensive livestock installations (projects not included in Annex I);

(f) Intensive fish farming;

(g) Reclamation of land from the sea.'

7 Annex III to the directive, which lists the selection criteria referred to in Article 4(3), states as follows:

'1. Characteristics of projects

The characteristics of projects must be considered having regard, in particular, to:

- the size of the project,

- the cumulation with other projects,

- the use of natural resources,
- the production of waste,
- pollution and nuisances,
- the risk of accidents, having regard in particular to substances or technologies used.

2. Location of projects

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

- the existing land use,
- the relative abundance, quality and regenerative capacity of natural resources in the area,
- the absorption capacity of the natural environment, paying particular attention to the following areas:

...

3. Characteristics of the potential impact

The potential significant effects of projects must be considered in relation to criteria set out under 1 and 2 above, and having regard in particular to:

- the extent of the impact (geographical area and size of the affected population),

...

National legislation

- 8 Directive 85/337 has been transposed into Irish law by, in particular, the Planning and Development Act, 2000 ('the PDA'), and the Planning and Development Regulations, 2001 (S.I. No 600/2001; 'the PDR'), as amended.
- 9 Under the PDA, the carrying out of development in principle requires planning permission.
- 10 An exemption from the obligation to obtain planning permission is laid down in Article 6 of the PDR for development falling within certain classes that are set out, in particular, in Part 3 of Schedule 2 to the PDR. This exemption is, however, subject to the requirement under Article 9 of the PDR that the development concerned must not be likely to have significant effects on the environment.
- 11 Article 9 of the PDR accordingly lists a number of cases in which the exemption cannot apply on account of the application of safeguard clauses.
- 12 As provided in Article 9(1)(a), that is so inter alia if the development in question would:

\ ...

- (vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan,
- (vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan, save any excavation, pursuant to and in accordance with a licence granted under section 26 of the National Monuments Act, 1930 ...,

...

- (x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility,
- (xi) obstruct any public right of way,
- (xii) further to the provisions of section 82 of the [PDA], consist of or comprise the carrying out of works to the exterior of a structure, where the structure concerned is located within an architectural conservation area or an area specified as an architectural conservation area in a development plan for the area or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan and the development would materially affect the character of the area'.

- 13 Also, it is clear from section 176 of the PDA, in conjunction with Article 93 of the PDR and paragraph 1 of Part 2 of Schedule 5 thereto, that Ireland has chosen, for projects falling within point 1(a) to (c) of Annex II to Directive 85/337, to set, in respect of each project category, a threshold based exclusively on project size, below which an environmental impact assessment is not obligatory.
- 14 Article 103 of the PDR empowers the planning authority to require submission of an environmental impact statement for a development where a planning application is not accompanied by such a statement. This applies in particular to development which does not exceed certain thresholds laid down by national law but which the planning authority considers would be likely to have significant effects on the environment.
- 15 In deciding whether or not a development is likely to have significant effects on the environment, the planning authority takes account of the criteria laid down in Schedule 7 to the PDR, which corresponds to Annex III to Directive 85/337.
- 16 In addition it is apparent from sections 9(1) and 10(2)(c) of the PDA that each planning authority must include objectives relating to conservation and protection

of the environment in the development plan which it is required to make every six years.

Pre-litigation procedure

- 17 After sending Ireland a request for information dated 13 September 2001, on 23 October 2001 the Commission sent it a letter of formal notice relating to a trial salmon farm on the Kenmare estuary in County Kerry. Ireland replied to that letter on 21 May 2002.
- 18 On 18 October and 19 December 2002, the Commission sent Ireland further letters of formal notice.
- 19 The first of these letters set out the Commission's position that Ireland's transposition of Directive 85/337 was deficient with regard to the project categories set out in point 1(a) to (c) of Annex II to the directive. The second referred to deficient transposition of the directive with regard to projects falling within point 1(f) of Annex II. Ireland replied to those letters by letters of 9 April and 26 May 2003.
- 20 On 11 July 2003 the Commission sent Ireland a reasoned opinion calling on it to take the necessary measures to comply with the reasoned opinion within two months of its receipt.
- 21 The Commission, after finding the position adopted by Ireland in a letter of 7 November 2003 in response to the reasoned opinion to be unsatisfactory, brought the present action under the second paragraph of Article 226 EC.
- 22 By order of the President of the Court of 11 May 2007, the Republic of Poland was granted leave to intervene in the present case in support of the form of order sought by Ireland.

The action

- 23 The Commission's action is based on two complaints. According to its first complaint, the Irish legislation transposing Directive 85/337 is deficient as it does not provide, in respect of the project categories covered by point 1(a) to (c) of Annex II to the directive, for effective measures to achieve the results required by Articles 2(1) and 4(2) and (3) of the directive. In the second complaint, the Commission submits that the competent Irish authorities are not expressly required to take account of the selection criteria set out in Annex III to Directive 85/337 so far as concerns intensive fish farming installations falling within point 1(f) of Annex II to the directive and that this infringes Community requirements.
- 24 Before considering the merits of these complaints, it is necessary to rule on Ireland's plea that the present action is inadmissible.

Admissibility of the action

Arguments of the parties

- 25 Ireland contends that the present action is inadmissible, especially as it is not properly pleaded since the Commission failed, in particular, to identify precisely the

provisions of national legislation against which the action is brought, in a situation where Directive 85/337 was transposed into Irish law by various legal instruments.

- 26 Ireland further contends that the Commission did not particularise its grounds of complaint sufficiently, having moreover relied on separate reasoned opinions. This caused a large measure of confusion that did not allow Ireland a proper opportunity to prepare its defence as it was unable to ascertain the precise reasons why it had allegedly failed to fulfil its obligations under Directive 85/337.
- 27 Furthermore, in Ireland's submission the Commission has not produced to the Court the material needed for the latter to determine that Ireland has failed to fulfil its obligations as alleged. The Commission has failed to adduce evidence as to the existence of development projects claimed by it to belong to a category of projects subject to the requirement for an environmental impact assessment in so far as they are likely to have significant environmental effects.
- 28 Since projects covered by the action are likely to have significant environmental effects only by reason of their particular characteristics, the Commission's failure to indicate specific development projects is fundamental and does not allow Ireland to defend itself effectively.
- 29 The Commission submits in response to this plea of inadmissibility that the present proceedings are based on a single reasoned opinion and that it and the application initiating the proceedings clearly define the grounds of complaint that are the subject-matter of the action. It adds that the application sets out the applicable national legislation and specifies the types of development at issue.

Findings of the Court

- 30 It is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (see, inter alia, Case C-195/04 *Commission v Finland* [2007] ECR I-3351, paragraph 22, and the judgment of 21 February 2008 in Case C-412/04 *Commission v Italy*, not yet published in the ECR, paragraph 103).
- 31 The Court has also held that, in the context of an action brought under Article 226 EC, the reasoned opinion and the action must set out the Commission's complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the scope of the infringement of Community law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged (see, in particular, Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003, paragraph 18).
- 32 In the present case, it is clear from the documents before the Court that the Commission indicated in the pre-litigation procedure, when it sent the request for information dated 13 September 2001 to Ireland, that the Irish legislation transposing Directive 85/337 which it was taking into consideration in that procedure was constituted primarily by the PDA and the PDR.

- 33 Moreover, in so far as the letters of formal notice of 18 October and 19 December 2002 expressly referred to certain of the complaints received that were cited in that letter of 13 September 2001, they left no remaining doubt as to the Irish legislation with which the Commission was concerned.
- 34 Furthermore, the single reasoned opinion, issued on 11 July 2003 at the end of the pre-litigation procedure, does not display any ambiguity either, while the application initiating the proceedings expressly cites the Irish legislation transposing Directive 85/337 – namely the PDA and the PDR – which is said to show that Ireland has not taken all the measures necessary in order for certain projects to be subject to an environmental impact assessment as established by the directive.
- 35 Finally, the projects in respect of which, according to the Commission, the Community requirements are not complied with are perfectly identifiable in the light of the project categories set out in Annex II to Directive 85/337.
- 36 It follows from the foregoing that the Commission's contentions in the course of the pre-litigation procedure and the procedure before the Court were sufficiently clear to enable Ireland to defend itself.
- 37 Accordingly, Ireland's plea of inadmissibility must be dismissed.

Substance

The first complaint

– Arguments of the parties

- 38 The Commission submits that the Irish legislation transposing Directive 85/337 is deficient in that it does not provide, in respect of project categories covered by point 1(a) to (c) of Annex II to the directive, for effective measures to achieve the objectives laid down in Article 2(1) and Article 4(2) and (3) of the directive.
- 39 Article 4(2) of Directive 85/337 permits Member States, in respect of projects listed in Annex II, to determine through a case-by-case examination and/or through thresholds or criteria set by the Member State whether a given project requires an environmental impact assessment in accordance with Articles 5 to 10 of the directive.
- 40 However, the thresholds based on project size adopted by Ireland fail to take account of sensitive locations, such as archaeological sites. They are, moreover, set arbitrarily and unrelated to the reality of the size of Irish land holdings. Finally, they do not permit cumulation with other projects to be taken into account.
- 41 Irish legislation therefore does not comply with the means for determining which projects falling within Annex II to Directive 85/337 must be subject to an environmental impact assessment, means which must take account of the selection criteria laid down in Annex III to the directive.
- 42 In support of its argument, the Commission sets out a number of examples which, in its submission, show that the use of uniform thresholds means that no examination at all is carried out in respect of the environmental effects of projects which are, however, likely to have significant such effects.

- 43 Thus, it submits that certain projects for the restructuring of rural land holdings which lead to the removal of hedgerows, in particular for agricultural purposes, are not the subject of an environmental impact assessment although the removal of hedgerows is liable to have adverse effects on biodiversity in the countryside and significant effects on the natural environment.
- 44 The same is true of projects for the restructuring of rural land holdings that involve the demolition of stone walls constituting field boundaries in certain regions, although their removal can result in significant archaeological loss.
- 45 The Commission finally makes the same criticism with regard to projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes and to water management projects for agriculture, including irrigation and land drainage projects.
- 46 Ireland submits first of all that the Commission has misinterpreted the scope of the Irish legislation and refers in particular to certain provisions of the PDR.
- 47 It adds that the interpretation of Article 4 of Directive 85/337 advocated by the Commission is irreconcilable with the wording of that article since it would effectively make reliance on thresholds impossible.
- 48 Directive 85/337 provides, by way of an alternative to a case-by-case examination of projects falling within Annex II, that a Member State may set thresholds for determining whether an environmental impact assessment is necessary.
- 49 Ireland states that it adopted the latter approach and set various thresholds, indeed at fairly low levels, including for the restructuring of rural land holdings, and that this system of thresholds is supplemented by Articles 103 and 109 of the PDR.
- 50 In deciding whether or not a development would be likely to have significant effects on the environment, the competent authority has regard to the criteria set out in Schedule 7 to the PDR, which corresponds to Annex III to Directive 85/337.
- 51 Ireland explains that detailed guidelines addressed to the competent local authorities deal with the screening of developments whose size is below the thresholds set by the applicable legislation and points out that those authorities can require the submission of an environmental impact statement, pursuant to Article 103 of the PDR.
- 52 Furthermore, the categories of development project at issue cannot be regarded per se as likely to have significant effects on the environment, so that it is only in the light of the characteristics specific to a given project that the possibility of such effects can be assessed.
- 53 Ireland adds that while certain classes of development, corresponding to minor development, are in principle exempted from the requirement to obtain permission, that exemption is, however, limited since, under Article 9 of the PDR, it cannot apply where a proposed development is likely to have significant effects on the environment. Article 9 of the PDR thus sets out six instances where the exemption cannot apply.

- 54 The Republic of Poland submits that the setting of uniform thresholds on the basis of the criterion of project size referred to in Annex III to Directive 85/337 does not of itself mean that the directive has been incorrectly transposed.
- 55 It observes that the Member States are entitled, for the purpose of determining which projects must be subject to an environmental impact assessment, to set thresholds without any requirement for a case-by-case examination. It adds in that regard that it is necessary, when adopting threshold values in respect of the criterion of project size, to take account of the other aspects of projects, in particular their nature and location.
- 56 The Republic of Poland concludes that Directive 85/337 can be infringed only by the setting of a threshold at a level which will fail to ensure that the objectives of the directive are achieved; a single threshold can therefore be set provided that it guarantees that all projects below the value thereby adopted have no significant effects on the environment.
- 57 Finally, the Republic of Poland states that all the selection criteria listed in Annex III to Directive 85/337 must be taken into account in the process of setting the threshold values.

– Findings of the Court

- 58 A preliminary point to note is that, by the present complaint, the Commission criticises certain provisions of the Irish legislation transposing Directive 85/337 and does not seek a declaration that Ireland has failed to fulfil its obligations under the directive in relation to specific factual situations.
- 59 Consequently, Ireland's line of argument that the Commission has not adequately established the factual basis for its action can only be rejected. Since the action for failure to fulfil obligations is concerned with the way in which Directive 85/337 has been transposed, and not with the actual result of the application of the legislation transposing it, it must be determined whether that legislation itself harbours the insufficiencies or defects in transposition of the directive which the Commission alleges, without any need to establish the actual effects of the legislation with regard to specific projects (see, to this effect, Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraphs 59 and 60).
- 60 In that regard, it must be stated first of all that the project categories covered by the present action fall within Annex II to Directive 85/337. The action therefore concerns projects in respect of which, pursuant to Article 4(2) of the directive, the Member States determine, either through a case-by-case examination or through thresholds or criteria, whether an environmental impact assessment is required. Article 4(2) provides that Member States may also decide to apply both those procedures.
- 61 In accordance with settled case-law, where Member States have decided to have recourse to the establishment of thresholds and/or criteria, the limits of the measure of discretion which is thus conferred upon them are to be found in the obligation set out in Article 2(1) of Directive 85/337 that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment before consent is given (see, to this effect, in particular Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50, and the judgment of 28 February 2008 in Case C-2/07 *Abraham and Others*, not yet published in the ECR, paragraph 37).

- 62 In addition, pursuant to Article 4(3) of Directive 85/337, the Member States are under an obligation to take into account, when establishing those criteria or thresholds, the relevant selection criteria set out in Annex III to the directive.
- 63 Among those criteria, Annex III distinguishes (i) the characteristics of projects, which must be considered having regard, in particular, to their size, the cumulation with other projects, the use of natural resources, the production of waste, pollution and nuisances and the risk of accidents, (ii) the location of projects, so that the environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to the existing land use and the absorption capacity of the natural environment, and (iii) the characteristics of the potential impact, having regard inter alia to the geographical area and the size of the population.
- 64 It follows that a Member State which, on the basis of Article 4(2) of Directive 85/337, established thresholds and/or criteria taking account only of the size of projects, without taking into consideration the criteria noted in paragraph 63 of the present judgment, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the directive (see, to this effect, Case C-392/96 *Commission v Ireland*, paragraph 65).
- 65 Furthermore, a Member State which established those thresholds and/or criteria at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would likewise exceed the limits of that discretion, unless all the projects excluded could, when viewed as a whole, be regarded as not likely to have significant effects on the environment (see Case C-392/96 *Commission v Ireland*, paragraph 75 and the case-law cited).
- 66 It is clear from section 176 of the PDA, in conjunction with Article 93 of the PDR and paragraph 1 of Part 2 of Schedule 5 thereto, that Ireland has chosen, for projects falling within point 1(a) to (c) of Annex II to Directive 85/337, to set, in respect of each project category, a threshold based exclusively on project size, below which an environmental impact assessment is not obligatory.
- 67 Under paragraph 1(a) and (b) of Part 2 of Schedule 5 to the PDR, the threshold is 100 hectares in relation to projects for the restructuring of rural land holdings and the use of uncultivated land or semi-natural areas for intensive agricultural purposes and, under paragraph 1(c), the threshold is a catchment area of 1 000 hectares, or 20 hectares of affected wetland, in relation to water management projects for agriculture.
- 68 With a view to demonstrating that Ireland has failed to fulfil its obligations with regard to the present complaint, the Commission has set out some of the characteristics of the Irish countryside which show that projects of a size below the thresholds set by the Irish legislation are nevertheless likely to have significant effects on the environment by virtue of their nature or location, since they are liable to have a substantial, or even irreversible, impact on environmental factors such as fauna and flora, land or cultural heritage.
- 69 Thus, the Commission has established that projects for the restructuring of rural land holdings and projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes may, regardless of their size, result in the loss of field boundaries, and therefore of hedgerows, a loss which is likely, in parts of the Irish countryside, to have significant effects on biodiversity. Nor does Ireland seriously contest that water management projects for agriculture are liable to

entail significant effects on the environment, since they may lead to a loss of biodiversity.

- 70 It should be noted that, according to information supplied by the Commission and confirmed by studies, the average field size in Ireland is approximately 2.4 hectares. As the Commission has demonstrated, in particular at the hearing, the effect of setting, in particular for the restructuring of rural land holdings, a threshold of 100 hectares is that a project relating to the consolidation of around 40 fields, which would entail the destruction of numerous hedgerows and other means of enclosure, could be granted consent without having been subject to an environmental impact assessment, although it is such as to have significant effects on biodiversity.
- 71 Likewise, it is common ground that, in certain areas, stone walls predominate and may have a certain archaeological importance, as is attested in particular by a case study concerning the Dingle Peninsula in County Kerry (F.H.A. Aalen, K. Whelan and M. Stout, *Atlas of the Irish Rural Landscape*, Cork University Press, 1997). Other studies establish a risk of accelerated destruction of archaeological remains that is directly connected with projects for the restructuring of rural land holdings and land drainage projects, although, in Annex III to Directive 85/337, subparagraph (h) of the third indent of point 2 mentions, among the selection criteria referred to in Article 4(3) of the directive, consideration of the environmental sensitivity of geographical areas likely to be affected by a given project in the light of the absorption capacity of the natural environment, paying particular attention to landscapes of historical, cultural or archaeological significance.
- 72 It is also common ground that, in practice, projects falling within point 1(a) to (c) of Annex II to Directive 85/337 are closely linked; the drainage of wetland thus often results in the use of semi-natural areas for intensive agricultural purposes.
- 73 While, as Ireland asserts, in the case of projects falling within point 1(a) to (c) of Annex II to Directive 85/337 that are of a size below the thresholds laid down by Schedule 5 to the PDR, planning authorities may apply Article 103 of the PDR in conjunction with Schedule 7 thereto and thus require submission of an environmental impact statement, such a possibility cannot be considered equivalent to a case-by-case examination complying with the Community requirements.
- 74 Those provisions of Irish legislation will be capable of applying only if the planning authorities have become aware of a project before it is carried out, and specifically if an application for consent has been made to them.
- 75 There is consequently no guarantee that, should those projects be likely to have significant effects on the environment, the competent authority will necessarily be able to require that an environmental impact assessment as provided for by Directive 85/337 be carried out before the decision entitling the developer to proceed with the project.
- 76 Furthermore, as Ireland acknowledges, it is apparent from Article 6 of the PDR in conjunction with Part 3 of Schedule 2 thereto that certain projects falling within point 1(a) to (c) of Annex II to Directive 85/337 are exempt from any requirement for prior consent, a fact which in principle precludes, in their regard, compliance with the procedure involving development consent and the assessment of their effects on the environment that is established by Article 2(1) of Directive 85/337.

- 77 Ireland submits, however, that such exemptions, which thus have the effect in particular that no application for planning permission is required in respect of the projects concerned, do not apply where one of the safeguard clauses contained in Article 9 of the PDR is applicable to the carrying out of the project envisaged and that the effect of the application of the safeguard clauses is that only projects which are not likely to have significant effects on the environment can benefit from those exemptions.
- 78 It should be remembered at this point that while, in proceedings under Article 226 EC for failure to fulfil obligations it is for the Commission to prove the existence of the alleged infringement and to place before the Court the information necessary for it to determine whether the infringement is made out, and in so doing the Commission may not rely on any presumption (see, to this effect, *inter alia* Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, paragraph 41 and the case-law cited, and Case C-441/02 *Commission v Germany* [2006] ECR I-3449, paragraph 48), the Member States are required, under Article 10 EC, to facilitate the achievement of the Commission's tasks (see, *inter alia*, Case C-494/01 *Commission v Ireland*, paragraph 42). It follows in particular that, where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is incumbent on the latter to challenge in substance and in detail the information produced and the consequences flowing therefrom (Case C-494/01 *Commission v Ireland*, paragraph 44).
- 79 With regard to application of the safeguard clauses contained in Article 9 of the PDR, Ireland has not demonstrated that those clauses are such as to ensure compliance with the requirements imposed by Directive 85/337; it acknowledged moreover in the course of the procedure that recourse to an alternative strategy to implement the relevant provisions of the directive would have very significant implications for Irish agriculture and also stated that one of the Irish Government's objectives is to minimise the regulatory burden on all sectors of the economy, particularly the agricultural sector.
- 80 Those clauses are subject to the fulfilment of a number of conditions which make their application too uncertain to be capable of being regarded as limiting the operation of the exemptions in such a way that projects likely to have significant effects on the environment are systematically subject, before consent is given, to a requirement for development consent and an assessment of their environmental effects.
- 81 Most of those clauses are operative only where they fall within the framework of development plans drawn up by the planning authorities specifying that the protection of the matters of archaeological, geological, historical or ecological interest constitutes one of their objectives.
- 82 The carrying out of an environmental impact assessment in respect of a given project accordingly depends on the inclusion of those objectives in the development plan, and not solely on the effects which the project may have on the environment. Moreover, it should be pointed out that Ireland has supplied no information regarding the conservation objectives which development plans may have contained on the date when the period laid down in the reasoned opinion expired.
- 83 These factors are sufficient to establish that the application of the safeguard clauses contained in Article 9 of the PDR does not guarantee that the requirements of Directive 85/337 are observed with regard to projects falling within point 1(a) to (c) of Annex II to the directive which are likely to have significant effects on the

environment and in particular that they will be subject to a requirement for development consent and an assessment of their environmental effects in accordance with Articles 5 to 10 of the directive, despite the fact that, as is recalled in recital 1 in the preamble to Directive 97/11, the assessment procedure is a fundamental instrument of environmental policy.

84 The first complaint is therefore well founded.

85 It follows that, by setting thresholds which take account only of the size of projects – to the exclusion of the other criteria laid down in Annex III to Directive 85/337 – for project categories covered by point 1(a) to (c) of Annex II to the directive and by not providing for a case-by-case examination for those project categories ensuring that projects likely to have significant effects on the environment do not escape an assessment of their environmental effects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the directive and has consequently not adopted all necessary measures to ensure that projects likely to have significant effects on the environment are made subject to a requirement for development consent and to an assessment of their environmental effects in accordance with Articles 5 to 10 of the directive.

The second complaint

– Arguments of the parties

86 The Commission states with regard to intensive fish farming installations that the Aquaculture (Licence Application) Regulations, 1998 (S.I. No 236/1998), which transposed Directive 85/337 in relation to aquaculture, allow an environmental impact assessment to be carried out for such an installation if the competent minister considers that the proposed aquaculture is likely to have significant effects on the environment.

87 Since that legislation does not, however, contain any reference to the criteria set out in Annex III to the directive, the minister is under no express obligation to take account of them in his appraisal.

88 The Commission cites by way of example a trial salmon farm at Kenmare Bay in County Kerry.

89 Ireland acknowledges that, initially, Irish legislation did not expressly provide that, when the competent minister considered whether the proposed aquaculture was likely to have significant effects on the environment, he had to have regard to the selection criteria set out in Annex III to Directive 85/337.

90 Ireland explains, however, that following the entry into force of the Aquaculture (Licence Application) (Amendment) Regulations, 2006 (S.I. No 197/2006), the applicable provisions henceforth expressly state that the minister must have regard to those criteria.

– Findings of the Court

91 First of all, it should be recalled that, in accordance with settled case-law, amendments to national legislation are irrelevant for the purposes of giving judgment on the subject-matter of an action for failure to fulfil obligations if they have not been implemented before the expiry of the period set by the reasoned opinion (see, in particular, Case C-392/96 *Commission v Ireland*, paragraph 86). It

is thus inappropriate to take into account, for the purpose of assessing the merits of the present complaint, the amendments made to the Irish legislation in 2006.

- 92 As to the remainder, while the legislation referred to in paragraph 86 of the present judgment provides that the competent minister may require the submission of an environmental impact statement in the context to which the present complaint refers, it is not disputed by Ireland that the minister's decision-making power is in no way circumscribed by that legislation.
- 93 In particular, it does not follow from the legislation itself that, when the competent minister examines on a case-by-case basis applications for permission relating to intensive fish farming installations, which are projects that fall within point 1(f) of Annex II to Directive 85/337, he must take account of the selection criteria laid down in Annex III to the directive.
- 94 Consequently, the second complaint is also well founded.
- 95 It follows from all of the foregoing considerations that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Directive 85/337, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the categories of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive.

Costs

- 96 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful, the latter must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the intervener in the present proceedings is to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Declares that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the categories of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive;**
- 2. Orders Ireland to pay the costs of the Commission of the European Communities;**
- 3. Orders the Republic of Poland to bear its own costs.**

[Signatures]

* Language of the case: English.

For inspection purposes only.
Consent of copyright owner required for any other use.

JUDGMENT OF THE COURT (First Chamber)

3 March 2011 (*)

(Failure of a Member State to fulfil obligations – Directive 85/337/EEC – Obligation of the competent environmental authority to carry out an assessment of the effects of certain projects on the environment – More than one competent authority – Need to ensure an assessment of the interaction between factors likely to be directly or indirectly affected – Application of the directive to demolition works)

In Case C-50/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 February 2009,

European Commission, represented by P. Oliver, C. Clyne and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, assisted by G. Simons SC and D. McGrath BL, with an address for service in Luxembourg,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, M. Ilešič and M. Berger (Rapporteur), Judges,

Advocate General: J. Mazák,

Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2010,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its action, the Commission of the European Communities requested the Court to declare that:

- by failing to transpose Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) and by Directive 2003/35/EC

of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17; 'Directive 85/337');

- by failing to ensure that, where Irish planning authorities and the Environmental Protection Agency ('the Agency') both have decision-making powers on a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of that directive; and
- by excluding demolition works from the scope of its legislation transposing that directive,

Ireland has failed to fulfil its obligations under that directive.

Legal context

European Union legislation

2 Article 1(2) and (3) of Directive 85/337 provide:

'(2) For the purposes of this Directive:

"project" means:

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

...

"development consent" means

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

(3) The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this Directive.'

3 Under Article 2(1) to (2a) of Directive 85/337:

'(1) Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4.

(2) The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

(2a) Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Council Directive 96/61/EC of 24 September 1996 on integrated pollution prevention and control ...'

4 Article 3 of Directive 85/337 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora,
- soil, water, air, climate and the landscape,
- material assets and the cultural heritage,
- the interaction between the factors mentioned in the first, second and third indents.'

5 Article 4(1) and (2) of Directive 85/337 are worded as follows:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).'

6 Articles 5 to 7 of Directive 85/337 concern the information which must be gathered and the consultations which must be undertaken for the purposes of the assessment procedure. Article 5 deals with the information which the developer must supply, Article 6 deals with the obligation to consult, on the one hand, authorities with specific environmental responsibilities and the public, on the other, and Article 7 covers the obligation, in the case of a cross-border project, to inform the other Member State concerned. Article 8 of the directive states that the results of those consultations and the information gathered must be taken into consideration in the development consent procedure.

7 Articles 9 to 11 of Directive 85/337, relating to the decision taken at the conclusion of the consent procedure, cover, respectively, informing the public and the Member States concerned, respect for commercial and industrial confidentiality, the right of members of the public to bring proceedings before a court and the exchange of information between Member States and the Commission.

8 Under Article 12(1) of Directive 85/337, in its original version, the Member States were obliged to comply with that directive's provisions by 3 July 1988 at the latest. With regard to the amendments made to it by Directives 97/11 and 2003/35, the Member States were obliged to bring them into force at the latest by 14 March 1999 and 25 June 2005 respectively.

National legislation

The Planning and Development Act 2000

- 9 The Planning and Development Act 2000, as amended by the Strategic Infrastructure Act 2006 ('the PDA'), lays down the legal framework for issuing development consent for most of the project categories listed in Annexes I and II to Directive 85/337. For some projects, development consent under the PDA, which is termed 'planning permission' and granted, as a rule, by a local authority, is the only form of consent required for a project to proceed. In such cases, the PDA provides that the decisions taken by local authorities may be appealed against to An Bord Pleanála (The Planning Appeals Board; 'the Board').
- 10 Part X of the PDA, comprising sections 172 to 177, is devoted to environmental impact assessments. Section 176 provides for ministerial regulations to identify projects requiring such an assessment. Section 172 provides that, for projects covered by regulations made under section 176, applications for planning permission are to be accompanied by an environmental impact statement. Under section 173, where a planning authority receives an application for planning permission accompanied by an environmental impact statement, that authority and, on appeal, the Board must have regard to that statement. Section 177 provides that the information to be included in such a statement is to be prescribed by ministerial regulation.
- 11 Detailed measures for the implementation of the PDA are set out in the Planning and Development Regulations 2001, as amended by the Planning and Development Regulations 2008 ('the PDR'), which were adopted pursuant to, among others, sections 176 and 177 of the PDA.
- 12 Part 2 of the PDR concerns projects which are exempt from an environmental impact assessment. Article 6 thereof refers in that regard to Part 1 of Schedule 2 to the PDR, which, in Category 50, refers to 'the demolition of a building or other structure'. Articles 9 and 10 of the PDR lay down the conditions under which a project as a rule exempted must none the less be made subject to a consent procedure.
- 13 Part 10 of the PDR is devoted to environmental impact assessments. Article 93 thereof, in combination with Schedule 5 thereto, defines the categories of projects for which such an assessment is required. Article 94 of the PDR, which lists the information that should be found in an environmental impact statement, is worded as follows:

'An environmental impact statement shall contain:

- (a) the information specified in paragraph 1 of Schedule 6,
- (b) the information specified in paragraph 2 of Schedule 6 to the extent that
 - (i) such information is relevant to a given stage of the consent procedure and to the specific characteristics of the development or type of development concerned and of the environmental features likely to be affected, and
 - (ii) the person or persons preparing the statement may reasonably be required to compile such information having regard, among other things, to current knowledge and methods of assessment, and,

(c) a summary in non-technical language of the information required under paragraphs (a) and (b).'

- 14 Schedule 6 to the PDR specifies the information to be contained in an environmental impact statement. Paragraph 2(b) of Schedule 6 stipulates that it must contain:

'A description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular:

- human beings, fauna and flora,
- soil, water, air, climatic factors and the landscape,
- material assets, including the architectural and archaeological heritage, and the cultural heritage,
- the inter-relationship between the above factors.'

- 15 Under Article 108 of the PDR, the competent planning authority is obliged to establish whether the information contained in an environmental impact statement complies with the requirements laid down in the PDR.

The Environmental Protection Agency Act 1992

- 16 The Environmental Protection Agency Act 1992 ('the EPAA') introduced, among other things, a new system of integrated pollution control under which many industrial activities require a licence granted by the Agency. Where the activity is new and/or involves new construction, it must also obtain planning permission as provided for by the PDA.

- 17 Section 98 of the EPAA, which precluded planning authorities from taking into consideration aspects connected with pollution risks in considering an application for planning permission, was amended by section 256 of the PDA to the effect that, whilst it precluded planning authorities from including any pollution control conditions in planning permissions for activities also requiring a licence from the Agency, they could nevertheless, where appropriate, refuse to grant planning permission on environmental grounds. Section 98 of the EPAA, as amended, provides that planning authorities may ask the Agency for an opinion, in particular on an environmental impact statement. However, the Agency is not required to respond to such a request.

- 18 Under the Environmental Protection Agency (Licensing) Regulations 1994 ('the EPAR'), the Agency may notify a planning authority of a licence application. There is, however, no obligation on the planning authority to respond to such a notification.

The National Monuments Act 1930

- 19 The National Monuments Act 1930 ('the NMA') governs the protection of Ireland's most culturally significant archaeological remains, which are classed as 'national monuments'. It was amended by the National Monuments (Amendment) Act 2004, to relax the constraints imposed under earlier legislation concerning proposals to alter or remove national monuments.

- 20 Section 14 of the NMA confers on the Irish Minister for the Environment, Heritage and Local Government ('the Minister') discretion to consent to the destruction of a national monument. Where a national monument is discovered during the carrying out of a road development which has been subject to an environmental impact assessment, section 14A of the NMA provides that it is, in principle, prohibited to carry out any works on the monument pending directions by the Minister. Those directions can relate to 'the doing to the monument of [various] matters', including its demolition. There is no provision for any assessment to be made, for the adoption of such directions, of the effects on the environment. However, section 14B of the NMA provides that the Minister's directions must be notified to the Board. If those directions envisage an alteration to the approved road development, the Board must consider whether or not that alteration is likely to have significant adverse effects on the environment. If it is of that opinion, it must require the submission of an environmental impact statement.

Pre-litigation procedure

- 21 Following the examination of a complaint regarding Ireland's transposition of Directive 85/337, the Commission took the view that Ireland had failed to ensure its full and correct transposition and, by letter of 19 November 1998, gave Ireland formal notice, to submit its observations, in accordance with the procedure for failure to fulfil Treaty obligations. A further letter of formal notice was sent to Ireland on 9 February 2001.
- 22 After examining the observations received in response to those letters, the Commission, on 6 August 2001, sent the Irish authorities a reasoned opinion in which it claimed that Ireland had not correctly transposed Articles 2 to 6, 8 and 9 of Directive 85/337. In reply, Ireland stated that the legislative amendments necessary to bring about the transposition were being adopted and requested that the proceedings be stayed.
- 23 Following further complaints, the Commission, on 2 May 2006, sent an additional letter of formal notice to Ireland.
- 24 As the Commission was not satisfied with the replies received, on 29 June 2007 it addressed an additional reasoned opinion to Ireland in which it claimed that Ireland had not correctly transposed Directive 85/337, in particular Articles 2 to 4 thereof, and called upon it to comply with that reasoned opinion within a period of two months from the date of its receipt. In reply, Ireland maintained its position that the Irish legislation in force now constitutes adequate transposition of that directive.
- 25 The Commission then brought the present action.

The action

The first complaint, alleging failure to transpose Article 3 of Directive 85/337

Arguments of the parties

- 26 According to the Commission, Article 3 of Directive 85/337 is of pivotal importance, since it sets out what constitutes an environmental impact assessment and must therefore be transposed explicitly. The provisions relied upon by Ireland as adequate transposition of Article 3 of the directive are insufficient.

- 27 Thus, section 173 of the PDA, which requires planning authorities to have regard to the information contained in an environmental impact statement submitted by a developer, relates to the obligation, under Article 8 of Directive 85/337, to take into consideration the information gathered pursuant to Articles 5 to 7 thereof. By contrast, section 173 does not correspond to the wider obligation, imposed by Article 3 of Directive 85/337 on the competent authority, to ensure that there is carried out an environmental impact assessment which identifies, describes and assesses all the matters referred to in that article.
- 28 As for Articles 94, 108 and 111 of, and Schedule 6 to, the PDR, the Commission observes that they are confined, first, to setting out the matters on which the developer must supply information in its environmental impact statement and, second, to specifying the obligation on the competent authorities to establish that the information is complete. The obligations laid down by those provisions are different from that, imposed by Article 3 of Directive 85/337 on the competent authority, of carrying out a full environmental impact assessment
- 29 With regard to the relevance of the Irish courts' case-law on the application of the provisions of national law at issue, the Commission points out that while those courts may interpret ambiguous provisions so as to ensure their compatibility with a directive; they cannot plug legal gaps in the national legislation. Moreover, the extracts from the decisions cited by Ireland concern, in the Commission's submission, not the interpretation of that legislation but the interpretation of Directive 85/337 itself.
- 30 Ireland disputes the significance which the Commission attaches to Article 3 of that directive. It submits that that provision, drafted in general terms, is confined to stating that an environmental impact assessment must be made in accordance with Articles 4 to 11 of the directive. By transposing Articles 4 to 11 into national law, a Member State thereby, in Ireland's submission, ensures the transposition of Article 3.
- 31 Ireland maintains that Article 3 of Directive 85/337 is fully transposed by sections 172(1) and 173 of the PDA and Articles 94 and 108 of, and Schedule 6 to, the PDR. It points out that the Supreme Court (Ireland) has confirmed, in two separate judgments of 2003 and 2007, namely *O'Connell v Environmental Protection Agency* and *Martin v An Bord Pleanála*, that Irish law requires planning authorities and the Agency to assess the factors referred to in Article 3 and the interaction between them. Those judgments, which, Ireland submits, should be taken into account when assessing the scope of the national provisions at issue, do not fill a legal gap but are confined to holding that the applicable national legislation imposes an obligation on the competent authorities to carry out an environmental impact assessment of a development in the light of the criteria laid down in Article 3 of Directive 85/337.
- 32 In the alternative, Ireland refers to the concept of 'proper planning and sustainable development' referred to in section 34 of the PDA. It is, in Ireland's submission, the principal criterion which must be taken into consideration by any planning authority when deciding on an application for planning permission. That concept is in addition to all the criteria referred to in section 34 of the PDA, as well as in other provisions of that Act, including section 173, the application of which it reinforces.
- 33 Finally, Ireland submits that the Commission does not respect the discretion which a Member State enjoys under Article 249 EC as to the form and methods for transposing a directive. By requiring the literal transposition of Article 3 of Directive

85/337, the Commission is disregarding the body of legislation and case-law built up in Ireland over 45 years surrounding the concepts of 'proper planning' and 'sustainable development'.

Findings of the Court

- 34 At the outset, it is to be noted that the Commission and Ireland give a different reading to Article 3 of Directive 85/337 and a different analysis of its relationship with Articles 4 to 11 thereof. The Commission maintains that Article 3 lays down obligations which go beyond those required by Articles 4 to 11, whereas Ireland submits that it is merely a provision drafted in general terms and that the details of the process of environmental impact assessment are specified in Articles 4 to 11.
- 35 In that regard, whilst Article 3 of Directive 85/337 provides that the environmental impact assessment is to take place 'in accordance with Articles 4 to 11' thereof, the obligations referred to by those articles differ from that under Article 3 itself.
- 36 Article 3 of Directive 85/337 makes the competent environmental authority responsible for carrying out an environmental impact assessment which must include a description of a project's direct and indirect effects on the factors set out in the first three indents of that article and the interaction between those factors (judgment of 16 March 2006 in Case C-332/04 *Commission v Spain*, paragraph 33). As stated in Article 2(1) of the directive, that assessment is to be carried out before the consent applied for to proceed with a project is given.
- 37 In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case.
- 38 That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive.
- 39 Admittedly, Article 8 of Directive 85/337 provides that the results of the consultations and the information gathered pursuant to Articles 5 to 7 must be taken into consideration in the development consent procedure.
- 40 However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors.

- 41 It follows therefore both from the wording of the provisions at issue of Directive 85/337 and from its general scheme that Article 3 is a fundamental provision. The transposition of Articles 4 to 11 alone cannot be regarded as automatically transposing Article 3.
- 42 It is in the light of those considerations that the Court must consider whether the national provisions upon which Ireland relies constitute proper transposition of Article 3 of Directive 85/337.
- 43 It can be seen from the wording of section 172 of the PDA and of Article 94 of, and Schedule 6 to, the PDR that those provisions relate to the developer's obligation to supply an environmental impact statement, which corresponds, as the Commission correctly claims, to the obligation imposed upon the developer by Article 5 of Directive 85/337. Article 108 of the PDR imposes no obligation on the planning authority other than that of establishing the completeness of that information.
- 44 As regards section 173 of the PDA, according to which the planning authority, where it receives an application for planning permission accompanied by an environmental impact statement, must take that statement into account as well as any additional information provided to it, it is clear from the very wording of that article that it is confined to laying down an obligation similar to that provided for in Article 8 of Directive 85/337, namely that of taking the results of the consultations and the information gathered for the purposes of the consent procedure into consideration. That obligation does not correspond to the broader one, imposed by Article 3 of Directive 85/337 on the competent environmental authority, to carry out itself an environmental impact assessment in the light of the factors set out in that provision.
- 45 In those circumstances, it must be held that the national provisions invoked by Ireland cannot attain the result pursued by Article 3 of Directive 85/337.
- 46 Whilst it is true that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, in particular, Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, paragraph 54 and the case-law cited), the fact remains that, according to equally settled case-law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, in particular, *Commission v Ireland*, paragraph 55 and the case-law cited).
- 47 In that regard, the judgment of the Supreme Court in *O'Connell v Environmental Protection Agency* gives, admittedly, in the passage upon which Ireland relies, an interpretation of the provisions of domestic law consistent with Directive 85/337. However, according to the Court's settled case-law, such a consistent interpretation of the provisions of domestic law cannot in itself achieve the clarity and precision needed to meet the requirement of legal certainty (see, in particular, Case C-508/04 *Commission v Austria* [2007] ECR I-3787, paragraph 79 and the case-law cited). The passage in the judgment of the same court in *Martin v An Bord Pleanála*, to which Ireland also refers, concerns the question of whether all the factors referred to in Article 3 of Directive 85/337 are mentioned in the consent

procedures put in place by the Irish legislation. By contrast, it has no bearing on the question, which is decisive for the purposes of determining the first complaint, of what the examination of those factors by the competent national authorities should comprise.

- 48 As regards the concepts of 'proper planning' and 'sustainable development' to which Ireland also refers, it must be held that, even if those concepts encompass the criteria referred to in Article 3 of Directive 85/337, it is not established that they require that those criteria be taken into account in all cases for which an environmental impact assessment is required.
- 49 It follows that neither the national case-law nor the concepts of 'proper planning' and 'sustainable development' can be invoked to remedy the failure to transpose into the Irish legal order Article 3 of Directive 85/337.
- 50 The Commission's first complaint in support of its action must therefore be held to be well founded.

The second complaint, alleging failure to ensure full compliance with Articles 2 to 4 of Directive 85/337 where several authorities are involved in the decision-making process

Arguments of the parties

- 51 For the Commission, it is of the essence that the environmental impact assessment be carried out as part of a holistic process. In Ireland, following the Agency's creation, certain projects requiring such an assessment are subject to two separate decision-making processes: one process involves decision-making on land-use aspects by planning authorities, while the other involves decision-making by the Agency on pollution aspects. The Commission accepts that planning permission and an Agency licence may be regarded, as has been held in Irish case-law (*Martin v An Bord Pleanála*), as together constituting 'development consent' within the meaning of Article 1(2) of Directive 85/337 and it does not object to such consent being given in two successive stages. However, the Commission criticises the fact that the Irish legislation fails to impose any obligation on planning authorities and the Agency to coordinate their activities. In the Commission's submission, that situation is contrary to Articles 2 to 4 of Directive 85/337.
- 52 As regards Article 2 of Directive 85/337, the Commission notes that it requires an environmental impact assessment to be undertaken for a project covered by Article 4 'before consent is given'. The Commission submits that there is a possibility under the Irish legislation that part of the decision-making process will take place in disregard of that requirement. First, the Irish legislation does not require that an application for planning permission be lodged with the planning authorities before a licence application is submitted to the Agency, which is not empowered to undertake an environmental impact assessment. Second, the planning authorities are not obliged to take into account, in their assessment, the impact of pollution, which might not be assessed at all.
- 53 Referring to the Court's case-law (see, in particular, judgment of 20 November 2008 in Case C-66/06 *Commission v Ireland*, paragraph 59), the Commission states that it is not obliged to wait until the application of the transposing legislation produces harmful effects or to establish that it does so, where the wording of the legislation itself is insufficient or defective.

- 54 As regards Article 3 of Directive 85/337, the Commission submits that where there is more than one competent body, the procedures followed by each of them must, when taken together, ensure that the assessment required by Article 3 is fully carried out. The strict demarcation of the separate roles of the planning authorities on the one hand and the Agency on the other, as laid down by the Irish legislation, fails to take formally into account the concept of 'environment' in the decision-making. None of the bodies involved in the consent process is responsible for assessing and taking into consideration the interaction between the factors referred to in the first to third indents of Article 3, which fall respectively within the separate spheres of the powers of each of those authorities.
- 55 In that regard, the Commission, referring to section 98 of the EPAA, as amended, and to the EPAR, observes that there is no formal link, in the form of an obligation, for the competent authorities, to consult each other between the process of planning permission followed by the planning authority and the licensing process followed by the Agency.
- 56 In order to illustrate its analysis, the Commission refers to the projects relating to the installation of an incinerator at Duleek, in County Meath, and to the wood-processing factory at Leap, in County Offaly.
- 57 Referring to Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003, Ireland contests the admissibility of the Commission's second complaint in support of its action, on the ground that, in Ireland's submission, the Commission has failed to indicate precisely the reason why Ireland's designation of two competent authorities infringes the requirements of Directive 85/337. Ireland submits that the failure has interfered with the preparation of its defence.
- 58 On the substance, Ireland contends that the consequence of involving a number of different competent authorities in the decision-making process, which is permitted by Articles 1(3) and 2(2) of Directive 85/337, is that their involvement and their obligations will be different and will occur at different stages prior to 'development consent' being given. Relying on *Martin v An Bord Pleanála*, Ireland contends that nowhere in that directive is it in any sense suggested that a single competent body must carry out a 'global assessment' of the impact on the environment.
- 59 Ireland denies that there is a strict demarcation between the powers of the two decision-making bodies and submits that there is, rather, overlap between them. The concept of 'proper planning and sustainable development', to which the PDA refers, is a very broad one, which includes, in particular, environmental pollution. Planning authorities are required to assess environmental pollution in the context of a decision relating to planning permission. They are moreover empowered under various provisions to refuse planning permission on environmental grounds.
- 60 Replying to the Commission's argument that it is possible for a licence application to be made to the Agency before an application for planning permission has been made to the planning authority, and thus before an environmental impact assessment has been carried out, Ireland contends that under Irish law 'development consent' requires both planning permission from the competent planning authority and a licence from the Agency. In those circumstances, there is no practical benefit in the developer applying for a licence from the Agency without making a contemporaneous application to the planning authority; such separate applications do not therefore occur in practice.

- 61 In addition, Ireland argues that, contrary to the Commission's assertion that the Agency cannot undertake an environmental impact assessment, there is in several instances an obligation, particularly for waste recovery or waste disposal licence applications and for applications for integrated pollution control and prevention licences, to submit an environmental impact statement to the Agency independently of any earlier application for planning permission lodged with a planning authority. In addition, in such cases the Agency is expressly empowered to request further information from an applicant and may therefore request information which is substantially similar to that contained in an environmental impact statement.
- 62 Ireland submits that an obligation on the planning authority and the Agency to consult in every case would be inappropriate. It would be more appropriate to allow such consultation whilst affording a discretion to the relevant decision-makers as to whether, in each particular case, to undertake such consultation.
- 63 Finally, the judgment in Case C-66/06 *Commission v Ireland*, to which the Commission refers in order to avoid having to adduce proof of its allegations, is not relevant to the present case. In Ireland's submission, the alleged infringement, in that case, concerned the manner in which Directive 85/337 had been transposed into Irish domestic law, whereas the present case concerns the application of the legislation transposing that directive. Whilst a comprehensive scheme has been put in place by the Irish legislation on the environmental impact assessment, the Commission claims that that legislation may not always be applied properly in practice. In that regard, the onus of proof lies with the Commission, which has failed to discharge it. The references to the projects at Duleek and Leap offer no support whatsoever for the Commission's allegations.

Findings of the Court

- Admissibility of the second complaint

- 64 It is settled case-law that, in the context of an action brought on the basis of Article 226 EC, the reasoned opinion and the action must set out the Commission's complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the scope of the infringement of European Union law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged (see, in particular, *Commission v United Kingdom*, paragraph 18, and Case C-66/06 *Commission v Ireland*, paragraph 31).
- 65 In this case, it is apparent from the documents in the court file that, in the pre-litigation procedure, both paragraphs 3.2.2 to 3.2.5 of the reasoned opinion of 6 August 2001 and paragraphs 2.17 and 2.18 of the additional reasoned opinion of 29 June 2007 set forth the reason for which the strict demarcation between the separate roles assigned to the planning authorities, on the one hand, and the Agency, on the other, does not satisfy, in the Commission's submission, the requirements of Directive 85/337. It is there explained that such sharing of powers is incompatible with the fact that the concept of 'environment', as it must be taken into account in the decision-making process laid down by that directive, involves taking into consideration the interaction between the factors falling within the separate spheres of responsibility of each of those decision-making authorities.
- 66 That complaint is set out in identical or similar terms in paragraphs 55 et seq. of the application in this action which, in addition, contains, in its paragraphs 9 to 20, a summary of the relevant provisions of the Irish legislation.

67 It follows from those findings that the Commission's allegations in the course of the pre-litigation procedure and the proceedings before the Court were sufficiently clear to enable Ireland properly to defend itself.

68 Accordingly, Ireland's plea of inadmissibility in respect of the Commission's second complaint must be rejected.

– Substance

69 At the outset, it is to be noted that, by its second complaint, the Commission is criticising the transposition by the Irish legislation at issue of Articles 2 to 4 of Directive 85/337, on the ground that the procedures put in place by that legislation do not ensure full compliance with those articles where several national authorities take part in the decision-making process.

70 Consequently, Ireland's line of argument that the Commission has not adequately established the factual basis for its action must immediately be rejected. As the Commission claimed, since its action for failure to fulfil obligations is concerned with the way in which Directive 85/337 has been transposed, and not with the actual result of the application of the national legislation relating to that transposition, it must be determined whether that legislation itself harbours the insufficiencies or defects in the transposition of the directive which the Commission alleges, without any need to establish the actual effects of the national legislation effecting that transposition with regard to specific projects (see Case C-66/06 *Commission v Ireland*, paragraph 59).

71 Article 1(2) of Directive 85/337 defines the term 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Article 1(3) states that the competent authorities are to be that or those which the Member States designate as responsible for performing the duties arising from that directive.

72 For the purposes of the freedom thus left to them to determine the competent authorities for giving development consent, for the purposes of that directive, the Member States may decide to entrust that task to several entities, as the Commission has moreover expressly accepted.

73 Article 2(2) of Directive 85/337 adds that the environmental impact statement may be integrated into the existing procedures for consent to projects or failing that, into other procedures or into procedures to be established to comply with the aims of that directive.

74 That provision means that the liberty left to the Member States extends to the determination of the rules of procedure and requirements for the grant of the development consent in question.

75 However, that freedom may be exercised only within the limits imposed by that directive and provided that the choices made by the Member States ensure full compliance with its aims.

76 Article 2(1) of Directive 85/337 thus states that the environmental impact assessment must take place 'before the giving of consent'. That entails that the examination of a project's direct and indirect effects on the factors referred to in Article 3 of that directive and on the interaction between those factors be fully carried out before consent is given.

- 77 In those circumstances, while nothing precludes Ireland's choice to entrust the attainment of that directive's aims to two different authorities, namely planning authorities on the one hand and the Agency on the other, that is subject to those authorities' respective powers and the rules governing their implementation ensuring that an environmental impact assessment is carried out fully and in good time, that is to say before the giving of consent, within the meaning of that directive.
- 78 In that regard, the Commission maintains that it has identified, in the Irish legislation, a gap arising from the combination of two factors. The first is the lack of any right on the part of the Agency, where it receives an application for a licence for a project as regards pollution aspects, to require an environmental impact assessment. The second is the possibility that the Agency might receive an application and decide on questions of pollution before an application is made to the planning authority, which alone can require the developer to make an environmental impact statement.
- 79 In its defence, Ireland, which does not deny that, generally, the Agency is not empowered to require a developer to produce such a statement, contends that there is no practical benefit for a developer in seeking a licence from the Agency without simultaneously making an application for planning permission to the planning authority, since he needs a consent from both those authorities. However, Ireland has neither established, nor even alleged, that it is legally impossible for a developer to obtain a decision from the Agency where he has not applied to the planning authority for permission.
- 80 Admittedly, the EPAR give the Agency the right to notify a licence application to the planning authority. However, it is common ground between the parties that it is not an obligation and, moreover, an authority which has received such notification is not bound to reply to it.
- 81 It is therefore not inconceivable that the Agency, as the authority responsible for licensing a project as regards pollution aspects, may make its decision without an environmental impact assessment being carried out in accordance with Articles 2 to 4 of Directive 85/337.
- 82 Ireland contends that, in certain cases, relating particularly to licences for the recovery or disposal of waste and integrated pollution control and prevention licences, the Agency is empowered to require an environmental impact statement, which it must take into account. However, such specific rules cannot fill the gap in the Irish legislation identified in the preceding paragraph.
- 83 Ireland submits also that planning authorities are empowered, since the amendment of the EPAA by section 256 of the PDA, to refuse, where appropriate, planning permission on environmental grounds and that the concepts of 'proper planning' and 'sustainable development' confer on those authorities, generally, such power.
- 84 Such an extension of the planning authority's powers may, as Ireland argues, create in certain cases an overlap of the respective powers of the authorities responsible for environmental matters. None the less, it must be held that such an overlap cannot fill the gap pointed out in paragraph 81 of the present judgment, which leaves open the possibility that the Agency will alone decide, without an environmental impact assessment complying with Articles 2 to 4 of Directive 85/337, on a project as regards pollution aspects.

- 85 In those circumstances, it must be held that the Commission's second complaint in support of its action for failure to fulfil obligations is well founded.

The third complaint, alleging failure to apply Directive 85/337 to demolition works

Arguments of the parties

- 86 In the Commission's submission, demolition works may constitute a 'project' within the meaning of Article 1(2) of Directive 85/337, since they fall within the concept of 'other interventions in the natural surroundings and landscape'. However, in the PDR, Ireland purported to exempt nearly all demolition works from the obligation to carry out an environmental impact assessment. After the end of the two-month period laid down in the additional reasoned opinion of 29 June 2007, Ireland admittedly notified the Commission of new legislation, which amended the PDR by significantly narrowing the scope of the exemption for demolition works. However, that legislation cannot, the Commission submits, be taken into account in the present infringement action.
- 87 The Commission claims that Ireland's interpretation that demolition works fall outside the scope of the directive is reflected in the NMA, and refers in that regard to sections 14, 14A and 14B of that Act which relate to the demolition of a national monument.
- 88 By way of illustration of how, in contravention of Directive 85/337, the exclusion of demolition works allowed, by virtue of section 14A of the NMA, a national monument to be demolished without an environmental impact assessment being undertaken, the Commission cites the ministerial decision of 13 June 2007 ordering the destruction of a national monument in order to permit the M3 motorway project to proceed.
- 89 As a preliminary point, Ireland objects that the Commission's third complaint is, in so far as it concerns section 14 of the NMA, inadmissible, since that provision was not mentioned in the additional reasoned opinion of 29 June 2007.
- 90 In Ireland's submission, demolition works do not fall within the scope of Directive 85/337, since they are not mentioned in Annex I or II thereto. In addition, Ireland submits that section 10 of the PDA and Article 9 of the PDR, when read together, make clear that the exemption from the obligation to obtain planning permission in respect of demolition works can apply only if the project is unlikely to have significant effects on the environment.
- 91 As regards the obligation to carry out further assessments, Ireland argues that the essence of Directive 85/337 is that the environmental impact assessment be carried out at the earliest possible stage, before the development starts. The only occasion when it is ever necessary to carry out a fresh assessment is, in accordance with the first indent of point 13 in Annex II to the directive, where the development project has been changed or extended.
- 92 With regard to the scope of ministerial directions issued under section 14A of the NMA, Ireland states that that provision applies only in the context of a road development previously approved by the Board, on the basis of an environmental impact assessment. Only the Board may authorise an alteration to a road development and it must in such a case assess whether that alteration is likely to have adverse environmental consequences. In those circumstances, the Minister's power to issue ministerial directions cannot be equated with the giving of consent for the motorway project. Those directions are issued only, if at all, following the

commencement of the development works and the discovery of a new national monument and are designed only to regulate how the newly discovered national monument is to be dealt with. Also, Ireland denies that a ministerial decision was taken ordering the destruction of a national monument in order to allow the M3 motorway project to proceed.

Findings of the Court

– Admissibility of the third complaint

93 According to the Court's settled case-law, the subject-matter of proceedings brought under Article 226 EC is delimited by the administrative pre-litigation procedure governed by that article and the application must be founded on the same grounds and pleas as those stated in the reasoned opinion (see, in particular, Case C-340/02 *Commission v France* [2004] ECR I-9845, paragraph 26 and the case-law cited).

94 In this case, it is clear from the wording of the additional reasoned opinion of 29 June 2007 that the Commission, in paragraphs 2.34 to 2.38 thereof, complained that Ireland had excluded demolition works from the scope of the national legislation transposing Directive 85/337. In paragraphs 2.39 and 2.40 of the same opinion, the Commission stated that Ireland's interpretation of that directive was reflected not only in the PDA, but also in other more specific legislative provisions, such as the NMA, and it took as an example the carrying-out of the M3 motorway project.

95 It follows that, while the Commission did not expressly refer to section 14 of the NMA in that reasoned opinion, it none the less referred clearly to the decision-making mechanism laid down by that section as part of its analysis of the deficiencies which, in its submission, that Act entails.

96 In those circumstances, Ireland's plea of inadmissibility against the Commission's third complaint must be rejected.

– Substance

97 As regards the question whether demolition works come within the scope of Directive 85/337, as the Commission maintains in its pleadings, or whether, as Ireland contends, they are excluded, it is appropriate to note, at the outset, that the definition of the word 'project' in Article 1(2) of that directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition. Such works can, indeed, be described as 'other interventions in the natural surroundings and landscape'.

98 That interpretation is supported by the fact that, if demolition works were excluded from the scope of that directive, the references to 'the cultural heritage' in Article 3 thereof, to 'landscapes of historical, cultural or archaeological significance' in point 2(h) of Annex III to that directive and to 'the architectural and archaeological heritage' in point 3 of Annex IV thereto would have no purpose.

99 It is true that, under Article 4 of Directive 85/337, for a project to require an environmental impact assessment, it must come within one of the categories in Annexes I and II to that directive. However, as Ireland contends, they make no express reference to demolition works except, irrelevantly for the purposes of the present action, the dismantling of nuclear power stations and other nuclear reactors, referred to in point 2 of Annex I.

- 100 However, it must be borne in mind that those annexes refer rather to sectoral categories of projects, without describing the precise nature of the works provided for. As an illustration it may be noted, as did the Commission, that 'urban development projects' referred to in point 10(b) of Annex II often involve the demolition of existing structures.
- 101 It follows that demolition works come within the scope of Directive 85/337 and, in that respect, may constitute a 'project' within the meaning of Article 1(2) thereof.
- 102 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion (see, in particular, Case C-427/07 *Commission v Ireland*, paragraph 64 and the case-law cited).
- 103 Ireland does not deny that, under the national legislation in force at the date of the additional reasoned opinion, demolition works were not subject, as a general rule, to an environmental impact assessment but, on the contrary, were entitled to an exemption in principle.
- 104 It is clear from the rules laid down in sections 14 to 14B of the NMA as regards the demolition of a national monument that, as the Commission claims, they take no account of the possibility that such demolition works might constitute, in themselves, a 'project' within the meaning of Articles 1 and 4 of Directive 85/337 and, in that respect, require a prior environmental impact assessment. However, since the insufficiency of that directive's transposition into the Irish legal order has been established, there is no need to consider what that legislation's actual effects are in the light of the carrying-out of specific projects, such as that of the M3 motorway.
- 105 As regards the legislative changes subsequent to the action for failure to fulfil obligations being brought, they cannot be taken into consideration by the Court (see, in particular, Case C-427/07 *Commission v Ireland*, paragraph 65 and the case-law cited).
- 106 In those circumstances, the Commission's third complaint in support of its action must be held to be well founded.
- 107 Accordingly, it must be declared that:
- by failing to transpose Article 3 of Directive 85/337;
 - by failing to ensure that, where planning authorities and the Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of that directive; and
 - by excluding demolition works from the scope of its legislation transposing that directive,

Ireland has failed to fulfil its obligations under that directive.

Costs

108 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful the latter must be ordered to pay the costs.

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

1. Declares that:

- **by failing to transpose Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003;**
- **by failing to ensure that, where Irish planning authorities and the Environmental Protection Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of Directive 85/337, as amended by Directive 2003/35; and**
- **by excluding demolition works from the scope of its legislation transposing Directive 85/337, as amended by Directive 2003/35,**

Ireland has failed to fulfil its obligations under that directive;

2. Orders Ireland to pay the costs.

[Signatures]

* Language of the case: English.