

OH(2) Sub No. 12

Recd From: SHAY
LUNNEY

Date: 29/4/09 12.05

29/04/09

My name is Shay Lunney I live at Little Acre Cottage, Walshestown, Lusk, Co.Dublin.

This is my brief evidence in relation to EPA file ref no: WO-231-01 Fingal Landfill.

Hydrogeological Risk Assessment

In my opinion there is a certain irony about this assessment because it's almost 5 years since the EIS was issued. The irony is that the EIS was completely flawed and now this report is completely flawed. Yet between the years 2004-2009 our group have brought a mountain of factual evidence to the table (not to mention the mountains of factual evidence brought by all the other parties in that period also).

How much of it is considered in this report? None.

But how can this be when no one disproved our evidence?

Why were the council permitted to carryout this assessment based on the flawed EIS?

Has the agency forgotten that at previous oral hearings this council were forced to reproduce numerous maps and data which bore no resemblance to those contained in the EIS?

Has the agency forgotten that the 1st non-technical summary stated categorically that there was no gravel beneath the footprint of this site?

Has the agency forgotten that there is now at least 3 non technical summaries relating to this EIS all bearing different information, the 3rd which they didn't even bother to issue to the local residents.

The following is a list of points, which I believe the agency should reflect on.

- Does the agency believe that the vast horticulture industry in the area "worth approx. €600 million to the economy annually" was given adequate consideration in the EIS as required under the EIS directive.
- If so! Where is the logic in Dr. Marnanes proposed decision to "grant the licence " but at the same time recommend not to use the water to the east of the site?
- Are the agency fully aware that the vast majority of fresh food suppliers are generally located over this aquifer and downgradient of the site.
- Why has the agency not insisted on a regional "well report" as most of the greenhouse industry is downgradient of the site.
- Why has the agency not insisted on an independent study of the site and accepted the EIS at face value.
- Why is the agency proceeding to debate this latest report when it is fully aware that the council cannot even produce the correct basic clay maps never mind the critical information they should be providing.

- Are the agency fully aware of the critical importance of access to clean bacteria free ground water for the food industries survival.
- Evidence given at previous oral hearings has shown that similar so called " fully engineered modern landfill" are failing miserably for example "INAGH" in Co.Clare and the agency has this information.
- Why has the agency and Fingal county council ignored the GSI recommendation to carryout further testing to the south /south east of the site.
- What was the nature of the "cosy arrangement " between the council and Dr. Ian Marnane, which resulted in Dr. Marnanes request for a "mod flow study"being withdrawn? As a mod flow would clearly have provided the critical information which is required to make a determination on this proposal.
- Why have the council ignored the RPS strategic water report for the Dublin area which clearly states that a 2nd drinking water source exists below the site equal in capacity to the bog of the ring?
- The council and the agency are fully aware that the proposed site contains an enormous illegal landfill, previous evidence given to the agency has shown the nature of the waste contained within this landfill is significantly different to that illustrated in the EIS and this illegal landfill has been shown to be leaking leachate in its present form into the groundwater. What has the agency or the council done about this situation since it came to light?
There are serious questions hanging over the agency and the council over this?
As there is a legislation in place to deal with such a site! Which for some strange reason has not been enforced by the EPA.

I would remind the agency that under current legislation it is not permitted to grant a licence for this proposal prior to the remediation of the illegal landfill (Ireland's Largest).

- Since 6th September 2004 this community has had one door after another closed in its face by the council, the agency and An Board Pleanala. Therefore the only option left open to me was to take this case to the European Parliament and as the agency will be aware from previous evidence given, that there is now an active petition ongoing in relation to this proposal. I wish to take this opportunity to express my utter disbelief at the manner in which the agency has dealt with this proposal to date. At the previous agency hearing in March 2007 our group was represented by Mr. David Hammerstein MEP. The agency had a legal expert hovering behind the panel of inspectors whispering in their ears and this same legal expert attempted to "GAG" Mr Hammerstein by insisting on proof reading his brief of evidence prior to it being read into evidence. Thankfully Mr Hammerstein did not bow to the agency's expert and reminded him that he was a parliamentarian entitled to free speech at all hearings. As recently as yesterday we had to endure a barrage of bias and favouritism towards the council by the agency resulting in MR Kevin Cullen walking out of the hearing in anger.

- In any other developed country this proposal would have been binned in 2004/5 based on any / all of the following.
- A primary school is located adjacent to and downgradient of the proposed site.
- Irelands largest food producing aquifer is located beneath the site.
- The traffic study failed to consider many major contributors to the cumulative effect.
- The EIS directive has been breached.
- The water framework directive has been breached.
- The groundwater directive has been breached. Dr Marnanes proposed decision / list 1 discharges.
- The illegal landfill breaks all the rules.
- A major food industry is threatened worth €600million to the economy and thousands of jobs at risk.
- There is an abundance of landfill space available well into the future to meet the required need.
- Bog of the ring water supply inextricably linked to the proposed site and a 2nd water supply ready for abstraction below the site.
- As was stated in previous evidence by our group. This council could not be trusted and they have clearly lied about the information contained in the EIS and thereafter but what is even more shocking is that the agency and An Board Pleanala have entertained this fiasco for almost 5 years and €50 million of taxpayers money wasted on this ludicrous plan.
- Back in 2005 this council encouraged everyone to get involved in the "race against waste" with catchphrases like "you only pay for what you throw away" so separating your green waste and your organic waste was the incentive. But now less than 4 years later the €3.00 bin tag has risen to €8.50 and this council now want an annual bin charge on top of the cost of the tag) of €110.00. So now, where is the incentive to separate your waste? Because if you live in a 1 person or a 10 person household the council will take it all in the "black bin" for the same €110.00 annual charge plus a bin tag.
 Why would anyone bother separating waste when instead of rewarding people for the hassle of separating waste, this council impose greater taxes. Perhaps this is to justify their need for this ridiculous landfill.
- This fiasco is in parallel with the E voting machines fiasco and the people involved behind it are no different from the people that brought this country to its knees the BANKERS. In all probability how can this process be considered fair when the agency has one set of data, An Board Pleanala has a completely different set of data and the EIS does not meet the criteria for such a proposal under EU law.

JUDGMENT OF THE COURT (Second Chamber)

3 July 2008 (*)

(Failure of a Member State to fulfil obligations – No assessment of the environmental effects of projects within the scope of Directive 85/337/EEC – Regularisation after the event)

In Case C-215/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 11 May 2006,

Commission of the European Communities, represented by D. Recchia and D. Lawunmi, acting as Agents, 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,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, J. Makarczyk (Rapporteur), P. Kūris and J.-C. Bonichot, Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 February 2008,

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 seeks a declaration from the Court that:

- by failing to adopt all measures necessary to ensure that projects which are within the scope 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) either before or after amendment by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and

- by failing to adopt all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of Directive 85/337,

Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

Legal context

Community legislation

- 2 By its action the Commission seeks a declaration that Ireland has failed to fulfil its obligations under Directive 85/337 both in its original version and in the version as amended by Directive 97/11.

Directive 85/337

- 3 The wording of Article 1(2) and (3) of Directive 85/337 is as follows:

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;

"developer" means:

the applicant for authorisation for a private project or the public authority which initiates a project;

"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.'

- 4 Article 2(1) and (2) and the first subparagraph of Article 2(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 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.

3. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.'

5 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
- the inter-action between the factors mentioned in the first and second indents,
- material assets and the cultural heritage.'

6 Article 4 of that directive is worded as follows:

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

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

7 Article 5 of Directive 85/337 states:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

- (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

- a description of the project comprising information on the site, design and size of the project,
- a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,
- the data required to identify and assess the main effects which the project is likely to have on the environment,
- a non-technical summary of the information mentioned in indents 1 to 3.

3. Where they consider it necessary, Member States shall ensure that any authorities with relevant information in their possession make this information available to the developer.'

8 Article 6 of Directive 85/337 is worded as follows:

1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or in each case when the request for consent is made. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. Member States shall ensure that:

- any request for development consent and any information gathered pursuant to Article 5 are made available to the public,
- the public concerned is given the opportunity to express an opinion before the project is initiated.

...

9 Article 7 of Directive 85/337 provides:

'Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article 5 to the other Member State at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.'

10 Article 8 of Directive 85/337 states:

'Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.'

11 Article 9 of that directive is worded as follows:

'When a decision has been taken, the competent authority or authorities shall inform the public concerned of:

- the content of the decision and any conditions attached thereto,
- the reasons and considerations on which the decision is based where the Member States' legislation so provides.

The detailed arrangements for such information shall be determined by the Member States.

If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question.'

12 Article 10 of that directive provides:

'The provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national regulations and administrative provisions and accepted legal practices with regard to industrial and commercial secrecy and the safeguarding of the public interest.

Where Article 7 applies, the transmission of information to another Member State and the reception of information by another Member State shall be subject to the limitations in force in the Member State in which the project is proposed.'

13 Annex II to Directive 85/337 lists projects subject to Article 4(2) of that directive, namely those for which an environmental impact assessment is necessary only where the Member States consider that their characteristics so require. Projects referred to in that annex include, in point 2(a), extraction of peat, and in point 2(c), extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash.

14 Projects listed in point 10(d) of Annex II include the construction of roads.

Directive 97/11

15 Article 3 of Directive 97/11 is worded as follows:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 March 1999 at the latest. They shall forthwith inform the Commission thereof.

...

2. If a request for development consent is submitted to a competent authority before the end of the time-limit laid down in paragraph 1, the provisions of Directive 85/337/EEC prior to these amendments shall continue to apply.'

Directive 85/337 as amended by Directive 97/11 ('Directive 85/337 as amended')

16 In the interests of clarity, reference will be made only to the amendments to Directive 85/337 which have direct relevance to the alleged failure by Ireland to fulfil its obligations. Accordingly, reference will not be made to amendments introduced by Directive 97/11 to Articles 5 to 10 of Directive 85/337, since those have no bearing on the determination of this action which the Court is called upon to make.

17 Under Article 2(1) and (2) and the first subparagraph of Article 2(3) of Directive 85/337 as amended:

'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.

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.

...

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.'

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

'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.'

19 Article 4 of Directive 85/337 as amended 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.'

- 20 Point 3(i) of Annex II to Directive 85/337 as amended specifies installations for the harnessing of wind power for energy production (wind farms).
- 21 By virtue of point 13 of Annex II, any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (being a change or extension not listed in Annex I) must be regarded as a project within the scope of Article 4(2) of Directive 85/337 as amended.
- 22 Annex III to Directive 85/337 as amended, relating to the selection criteria referred to in Article 4(3) of that directive, provides that the characteristics of projects must be considered in relation, inter alia, to pollution and nuisances, and to the risk of accidents having regard in particular to technologies used. That annex also indicates that the environmental sensitivity of geographical areas likely to be affected by projects must be considered having regard, inter alia, to the absorption capacity of the natural environment, paying particular attention to certain areas, including mountain and forest areas.

National legislation

- 23 The requirements of Directive 85/337 as amended have been transposed into national law by, in particular, the Planning and Development Act, 2000, as amended ('the PDA'), and the Planning and Development Regulations, 2001.
- 24 Section 32(1)(a) of the PDA lays down a general obligation to obtain consent for all development projects within the scope of Annexes I and II to Directive 85/337 as amended; the application for permission must be lodged and the permission obtained before the commencement of works. In addition, section 32(1)(b) of the PDA provides that permission can be obtained to regularise unauthorised development (retention permission).
- 25 On receipt of an application for permission, the planning authority must decide whether the proposed development should be subject to an environmental impact assessment.
- 26 Section 151 of the PDA provides that any person who has carried out or is carrying out unauthorised development is guilty of an offence.
- 27 It is clear from sections 152 and 153 of the PDA that, on receipt of a complaint, planning authorities are, as a general rule, under an obligation to issue a warning letter, and must then decide whether or not it is appropriate to issue an enforcement notice. Failure to comply with the requirements of an enforcement notice constitutes an offence.

28 Under section 160 of the PDA:

'(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

- (a) that the unauthorised development is not carried out or continued;
- (b) in so far as practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;
- (c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.'

29 Section 162 of the PDA makes clear that an application for retention permission does not entail any ongoing enforcement action being stayed or withdrawn.

Pre-litigation procedure

30 After sending a letter of formal notice on 5 April 2001, the Commission sent to Ireland a reasoned opinion dated 21 December 2001.

31 On 7 July 2004, the Commission sent an additional letter of formal notice to Ireland.

32 On 5 January 2005, after the receipt of Ireland's observations as set out in a letter dated 6 December 2004, an additional reasoned opinion was sent to Ireland.

33 Since the Commission considered that Ireland's response to that reasoned opinion, in letters of 8 March, 17 June and 1 December 2005, was unsatisfactory, it brought this action under the second paragraph of Article 226 EC.

The action

The first complaint

34 The Commission's complaint is that Ireland has not taken all the measures necessary to comply with Articles 2, 4 and 5 to 10 of Directive 85/337 either in its original version or as amended by Directive 97/11. This complaint will be examined, first, in relation to Directive 85/337 as amended.

35 The first complaint, that transposition of Directive 85/337 as amended is incomplete and that, as a result, the directive is not properly implemented is based on three pleas in law.

- 36 First, the Commission claims that Ireland has not taken the measures necessary in order to ensure that checks are made to ascertain, in accordance with Article 2(1) of Directive 85/337 as amended, whether proposed works are likely to have significant effects on the environment, and, if that is the case, in order to render it obligatory that an environmental impact assessment be carried out, as laid down by that provision, before the grant of development consent.
- 37 Secondly, the Commission considers that the Irish legislation which allows an application for retention permission to be made after a development has been executed in whole or in part without consent undermines the preventive objectives of Directive 85/337 as amended.
- 38 Thirdly, the Commission claims that the enforcement regime established by Ireland does not guarantee the effective application of the directive, and that Ireland has thereby failed to fulfil its general obligation under Article 249 EC.
- 39 In support of the third plea in law, the Commission reports a number of examples which, in its opinion, illustrate the deficiencies in the application of the system of enforcement.

The first two pleas in law

- Arguments of the parties

- 40 The Commission claims that since it is possible, under the national legislation, to comply with the obligations imposed by Directive 85/337 as amended during or after execution of a development, there is no clear obligation to subject developments to an assessment of their effects on the environment before they are carried out.
- 41 In accepting that projects can be scrutinised, in an environmental impact assessment, after their execution, when the principal objective pursued by Directive 85/337 as amended is that effects on the environment should be taken into account at the earliest possible stage in all planning and decision-making processes, the national legislation in question recognises a possibility of regularisation which results in the undermining of that directive's effectiveness.
- 42 The Commission adds that the rules relating to retention permission are incorporated within the general provisions applicable to normal planning permission, and that there is nothing to indicate that applications for retention permission and the grant of such permission are limited to exceptional cases.
- 43 Ireland contends that the Commission's analysis of the Irish legislation which transposes Directive 85/337 as amended is not accurate. Ireland states that Irish law expressly requires that permission be obtained for any new development before the commencement of works and that, as regards development which must be subject to an environmental impact assessment, the assessment must be carried out before the works. Failure to comply with those obligations is, moreover, a criminal offence and may result in enforcement action.
- 44 Ireland contends, in addition, that retention permission, established by the PDA and the Planning and Development Regulations, 2001, is an exception to the general rule which requires permission to be obtained before the commencement of a development, and best meets the objectives of Directive 85/337 as amended, in particular the general

objective of protection of the environment, since the removal of an unauthorised development may not be the most appropriate measure to achieve that protection.

- 45 According to that Member State, the requirements of Directive 85/337 as amended are wholly procedural and are silent as to whether there may or may not be an exception by virtue of which an environmental impact assessment might, in certain cases, be carried out after commencement of works. Ireland adds that nowhere in the directive is it expressly stated that an assessment can solely be carried out before the execution of a project, and refers to the definition of the term 'development consent' given by Directive 85/337 as amended to argue that the use of 'proceed' is significant, that term not being confined to the commencement of works but also applying to the continuation of a development project.
- 46 Ireland contends, in addition, that retention permission is a reasonable fall-back mechanism to be resorted to in exceptional circumstances, designed to take account of the fact that some projects will inevitably, for various reasons, commence before the grant of development consent within the meaning of Directive 85/337 as amended.
- 47 On that point, Ireland relies on Case C-201/02 *Wells* [2004] ECR I-723 to argue that a remedial assessment may be carried out at a later stage, by way of exception to the general rule that the assessment must be carried out at the earliest possible stage in the decision-making process.
- 48 That Member State considers also that it would be disproportionate to order the removal of some structures in circumstances where, after consideration of an application for retention permission, retention is held to be compatible with proper planning and sustainable development.

- Findings of the Court

- 49 Member States must implement Directive 85/337 as amended in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a requirement for development consent and an assessment with regard to their effects (see, to that effect, Case C-287/98 *Linster* [2004] ECR I-723, paragraph 52, and Case C-486/04 *Commission v Italy* [2006] ECR I-11025, paragraph 36).
- 50 Further, development consent, under Article 1(2) of Directive 85/337 as amended, is the decision of the competent authority or authorities which entitles the developer to proceed with the project.
- 51 Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.
- 52 That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only

if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.

- 53 A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.
- 54 As the Irish legislation stands, it is undisputed that environmental impact assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitutes under Irish law a contravention of the planning rules.
- 55 However, it is also undisputed that the Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed.
- 56 In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.
- 57 While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.
- 58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.
- 59 Lastly, Ireland cannot usefully rely on *Wells*. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60 This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.

61 It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive.

62 Consequently, the first two pleas in law are well founded.

The third plea in law

– Arguments of the parties

63 According to the Commission, there are shortcomings in the Irish legislation relating to enforcement measures and in the resulting enforcement practices which undermine the proper transposition and implementation of Directive 85/337 as amended, when, under that directive, an effective system of control and enforcement is mandatory.

64 First, the Commission claims that the enforcement measures provided for by Irish planning legislation do not offset the absence of provisions requiring compliance with the obligations as to an environmental impact assessment before development is carried out.

65 Secondly, the Commission claims that enforcement practices undermine the proper transposition of Directive 85/337 as amended. The Commission refers to specific situations which illustrate, in its opinion, the deficiencies of the Irish legislation regarding supervising compliance with the rules established by that directive.

66 As regards the procedure relating to enforcement, Ireland contends the choice and form of enforcement is a matter within the discretion of Member States, in particular as there has been no harmonisation at Community level of planning and environmental controls.

67 In any event, Ireland states that the system of enforcement established by the Irish legislation is comprehensive and effective. The Member State adds that, under environmental law, the applicable provisions are legally binding.

68 Thus, the legislation places planning authorities under the obligation of sending a warning letter when they learn that an unauthorised development is being carried out, unless they consider that the development is of minor importance.

69 Once the warning letter has been sent, the planning authorities must decide whether it is appropriate to issue an enforcement notice.