JUDGMENT OF THE COURT (Second Chamber)

9 November 2006 *

In Case C-216/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 May 2005,

Commission of the European Communities, represented by X. Lewis, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, B. Murray, Senior Counsel, and G. Simons, Barrister-at-Law, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris, J. Klučka, R. Silva de Lapuerta (Rapporteur) and J. Makarczyk, Judges,

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 April 2006,

after hearing the Opinion of the Advocate General at the sitting on 22 June 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by making the full and effective participation of the public in certain environmental impact assessments subject to prior payment of fees, Ireland has failed to comply with its obligations under Articles 6 and 8 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').

Legal framework

Community law

2 According to the sixth recital in the preamble to Directive 85/337, 'development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; ... this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question'.

3 Article 6 of Directive 85/337 thus provides:

'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 information supplied by the developer and on the request for development consent. To this end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those 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 within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.

3. The detailed arrangements for such information and consultation shall be determined by the Member States, which may in particular, depending on the particular characteristics of the projects or sites concerned:

— determine the public concerned,

— specify the places where the information can be consulted,

— specify the way in which the public may be informed, for example by bill-posting within a certain radius, publication in local newspapers, organisation of exhibitions with plans, drawings, tables, graphs, models,

— determine the manner in which the public is to be consulted, for example, by written submissions, by public enquiry,

— fix appropriate time-limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.'

4 Article 8 of Directive 85/337 provides 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

5 Section 33 of the Planning and Development Act, 2000 ('the Act') provides:

'(1) The Minister shall by regulations provide for such matters of procedure and administration as appear to the Minister to be necessary or expedient in respect of applications for permission for the development of land.

(2) Without prejudice to the generality of subsection (1), regulations under this section may make provision for the following —

...

(c) enabling persons to make submissions or observations on payment of the prescribed fee and within a prescribed period;

...'

6 According to section 130(1)(a) of the Act, 'any person other than a party may make submissions or observations in writing to the Board [An Bord Pleanála, the Planning Appeals Board] in relation to an appeal or referral, other than a referral under section 96(5)'.

7 Section 144 of the Act provides:

'(1) Subject to the approval of the Minister, the Board may determine fees in relation to appeals, referrals, the making of an application under section 37(5), the making of submissions or observations to the Board under section 130, and requests for oral hearings under section 134, and may provide for the payment of different fees in relation to different classes or descriptions of appeals and referrals, for exemption from the payment of fees in specified circumstances and for the waiver, remission or refund in whole or in part of fees in specified circumstances.

(2) The Board shall review the fees determined under subsection (1) from time to time, but at least every three years, having regard to any change in the consumer price index since the determination of the fees for the time being in force, and may amend the fees to reflect the results of that review, without the necessity of the Minister's approval under subsection (1).

...

(4) Where the Board determines or amends fees in accordance with this section, it shall give notice of the fees in at least one newspaper circulating in the State, not less than eight weeks before the fees come into effect.

...

(6) The Board shall specify fees for the making of copies under section 5(6)(a), not exceeding the cost of making the copies.'

Facts and pre-litigation procedure

8 Following two complaints sent to the Commission in 2000 concerning Irish legislation proposed at that time on planning and development, the Commission, by letter of 29 August 2000, called on the Irish authorities to comment on certain aspects of the proposed legislation, in particular in relation to the payment of a fee in order for members of the public to have their views taken into consideration in development consent procedures.

9 Having given Ireland formal notice to submit its observations on the compatibility of such fees with the exercise of the right of public participation provided for in Articles 6 and 8 of Directive 85/337, the Commission, on 23 January 2003, issued a reasoned opinion requesting that Member State to take the necessary measures to comply with the opinion within two months from receipt thereof.

10 Finding the response from Ireland to be unsatisfactory, the Commission brought the present action.

The action

Arguments of the parties

11 The Commission puts forward a single plea in law in support of its action, alleging that, by making the participation of the public in certain environmental impact assessments subject to prior payment of participation fees, the Irish legislation infringes Article 6 of Directive 85/337 and, consequently, Article 8 thereof.

12 In support of its plea, the Commission bases the infringement of Article 6 on four arguments.

13 First of all, it observes that no provision of Directive 85/337 expressly authorises the levying of such fees, whereas other directives on related subjects, such as Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56), expressly authorise the levying of a fee.

14 The Commission submits, second, that the levying of such fees is contrary to the scheme and purpose of Directive 85/337, which seeks to supplement environmental impact assessments with appropriate information, in that the requirement to pay those fees in development consent procedures may have the effect of dissuading members of the public, one of the principal sources of information, from participating in the decision-making process or of making their participation more difficult.

15 The Commission contends, third, that the wording of Article 6(2) and (3) of Directive 85/337 does not admit the interpretation advocated by Ireland. The imposition of participation fees as part of the 'detailed arrangements' for public consultation cannot be regarded as coming within the scope of what is reasonably necessary to give effect to Article 6(2) of that directive.

16 The Commission states, fourth, that, in charging those fees, Ireland has, actually or potentially, created an obstacle to the exercise of the rights conferred on the public by Article 6(2) of Directive 85/337, particularly for persons on low income.

17 The infringement of Article 8 of that directive arises from the fact that, in charging participation fees prohibited by Article 6, Ireland fails to ensure that opinions expressed by members of the public who are not able to pay participation fees are taken into account in development consent procedures pertaining to projects likely to have significant effects on the environment.

18 In its statement in defence, Ireland opposes each of the arguments put forward by the Commission in support of the plea alleging infringement of Article 6 of Directive 85/337.

19 Ireland submits with respect to the first argument that, since the legal basis for Directive 85/337 is Article 235 of the EEC Treaty (subsequently Article 235 of the EC Treaty, now Article 308 EC), the limits of Community competence and the extent thereof are delineated by the precise wording of the directive. Accordingly, prohibitions not contained in the express wording of the directive cannot be

implied. The principle of subsidiarity in the exercise of Community powers and the measure of discretion which Member States have when transposing directives corroborate this view.

20 As to the argument that the participation fees provided for by the Irish legislation run counter to the spirit and purpose of Directive 85/337, Ireland submits that their introduction is not inimical to the concept of public participation established by the directive, but rather is intended to facilitate that participation in so far as it permits local authorities to receive a contribution towards the costs of administering the system for informing and consulting the public.

21 With respect to the Commission's third argument, Ireland observes that the wording of Article 6(3) of Directive 85/337 in particular allows for Member States to determine the detailed arrangements for informing and consulting the public and claims that it is for the Commission to demonstrate that the detailed arrangements, as laid down by a Member State, prevent the purpose of the directive from being fulfilled.

22 As to the last argument put forward by the Commission, Ireland denies that the fees at issue may constitute a barrier to persons on low income, adding that they are charged for administrative purposes and are reasonable, both in principle and in amount.

23 Lastly, since the infringement of Article 8 of Directive 85/337 alleged by the Commission is based solely on the alleged breach of Article 6 of that directive because of the charging of the participation fees at issue, that allegation should also be dismissed following a finding that there has been no infringement of Article 6.

Findings of the Court

24 Regarding the alleged infringement of Article 6 of Directive 85/337, the Commission raises, first, the argument that Ireland would be empowered to levy fees only if the directive expressly so provided. Such a proposition cannot be accepted.

25 The third paragraph of Article 249 EC provides that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

26 That provision must be interpreted as meaning that Member States have the obligation, when they transpose a directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of methods (see, to that effect, Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 18).

27 As regards, in particular, the Commission's argument derived from the fact that, in related fields, both Directive 90/313 and Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313 (OJ 2003 L 41, p. 26) provide expressly in Article 5 that Member States may charge such fees, it suffices to state, as did the Advocate General in point 34 of her Opinion, that the fact that under another directive the levying of fees is expressly permitted cannot found a general presumption that the Community legislature has wished to allow fees only when the legislation expressly so provides.

28 It follows that the Commission's argument that Ireland cannot charge the disputed fees because Directive 85/337 does not contain any provision expressly authorising the levying of participation fees cannot be reconciled with the freedom of choice under the third paragraph of Article 249 EC.

29 Accordingly, this first argument cannot be upheld.

30 By its third argument, which it is appropriate to examine before the second and fourth arguments, the Commission contends that Ireland, in establishing the participation fees in question by way of 'detailed arrangements' for public consultation, went beyond the margin of discretion allowed by Article 6(2) and (3) of Directive 85/337. It suggests that the validity of the measure in dispute must be assessed in the light of its necessity in terms of giving effect to those provisions.

31 It follows from Article 6(2) of the directive that the Member States must ensure that the members of the public concerned are given an opportunity to express their opinion before development consent is granted for a project. Under Article 6(3), each Member State has the power to determine the detailed arrangements for the consultation. That provision lists a number of possibilities open to the Member States in this regard, but the list is not exhaustive, as evidenced by the words 'in particular'.

32 That wording indicates that the Community legislature wished not to limit the powers of the Member States in the determination of the detailed arrangements for

public consultation but, on the contrary, to give them a wide discretion in defining those arrangements.

33 When determining the arrangements, the Member States are, in principle, free to impose a participation fee such as the one at issue, provided that it is not such as to constitute an obstacle to the exercise of the rights of participation conferred by Article 6 of Directive 85/337.

34 In that light, the Commission's argument that the charging of the fees at issue is not necessary to give effect to Article 6(2) of Directive 85/337 is irrelevant. The directive does not make the exercise by the Member States of their discretion under Article 6(3) subject to a test of necessity.

35 In its second and fourth arguments, which it is appropriate to consider together, the Commission claims that the fees in question are contrary to the scheme and purpose of Directive 85/337 in that they restrict the exercise by the public of their rights under that directive.

36 The sixth recital in the preamble to Directive 85/337 states that the prior assessment of the environmental effects of certain projects must be conducted 'on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question'.

37 It is apparent from that recital, as it is from Article 6(2), that one of the directive's objectives is to afford the members of the public concerned the opportunity to express their opinion in the course of development consent procedures for projects likely to have significant effects on the environment.

38 The Court notes that Article 6(3) of Directive 85/337 allows Member States to place certain conditions on participation by members of the public concerned by the project. Thus, under that provision, the Member States may determine the detailed arrangements for public information and consultation and, in particular, determine the public concerned and specify how that public may be informed and consulted.

39 Moreover, and contrary to the Commission's assertions, that approach is supported by the rules in areas closely related to Directive 85/337.

40 Thus, both Directive 90/313 and Directive 2003/4 note, in the sixth and eighth recitals in their preambles respectively, the necessity to ensure that any natural or legal person in the European Community has a right of access to environmental information held by or for public authorities.

41 Article 5 of each of these directives provides that Member States may levy a charge for supplying information but that such charge is not to exceed a reasonable

amount. Those rules show that, for the Community legislature, the charging of a fee of a reasonable amount is not incompatible with the guarantee of access to information.

42 It follows from all the foregoing that the levying of an administrative fee is not in itself incompatible with the purpose of Directive 85/337.

43 Although Directive 85/337 does not preclude fees such as those charged under the national legislation at issue in the present case, they cannot, however, be fixed at a level which would be such as to prevent the directive from being fully effective, in accordance with the objective pursued by it (see, to that effect, Case C-97/00 *Commission* v *France* [2001] ECR I-2053, paragraph 9).

44 This would be the case if, due to its amount, a fee were liable to constitute an obstacle to the exercise of the rights of participation conferred by Article 6 of Directive 85/337.

45 The amount of the fees at issue here, namely EUR 20 in procedures before local authorities and EUR 45 at the Board level, cannot be regarded as constituting such an obstacle. Nor has the Commission succeeded in refuting Ireland's argument that the level of the fees is justified in the light of the administrative costs involved in processing the observations received from persons concerned.

46 In the light of those considerations, the Commission's arguments that the fees in question are contrary to the scheme and purpose of Directive 85/337 must be rejected.

47 Lastly, the Commission also questions the validity of the fees in question in that the Act authorises the competent minister and the Board to determine their amount without limiting that power or defining it more precisely.

48 Suffice it to note, in this respect, that such a delegation is, in principle, a matter of national law and is not in itself open to criticism in the light of Directive 85/337. However, the amounts prescribed in the exercise of that delegated power must be compatible with that directive. As found earlier, consideration of the arguments put forward by the Commission has not revealed that this is not the case with respect to the amount of the fees at issue in the present proceedings.

49 In those circumstances, the Court finds that the plea in law alleging infringement of Article 6 of Directive 85/337 is, in its entirety, without foundation.

50 Since the claim that Article 8 of that directive has been infringed is exclusively based on infringement of Article 6 thereof, the necessary conclusion is that the infringement of Article 8 has not been established either.

Costs

51 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 Ireland has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]