JUDGMENT OF THE COURT (First Chamber)

4 May 2006 *

In Case C-508/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 1 December 2003,

Commission of the European Communities, represented by F. Simonetti and X. Lewis, acting as Agents,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by K. Manji, acting as Agent, D. Elvin QC and J. Maurici, Barrister,

defendant,

* Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Schiemann, N. Colneric, E. Juhász and E. Levits, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2005,

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 seeks a declaration from the Court that:

— by failing to apply correctly Articles 2(1) and 4(2) 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) in relation to the proposed urban development projects at White City and at Crystal Palace as projects falling within point 10(b) of Annex II to the directive, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;

— by failing to ensure the correct application of Articles 2(1), 4(2), 5(2) and 8 of Directive 85/337, as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337, as amended'), when development consent is granted in a multi-stage procedure, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive.

Legal context

Community legislation

2 According to the fifth recital in the preamble thereto, Directive 85/337 is intended to establish general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects which are likely to have an effect on the environment.

3 For this purpose, Article 1(2) of Directive 85/337 defines 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

4 Article 2(1) of the directive states:

'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.'

5 Article 4 of the directive provides:

'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.'

6 Article 5(2) of the directive provides that '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'.

7 Under Article 8 of the directive, 'information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure'.

8 Point 10(b) of Annex II to the directive refers to 'urban development projects'.

9 Directive 85/337, in particular the rules relating to projects falling within Annex II, was substantially amended by Directive 97/11, which had to be transposed in the United Kingdom by 14 March 1999 at the latest. Since the applications seeking consent for the two projects at issue in the first complaint were submitted to the competent authorities before that date, those amendments are not relevant to the projects, as is clear from Article 3(2) of Directive 97/11.

10 The second complaint, however, must be considered in the light of Directive 85/337, as amended.

11 In that regard, while Article 1(2) of Directive 85/337, as amended, remains unchanged, Article 2(1) of the directive now provides that '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'.

12 Directive 97/11 also made a minor amendment to the wording of Article 5(2) of Directive 85/337 by inserting an indent requiring the developer also to provide:

'— an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects'.

13 The numbering of that provision also changed and it became Article 5(3) of Directive 85/337, as amended.

14 Article 8 of the directive provides, in its amended version, that 'the results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure'.

National legislation

15 In England, the principal legal instrument relating to land planning is the Town and Country Planning Act 1990 ('the Town and Country Planning Act'), which lays down general rules concerning both the grant of planning permission and the modification or revocation of such permission. This Act is amplified by the Town and Country Planning (General Development Procedure) Order 1995 ('the General Development Procedure Order') and the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ('the Assessment of Environmental Effects Regulations').

16 The Assessment of Environmental Effects Regulations were replaced by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ('the 1999 Regulations'). Since these new regulations apply only to applications lodged on or after 14 March 1999, they are not relevant to the two

projects at issue in the first complaint. On the other hand, they determine the relevant national law for the purposes of the second complaint.

— The Town and Country Planning Act and the General Development Procedure Order

17 Under section 57(1) of the Town and Country Planning Act, planning permission is required for any 'development' within the meaning of section 55, a term which includes 'the carrying out of building ... or other operations in, on, over or under land ...'.

18 Planning permission may be granted in several forms, one of which is outline permission with a requirement of subsequent approval of the reserved matters.

19 Section 92(1) of the Town and Country Planning Act provides that 'outline planning permission' is permission 'granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority or the Secretary of State of matters not particularised in the application ("reserved matters")'.

20 Article 1(2) of the General Development Procedure Order defines such 'reserved matters' as 'any of the following matters in respect of which details have not been given in the application, namely (a) siting, (b) design, (c) external appearance, (d) means of access, (e) the landscaping of the site'.

21 Section 92(2) of the Town and Country Planning Act implicitly provides that consent is deemed to be finally given for a reserved matter by the decision granting subsequent approval.

22 It is apparent from section 73 of the Town and Country Planning Act that an application for an amendment to an existing permission constitutes an application for a new planning permission.

— The Assessment of Environmental Effects Regulations and the 1999 Regulations

23 By virtue of the Assessment of Environmental Effects Regulations, certain projects must be subject to an environmental impact assessment before consent is granted.

24 Schedule 2 to the Assessment of Environmental Effects Regulations sets out the classes of project which are listed in Annex II to Directive 85/337, including 'urban development project[s]'.

25 Under regulation 2(1) of the Assessment of Environmental Effects Regulations, 'Schedule 2 application' means 'an application for planning permission ... for the carrying out of development of any description mentioned in Schedule 2, which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location', this being a matter to be assessed by the competent authority on a case-by-case basis.

26 As provided in regulation 4(1) and (2) of the Assessment of Environmental Effects Regulations, the competent authority cannot grant planning permission in respect of, inter alia, a Schedule 2 application unless it has first taken the environmental information into consideration and states in its decision that it has done so.

27 When faced with an application for planning permission in respect of a project envisaged in Schedule 2 to the regulations, the competent authority must therefore, on a case-by-case basis, determine prior to any grant of planning permission whether the characteristics of the project require an assessment of its environmental impact, that is to say whether the project is likely to have significant effects on the environment, and refuse permission if it does not have sufficient information to come to a decision on this point.

28 Under national law, outline planning permission constitutes 'planning permission' for the purposes of regulation 4 of the Assessment of Environmental Effects Regulations, whereas the decision approving reserved matters does not. For this reason, an environmental impact assessment can, under national law, be carried out in respect of a project only at the initial outline planning permission stage, and not at the later stage of approval of the reserved matters.

29 While the 1999 Regulations made substantive amendments to the rules applying to environmental impact assessment, they in no way altered the fact, at issue in the second complaint, that an assessment cannot be carried out at the reserved matters stage.

National implementing measures

30 Circular 15/88, issued by the Department of the Environment, provides non-statutory guidance to help the competent authorities to identify projects as referred to in Schedule 2 to the Assessment of Environmental Effects Regulations which must be the subject of an environmental impact assessment.

31 After stating, in paragraph 18, that the basic question to be asked is whether a project is likely to give rise to significant environmental effects, Circular 15/88 then explains, in paragraph 20, that in general terms an assessment is needed (i) for projects which are of more than local importance, (ii) for projects proposed in sensitive locations and (iii) for projects with unusually complex and potentially adverse effects.

32 Paragraphs 30 and 31 of Circular 15/88 state that, for certain categories of project, criteria and thresholds are listed in Appendix A to the circular that are intended to give a broad indication of the types of cases in which, in the Secretary of State's view, an environmental assessment may be required under the Assessment of Environmental Effects Regulations or, conversely, is not likely to be required. The circular adds, however, that those criteria and thresholds are purely indicative and the fundamental test to be applied in each case is whether the project is likely to have significant environmental effects.

33 With regard, more particularly, to urban development projects, the circular states, in paragraph 15 of Appendix A, that redevelopment of previously developed land is unlikely to require an assessment, unless the proposed development is one of certain specific types or is on a very much greater scale than the previous development.

34 The circular states, in paragraph 16 of Appendix A, with regard to projects on sites which have not previously been intensively developed that 'the need for [an assessment] should be considered in the light of the sensitivity of the particular location'. Thus, 'such schemes ... may require [an assessment] where:

(i) the site area of the scheme is more than five hectares in an urbanised area; or

(ii) there are significant numbers of dwellings in close proximity to the site of the proposed development, e.g. more than 700 dwellings within 200 metres of the site boundaries; or

(iii) the development would provide a total of more than 10 000 square metres (gross) of shops, offices or other commercial uses'.

35 In addition, paragraph 42 of the circular states that the preparation of an environmental statement is bound to require the developer to work out his proposals in some detail. Otherwise any thorough appraisal of likely effects will be impossible. It will be for the planning authority to judge how much information is required in the particular case. The information given in the environmental statement will have an important bearing on whether matters may be reserved in an outline planning permission. Where the information states or implies a particular treatment of any matter, it will not be appropriate to reserve that matter in the planning permission.

36 Paragraph 48 of Circular 2/99 issued by the Department of the Environment, Transport and the Regions, which replaced Circular 15/88 in March 1999 (in order to take account of the 1999 Regulations), notes that, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an environmental impact assessment can be carried out only at the initial stage of granting such permission and not at the later stage of approval of the reserved matters.

Facts and pre-litigation procedure

White City

37 In December 1993 Chesfield Plc ('Chesfield') applied to the London Borough of Hammersmith & Fulham ('Hammersmith & Fulham LBC'), the competent planning authority, for outline planning permission to develop retail and leisure facilities at White City, London (the 'White City development project'), a project falling within Annex II to Directive 85/337.

38 After considering the effects of the project, as set out in a number of reports, and following public consultation, Hammersmith & Fulham LBC took the view that an assessment of the effects that the project might have on the environment was not required.

39 In March 1996 Hammersmith & Fulham LBC granted outline planning permission. Certain matters were reserved for subsequent approval by that authority.

40 In October 1997 and September 1998 Chesfield made applications for approval of the reserved matters.

41 On 12 October 1999 Hammersmith & Fulham LBC gave such approval.

42 Works commenced after the approval.

43 Following receipt of a complaint, the Commission, by letter of 19 April 2001, gave the United Kingdom the opportunity to submit its observations and, on 20 August 2002, sent it a reasoned opinion, alleging that it had infringed Articles 2(1) and 4(2) of Directive 85/337 in relation to the White City development project, a project falling within point 10(b) of Annex II to that directive. The Commission set the United Kingdom a time-limit of two months for it to take the measures necessary to comply with the reasoned opinion. Being dissatisfied with the response given by the United Kingdom Government in its letter of 29 October 2002, the Commission brought the present action.

Crystal Palace

44 Crystal Palace Park, in London, is Metropolitan Open Land listed as a Grade II* historic park on the statutory register kept by English Heritage. Part of the site at issue relating to the access and adjoining land fall within the Crystal Palace Park Conservation Area.

45 On 4 April 1997 London & Regional Properties Ltd ('L&R') applied to the London Borough of Bromley ('Bromley LBC'), the competent planning authority, for outline planning permission to develop a leisure complex in Crystal Palace Park ('the Crystal Palace development project'), a project falling within Annex II to Directive 85/337.

46 After consideration which took into account a number of reports and additional information, Bromley LBC concluded that an environmental impact assessment was not required for the project.

47 On 24 March 1998 Bromley LBC granted outline planning permission, reserving certain matters for subsequent approval before any development was commenced.

48 On 25 January 1999 L&R applied to Bromley LBC for final determination of certain reserved matters. The details of the Crystal Palace development project then showed: (i) on the ground floor, 18 cinemas, a leisure area and an exhibition area; (ii) at the gallery level, restaurants and cafes, two leisure areas and public toilets; (iii) at roof level, a roof-top car park with a maximum of 950 spaces, four viewing areas and areas enclosing plant and equipment; (iv) the addition of a mezzanine floor of 800 square metres; and (v) changes to the construction of the external walls.

49 Those matters fell wholly within the parameters of the outline permission already granted.

50 However, at the meeting where a decision was to be taken on approval of the reserved matters, some Bromley LBC councillors expressed the wish that an environmental impact assessment should be carried out. After legal advice had been sought, they were informed that as a matter of domestic law an assessment could be carried out only at the initial outline planning permission stage.

51 Bromley LBC issued the notice of approval on 10 May 1999.

52 However, the planning permission has expired in the meantime without the project being carried out.

53 Following receipt of a complaint, the Commission, by letter of 6 November 2000, gave the United Kingdom the opportunity to submit its observations and, on 26 July 2001, sent it a reasoned opinion, alleging that it had infringed Articles 2(1) and 4(2) of Directive 85/337 in relation to the Crystal Palace development project, a project falling within point 10(b) of Annex II to that directive. The Commission set the United Kingdom a time-limit of two months for it to take the measures necessary to comply with the reasoned opinion. Being dissatisfied with the response given by the United Kingdom Government in its letter of 3 December 2001, the Commission brought the present action.

Incorrect transposition of Directive 85/337, as amended, regarding outline planning permission with a requirement of subsequent approval of the reserved matters

54 On 26 July 2001, having given the United Kingdom the opportunity to submit its observations, the Commission sent it a reasoned opinion, in which it stated that some aspects of the national legislation concerning assessment of the environmental

impact of projects, in particular as regards outline planning permission with a requirement of subsequent approval of the reserved matters, appeared to it to be incompatible with Directive 85/337, as amended. The Commission set the United Kingdom a time-limit of two months for it to take the measures necessary to comply with the reasoned opinion. Being dissatisfied with the response given by the United Kingdom Government in its letter of 3 December 2001, the Commission brought the present action.

The action

55 The Commission puts forward two complaints in support of its action.

56 The first complaint, as advanced by the Commission during the pre-litigation procedure and in its reply, is in essence divided into three limbs:

— infringement of Articles 2(1) and 4(2) of Directive 85/337 in that Hammersmith & Fulham LBC failed to investigate whether the White City development project required an environmental impact assessment;

— infringement of Articles 2(1) and 4(2) of Directive 85/337 in that Hammersmith & Fulham LBC failed to adopt a formal decision allowing it to be checked that the decision was based on adequate prior investigation;

— infringement of Articles 2(1) and 4(2) of Directive 85/337 in that neither Hammersmith & Fulham LBC nor Bromley LBC carried out an environmental impact assessment of the White City and Crystal Palace development projects respectively.

57 However, in its application the Commission mentions only the third limb of this complaint.

58 The second complaint concerns the incorrect transposition into national law of Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended, in the national rules which provide that, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an assessment may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage ('the rules at issue in the present case').

The first complaint: breach of the obligations to investigate whether an assessment was required, to adopt a formal decision in that regard and to carry out such an assessment (Articles 2(1) and 4(2) of Directive 85/337)

Admissibility of the first complaint

59 The United Kingdom Government puts forward four pleas of inadmissibility, alleging that a new complaint is involved, that the principle of legal certainty is infringed, that the national courts have jurisdiction and that the action is devoid of purpose.

— A new complaint

60 The United Kingdom Government contends that the first and second limbs of the first complaint, as set out in the Commission's reply, constitute a new complaint. While mention was admittedly made of those limbs in the letter of formal notice and the reasoned opinion and they were subsequently restated in the reply submitted to the Court, they were not, however, set out in the application initiating the proceedings. It is the application which defines the subject-matter of a case.

61 As to those submissions, it is not permissible for a party to alter the very subject-matter of the case during the proceedings, and the merits of the action must be examined solely in the light of the claims contained in the application initiating the proceedings (see, to that effect, Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3, and Case C-256/98 *Commission* v *France* [2000] ECR I-2487, paragraph 31).

62 Furthermore, by virtue of Article 21 of the Statute of the Court of Justice and Article 38(1)(c) of its Rules of Procedure, the Commission must, in any application made under Article 226 EC, indicate the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (see Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17).

63 In the present case, no mention is made of the first and second limbs of the first complaint in the claims at the end of the application. Nor do they appear in the part of the application headed 'in law'.

64 Accordingly, the first two limbs of the first complaint, which were not included in the application initiating proceedings, are inadmissible although they were set out in the Commission's reply and mention is made of them in the letter of formal notice and the reasoned opinion.

65 It remains to consider, therefore, the admissibility of the third limb of the first complaint in the light of the other pleas of inadmissibility raised by the United Kingdom Government.

— Infringement of the principle of legal certainty

66 The United Kingdom Government contends that, in view of the considerable length of time that has passed since the planning permissions at issue were granted, the action for failure to fulfil obligations offends against the principle of legal certainty and undermines the legitimate expectations which developers derive from acquired rights.

67 It should be stated with regard to those submissions, first, that the infringement procedure is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation (see, to that effect, Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 14, and Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 23).

68 Secondly, it follows from case-law that, while the principles of legal certainty and of the protection of legitimate expectations require the withdrawal of an unlawful measure to occur within a reasonable time and regard must be had to how far the person concerned might have been led to rely on the lawfulness of the measure, the

fact remains that such withdrawal is, in principle, permitted (see, in particular, Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly of the ECSC* [1957] ECR 39, at 55 and 56; Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10; and Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 12).

69 A Member State cannot therefore rely on legal certainty and legitimate expectations derived by developers from acquired rights in order to prevent the Commission from bringing an action seeking an objective finding that the Member State has failed to fulfil its obligations under Directive 85/337 with regard to assessment of the effects of certain projects on the environment.

— The jurisdiction of the national courts

70 The United Kingdom Government contends that it is for national courts and not the Court of Justice to determine whether a competent authority has correctly assessed whether a project will have significant effects on the environment.

71 As to that submission, the fact that proceedings have been brought before a national court to challenge the decision of a competent authority which is the subject of an action for failure to fulfil obligations and the decision of that court cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of the remedies available through the national courts cannot prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects (see Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraph 9; Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 24; and Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 39).

— The action is devoid of purpose

72 The United Kingdom Government maintains that the permission granted in respect of the Crystal Palace development project expired in March 2003 without being implemented and that any infringement, even if established, is therefore wholly theoretical.

73 As to that submission, an action in respect of an infringement which no longer existed on the date upon which the period laid down in the reasoned opinion expired is, according to the case-law, inadmissible because it is devoid of purpose (see Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 13, and Case C-209/02 *Commission* v *Austria* [2004] ECR I-1211, paragraphs 17 and 18).

74 It is clear from settled case-law that the purpose of an action brought under Article 226 EC is to obtain a declaration that the State concerned has failed to fulfil its obligations under the Treaty and that it has failed to put an end to that infringement within the time set by the Commission in its reasoned opinion (Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 40). The Court has also consistently held that the question whether a Member State has failed to fulfil its obligations must be assessed by reference to the situation prevailing in the Member State concerned at the end of the period laid down in the reasoned opinion (see Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13, and Case C-362/90 *Commission* v *Italy*, paragraph 10).

75 In the present case, the fact that on expiry of the period laid down in the reasoned opinion, namely on 26 September 2001, the planning permission at issue was still in force is sufficient to preclude the action for failure to fulfil obligations from being regarded as devoid of purpose.

76 It follows from the above considerations that the pleas of inadmissibility in respect of the third limb of the first complaint must be dismissed.

The merits of the third limb of the first complaint

77 Before considering the merits, it is appropriate first to note that in proceedings under Article 226 EC for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions (see, in particular, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 41 and the case-law cited).

78 Thus, with regard more specifically to Directive 85/337, the Court held in Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, at paragraph 85, that the Commission must furnish at least some evidence of the effects that the project in question is likely to have on the environment.

79 However, the Member States are required, under Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article 211 EC, in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied (see, in particular, *Commission* v *Ireland*, paragraph 42 and the case-law cited).

80 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 (see *Commission* v *Ireland*, paragraph 44 and the case-law cited).

81 It is in the light of those principles that the merits should be considered.

82 The Commission submits, in the third limb of its first complaint, that Articles 2(1) and 4(2) of Directive 85/337 have been infringed, on the ground that neither Hammersmith & Fulham LBC nor Bromley LBC carried out an environmental impact assessment of the White City and Crystal Palace development projects respectively, although those projects are likely to have significant effects.

83 The Commission notes that the White City development project involves about 58 000 square metres of retail and leisure development, including a major new road junction, 4 500 car parking spaces and a link to the Underground network. In its opinion, for a project of that size there is a presumption that an assessment is necessary, unless such a presumption is mitigated by other factors.

84 The Commission notes that the Crystal Palace development project includes leisure and commercial uses (18 cinemas, galleries, restaurants) covering 52 000 square metres, a roof-top car park with 950 spaces and a car park at ground level. The Commission is of the view that the scale and size of the project are such that it is likely to have significant effects on the environment, and that the competent authority therefore exceeded the limits of its discretion.

85 The United Kingdom Government considers that the competent authorities, in the light of the reports and studies in their possession and following the consultations that they carried out, were entitled to conclude that neither of the two projects was likely to have significant effects on the environment, and that they did not therefore need to be the subject of an environmental impact assessment.

86 As to those submissions, it should be noted that, as provided in Article 2(1) of Directive 85/337, 'projects' within the meaning of Article 4 of that directive which are likely to have significant effects must be made subject to an assessment with regard to their effects on the environment before consent for them is given.

87 For that purpose, Article 4(2) of Directive 85/337, read in conjunction with Annex II thereto, lists the projects to be made subject to an impact assessment where Member States consider that their characteristics so require.

88 Although in those circumstances Article 4(2) of Directive 85/337 gives the competent authority a degree of freedom in appraising whether or not a particular project must be made subject to an assessment, it is, however, clear from settled case-law that the limits of that discretion are to be found in the obligation, set out in Article 2(1) of the directive, that all projects which are likely to have significant effects on the environment are to be subject to an assessment (see, to that effect, Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraphs 44 and 45; Case C-87/02 *Commission* v *Italy*, paragraphs 43 and 44; and Case C-83/03 *Commission* v *Italy* [2005] ECR I-4747, paragraph 19).

89 Thus, it is clear from case-law that Directive 85/337 requires that all projects falling within Annex II that are likely to have significant effects on the environment be

made subject to an assessment (see, to that effect, *WWF and Others*, paragraph 45; *Commission* v *Portugal*, paragraph 82; and Case C-87/02 *Commission* v *Italy*, paragraph 44).

90 However, as has already been noted in paragraphs 77 to 80 above, proof that Article 2(1) of Directive 85/337 has been infringed requires the Commission to demonstrate that a Member State has failed to 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. That proof may effectively be furnished by demonstrating that a Member State did not take the measures necessary to ascertain whether a project which does not reach the thresholds envisaged in Article 4(2) of Directive 85/337 is nevertheless likely to have significant effects on the environment by virtue inter alia of its nature, size or location. The Commission might also establish that a project likely to have significant effects on the environment was not the subject of an impact assessment although it should have been (*Commission* v *Portugal*, paragraph 82).

91 In that last respect, it is also clear from paragraphs 85 and 87 of *Commission* v *Portugal* that, in order to demonstrate that the national authorities exceeded the limits of their discretion by failing to require that an impact assessment be carried out before giving consent for a specific project, the Commission cannot limit itself to general assertions by, for example, merely pointing out that the information provided shows that the project in question is located in a highly sensitive area, without presenting specific evidence to demonstrate that the national authorities concerned made a manifest error of assessment when they gave consent to a project. The Commission must furnish at least some evidence of the effects that the project is likely to have on the environment.

92 In the present case, it is clear that the Commission did not satisfy the burden of proof placed upon it. It cannot merely rely on presumptions that large-scale projects are automatically likely to have significant effects on the environment without establishing, on the basis of at least some specific evidence, that the competent authorities made a manifest error of assessment.

93 Despite the analytical material and documents supplied by the United Kingdom Government, the Commission did not seek to back up its own assertions and refute those of the defendant Member State through detailed examination of that material or by obtaining, producing, examining or providing an analytical presentation of tangible and specific evidence which might have enabled the Court to assess whether the competent authorities did in fact exceed the limits of their discretion.

94 In those circumstances, the third limb of the first complaint must be dismissed as unfounded.

The second complaint: incorrect transposition into domestic law of Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended

95 By its second complaint, the Commission in essence contends that the national rules at issue, under which an assessment may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage, incorrectly transpose into domestic law Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended.

96 The Commission argues that, where national law provides for a consent procedure comprising more than one stage, Directive 85/337, as amended, requires that an assessment may in principle be carried out at each stage in that procedure if it appears that the project in question is likely to have significant effects on the environment.

97 The Commission contends that, in so far as the national rules at issue in the present case preclude an assessment at the later reserved matters stage, they do not satisfy that requirement.

98 In its view, those rules allow some projects to escape assessment although they are likely to have significant effects on the environment.

99 The United Kingdom Government contends, on the other hand, that Article 2(1) of that directive makes it clear that a project must be subject to an assessment 'before consent is given'. Since that 'consent' is given when outline planning permission is granted (and not when the reserved matters are subsequently approved), the rules at issue correctly transpose Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended.

100 As to those submissions, it should be noted that Article 1(2) of that directive defines 'development consent' for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project.

101 In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.

102 Therefore, the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) 'development consent' within the meaning of Article 1(2) of Directive 85/337, as amended.

103 In those circumstances, it is clear from Article 2(1) of Directive 85/337, as amended, that projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to their effects before (multi-stage) development consent is given (see, to that effect, Case C-201/02 *Wells* [2004] ECR I-723, paragraph 42).

104 In that regard, the Court stated in *Wells*, at paragraph 52, that where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

105 In the present case, the rules at issue provide that an environmental impact assessment in respect of a project may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage.

106 Those rules are therefore contrary to Articles 2(1) and 4(2) of Directive 85/337, as amended. The United Kingdom has thus failed to fulfil its obligation to transpose those provisions into domestic law.

107 However, so far as concerns Articles 5(3) and 8 of Directive 85/337, as amended, the Commission has not provided any explanation as to why it considers that those two provisions have not been complied with.

108 Accordingly, the second complaint is partly well founded.

109 In the light of all the above considerations, it must be held that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Community law by incorrectly transposing into domestic law Articles 2(1) and 4(2) of Directive 85/337, as amended, as a result of the national rules under which, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an assessment may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage.

Costs

110 Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs, if each party succeeds on some and fails on other heads. Since the parties have respectively been unsuccessful on a number of heads, they must be ordered to bear their own costs.

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

1. **Declares that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Community law by incorrectly transposing into domestic law Articles 2(1) and 4(2) 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, as a result of the national rules under which, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an assessment may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission of the European Communities and the United Kingdom to bear their own costs.**

[Signatures]