JUDGMENT OF THE COURT (Fifth Chamber)

29 April 2004 *

In Case C-117/02,

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

applicant,

v

Portuguese Republic, represented by L. Fernandes, M.Telles Romão and M. João Lois, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Portuguese.

APPLICATION for a declaration that, by allowing consent to be given to a planned tourism complex including residential units, hotels and golf courses, located in the area of Ponta do Abano, without an assessment of the effects of that project on the environment, the Portuguese Republic has failed to fulfil its obligations under Article 2(1) 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),

THE COURT (Fifth Chamber),

composed of: A. Rosas (Rapporteur), acting for the President of the Fifth Chamber, A. La Pergola and S. von Bahr, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

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

gives the following

Judgment

1 By application lodged at the Court Registry on 27 March 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by allowing consent to be given to a planned tourism complex including residential units, hotels and golf courses, located in the area of Ponta do Abano, without an assessment of the effects of that project on the environment, the Portuguese Republic has failed to fulfil its obligations under Article 2(1) 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).

Legal context

Community legislation

Directive 85/337/EEC

2 Directive 85/337 applies, according to Article 1(1) thereof, to the assessment of the environmental effects of public and private projects which are likely to have significant effects on the environment.

3 Article 1(2) defines a project as:

'— 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'.

4 Article 2(1) of Directive 85/337 provides:

'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 Directive 85/337 states:

'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 Annex II to Directive 85/337, concerning projects subject to Article 4(2) of the Directive, lists under point 11, entitled 'Other projects', (a):

'Holiday villages, hotel complexes'.

7 In substance, Article 5 of Directive 85/337 sets out the minimum information which the developer must supply. Article 6 requires Member States to take the measures necessary to ensure that the authorities and public concerned are informed and can express their opinion before the project is initiated. Article 8 requires the competent authorities to take into consideration the information gathered pursuant to Articles 5 and 6. Article 9 lays down the obligation for the competent authorities to inform the public of the decision which has been taken and any conditions attached thereto.

8 Article 12 of Directive 85/337 provides that Member States are to take the measures necessary to comply with the Directive within three years of its notification. It was notified to the Member States on 3 July 1985.

9 Directive 85/337 was amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), Article 3(1) of which provides for implementation by 14 March 1999 at the latest.

Directive 92/43/EEC

10 Article 3(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) provides for the establishment of a European ecological network of special areas of conservation, under the title Natura 2000, composed of sites hosting the natural habitat types listed in Annex I to the Directive and habitats of the species listed in Annex II. Pursuant to the second subparagraph of Article 4(1) of the Directive, each Member State is to transmit to the Commission, within three years of the notification of the Directive, a list of the sites which it has designated as special areas of conservation within the meaning of the Directive.

11 The first sentence of Article 6(3) of Directive 92/43 states:

'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.'

12 Pursuant to Article 23(1) thereof, Member States were to implement the Directive within two years of its notification.

National legislation

13 Directive 85/337 was transposed into Portuguese law by Decree-Law No 186/90 of 6 June 1990 (*Diário da República*, series I, No 130 of 6 June 1990, p. 2462).

14 The Sintra-Cascais natural park, which includes the area of Ponta do Abano, was created by Regulatory Decree No 8/94 of 11 March 1994 (*Diário da República*, series I-B, No 59 of 11 March 1994, p. 1226).

15 The development plan for the Sintra-Cascais natural park was laid down by Regulatory Decree No 9/94, which was also adopted on 11 March 1994 (*Diário da República*, series I-B, No 59 of 11 March 1994, p. 1228).

16 On 18 April 1996, following a favourable opinion from the management committee of the Sintra-Cascais natural park, the general directorate of tourism approved the location of a project to construct residential units in the area of Ponta do Abano.

17 By Resolution No 142/97 of the Council of Ministers of 28 August 1997, the areas of Cabo Raso and Ponta do Abano were included in the site Sintra-Cascais, in accordance with Decree-Law No 226/97 of 27 August 1997, which transposes Directive 92/43 into Portuguese law.

18 As is clear from the reasoned opinion, the commune of Cascais published on 9 March 1998 the decision consenting to the project.

Pre-litigation procedure

19 By letter of 4 January 2000, the Commission drew the attention of the Portuguese authorities to a complaint referred to it regarding projects to construct residential units within the site of Community importance of Sintra-Cascais, and more precisely in the areas of Cabo Raso and Ponta do Abano. It pointed out that certain projects likely to have a significant effect on a site of Community importance were to be subject to an assessment of their implications in accordance with Directive 92/43. The Commission asked the Portuguese authorities to submit their observations to it within two months.

20 Since it had not received a reply to that letter, the Commission on 4 April 2000 sent the Portuguese authorities a letter of formal notice for the purposes of Article 226 EC, in which it stated that, by allowing consent to be given in 1998 to two tourism projects including residential units, hotels and golf courses, located in an area which appears in the national list of sites and which should have been proposed as a site of Community importance to be included in the Natura 2000 network, without an adequate assessment of their effects on the environment, the Portuguese Republic had failed to fulfil its obligations under Article 6(2), (3) and (4) of Directive 92/43 and, in the alternative, under Article 2(1) of Directive 85/337.

21 In particular, it stated that, even though an environmental impact assessment had not been carried out pursuant to Directive 92/43, it should have been made pursuant to Directive 85/337. Although the projects at issue are referred to in Annex II to Directive 85/337, the Portuguese authorities acted in breach of the discretion afforded them under Article 4(2) of the Directive, which, as the Court has confirmed, is limited by Article 2(1) thereof (see, to that effect, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 64). According to the

Commission, the projects would undoubtedly give rise to significant effects on the environment since the areas in question included habitat types referred to in Annex I to Directive 92/43 and species referred to in Annex II to the Directive.

22 The Portuguese Government was requested to submit its observations within two months of receipt of the letter of formal notice.

23 By letter of 30 March 2000, received on 7 April 2000, the Portuguese authorities sent their reply to the Commission's letter of 4 January 2000.

24 In that letter, they gave the references of the relevant legislation and administrative decisions. They made clear that consent had not been given to any project in the area of Cabo Raso. As regards the project in Ponta do Abano, they pointed out that its location had been decided well before approval of the national list of sites drawn up in accordance with Directive 92/43.

25 The Portuguese authorities acknowledged that Decree-Law No 186/90, transposing Directive 85/337 into national law, was in force at the time consent was given to the project. Nevertheless, they considered that the holiday villages planned for the area of Ponta do Abano did not, given their size, satisfy the legal conditions which would require an environmental impact assessment procedure to be carried out.

26 They also informed the Commission that they had recently decided to review and to suspend with immediate effect the development plan for Sintra-Cascais natural park in the areas favouring tourism and leisure activities and that they had decided to adopt preventive measures prohibiting, with immediate effect, the construction of new complexes in those areas, including the area of Cabo Raso.

27 By letter of 14 June 2000, the Portuguese authorities replied to the letter of formal notice of 4 April 2000, pointing out that the Commission had sent that letter without taking into account the letter of 30 March 2000 and should therefore, after analysing the replies provided, shelve the case or start a new pre-litigation procedure for the purposes of Article 226 EC.

28 They drew attention to the information contained in their earlier letters, noting that they did not understand the various references to Directive 92/43, since the location of the construction project had been approved in 1996 — and not in 1998, as the Commission incorrectly claimed — on the basis of the development plan for Sintra-Cascais natural park, that is to say, prior to approval of the national list of sites under Directive 92/43.

29 They submitted that, since the legal regime of the Natura 2000 network was not applicable at the time the decision regarding the location of the tourism complex in Ponta do Abano was taken, that project was to be made subject to an assessment of its effects on the environment only if such an obligation flowed from Decree-Law No 186/90, which transposes Directive 85/337. Such was not the case, however, as is clear from the explanations provided in the letter of 30 March 2000.

30 Since it considered the replies provided by the Portuguese Government to be unsatisfactory, the Commission issued a reasoned opinion on 25 July 2000,

referring principally to infringement of Directive 92/43 and, in the alternative, to infringement of Directive 85/337, and setting a time-limit of two months for the Portuguese Republic to adopt the measures necessary to comply with it.

31 As regards the discretion resulting from Article 4(2) of Directive 85/337, the Commission repeated that it had been exceeded in the present case. The projects would undoubtedly have produced significant environmental effects since the areas in question included habitat types referred to in Annex I to Directive 92/43 and species mentioned in Annex II to the Directive.

32 The Commission has disputed the argument by the Portuguese authorities that Directive 92/43 was not applicable at the time the location of the project was decided. It has pointed out that under Portuguese legislation consent for town planning comes within the competence of the municipal authorities. In the present case, the commune of Cascais published the decision consenting to the project on 9 March 1998, that is, after the inclusion in 1997 of the Sintra-Cascais site in the national list of sites drawn up in accordance with Directive 92/43.

33 The Commission has therefore again concluded that, by allowing consent to be given to a planned tourism complex including residential units, hotels and golf courses, located in the area of Ponta do Abano, that is to say, in an area which appeared in the national list of sites and which should have been proposed as a site of Community importance to be included in the Natura 2000 network, without an adequate assessment of its effects on the environment, the Portuguese Republic failed to fulfil its obligations under Article 6(2), (3) and (4) of Directive 92/43 and, in the alternative, under Article 2(1) of Directive 85/337.

34 By letter of 29 September 2000, the Portuguese Government requested a two-month extension to the period prescribed by the Commission for replying to the reasoned opinion.

35 By letter of 20 November 2000, it replied to the reasoned opinion. It noted that the reasoned opinion no longer mentioned the tourism complex at Cabo Raso.

36 As regards the project in the area of Ponta do Abano, it first reasserted that Directive 92/43 was not applicable at the time the project was authorised. It stated in that regard that tourism projects are subject to specific legislation which confers competence on the central administration, in this case the general directorate for tourism, for the purpose of approving site locations. The competence of the municipal authorities is limited to authorising infrastructure works and construction works, always within the limits of the location approved by the central administration.

37 The Commission's interpretation of the relevant Portuguese legislation is erroneous. The decision to be taken into consideration in order to determine whether an impact assessment was necessary is that giving consent to the location of the project, which was taken in 1996, that is prior to inclusion of the Sintra-Cascais site in the national list of sites of Community importance under Directive 92/43.

38 As regards infringement of Directive 85/337, the Portuguese authorities have maintained that the Commission's complaint was based on a single argument, namely that the limits to the discretion afforded to Member States by Article 4(2) of Directive 85/337 were exceeded since there was no doubt that the projects would have significant effects on the environment, given that the areas concerned included habitat types referred to in Annex I to Directive 92/43 and species mentioned in Annex II to the Directive.

39 The Portuguese authorities have challenged that interpretation in two respects. First, they have contended that review of the use by Member States of the discretion conferred on them by Article 4(2) of Directive 85/337 can be carried out only as regards transposition of the Directive. It is therefore not possible to call in question the 1996 decision taken in respect of Ponta do Abano, in compliance with a transposition which is not contested on that point, lest it give rise to complete legal uncertainty for public authorities and citizens, exposed to the uncertainty of a legal framework permanently threatened by subsequent case-by-case review on the part of Community bodies.

40 In addition, the Portuguese authorities have pointed out that justifying the finding of an infringement of Directive 85/337 on the ground that the Ponta do Abano project threatens values protected under Directive 92/43 amounts to applying Directive 92/43 with retroactive effect. They contend that Directive 92/43 and the national list of sites established subsequently cannot be relied on to define the rules of procedure which applied at the time the Ponta do Abano decision was taken.

41 Finally, the Portuguese authorities have pointed out that, in any event, tourism complexes appear only in Annex II to Directive 85/337 and that failure to assess their effects therefore cannot constitute a breach of Community law.

Admissibility

Arguments of the parties

42 In its defence, the Portuguese Republic states that the action is not admissible inasmuch as the Commission amended the subject-matter of the dispute in relation to the pre-litigation stage. While the reasoned opinion related to failure to

fulfil obligations principally under Directive 92/43 and, in the alternative, under Directive 85/337, the application now refers only to failure to fulfil obligations under Directive 85/337. There has been a change in the subject-matter of the dispute, not merely a limitation thereof, since the centre of consideration has been shifted.

43 The Portuguese Republic maintains that the Commission could have made clear the alleged infringement when the reasoned opinion was adopted, since the Portuguese authorities had submitted arguments justifying withdrawal of the complaint relating to infringement of Directive 92/43 before that opinion was issued, in particular by letters of 30 March 2000 and 14 June 2000.

44 Moreover, it points out that the Commission has always invoked the failure to fulfil obligations under Directive 85/337 in the alternative and on the sole ground that the project would have a significant effect on the environment since the area includes habitat types and species referred to in Annexes I and II to Directive 92/43. In that context, the Portuguese Republic centred its argument on analysis of the principal complaint. Accordingly, by modifying the complaint in the application, the Commission shifted the centre of discussion towards the question of the failure to implement Directive 85/337 and the Portuguese authorities have not had the opportunity to develop their defence relating to that complaint.

45 According to the Portuguese Republic, the Commission raises new arguments in its application which were not formulated during the pre-litigation stage, in order to justify the finding of a failure to implement Directive 85/337. Accordingly, the Commission maintains, inter alia, that the Portuguese authorities regarded the thresholds set by national legislation as absolute thresholds, without having analysed the possibility of significant effects on the environment related to the nature, size and location of the project.

46 As regards that last point, the Portuguese Republic contends that the Commission should have taken into account the answers provided by the Portuguese authorities or issued a supplementary reasoned opinion in accordance with the case-law of the Court, thereby giving the Portuguese Republic the opportunity to present its defence in relation to the alleged failure to implement Directive 85/337.

47 In addition, it considers that the Commission prejudiced its rights of defence inasmuch as it never, during the pre-litigation procedure, clearly and directly called in question the application of national legislation in this case. In particular, the Commission never explained why the assessment carried out by the Portuguese authorities through the application of national legislation, in order to ascertain whether significant effects would occur, was not correct.

48 The Commission, in its reply, contests the plea of inadmissibility raised by the Portuguese Government.

49 It claims that it took into account the replies by the Portuguese Government to the letter of 4 January 2000 and to the formal notice of 4 April 2000. It was solely on account of the clarifications made only at the stage of the reply to the reasoned opinion that the Commission was able to discontinue the complaint of infringement of Directive 92/43, since in that reply the Portuguese authorities explained in greater detail the limited scope of the decision adopted in 1998 giving consent to the works as opposed to the 1996 decision authorising the location of the project.

50 The fact that the failure to fulfil obligations under Directive 85/337 was set out at the pre-litigation stage merely in the alternative, as against the failure to fulfil obligations under Directive 92/43, does not prevent the Commission from maintaining solely that complaint in the application. The subject-matter of the dispute has been limited but not altered.

51 In that regard, the Commission denies that during the pre-litigation stage it put forward merely one argument, relating to Directive 92/43. It maintains that both the letter of formal notice and the reasoned opinion contained a clear account of the argument justifying the assessment of the project's effects in the light of the relevant provisions of Directive 85/337, irrespective of considerations relating to Directive 92/43. The assertions put forward by the Portuguese authorities in the pre-litigation procedure demonstrate that those authorities had clearly understood the Commission's arguments on that point.

Findings of the Court

52 The pre-litigation procedure did not occur in conditions allowing rapid clarification of the complaints put forward by the Commission and the grounds of defence presented by the Portuguese Republic. First, in the Commission's letter of 4 January 2000, the complaints were not formulated very precisely and, second, the late reply to that letter on the part of the Portuguese authorities did not allow the Commission in the letter of formal notice of 4 April 2000 to take into account certain replies to those complaints.

53 However, such elements do not appear to call in question the admissibility of the action. The purpose of the pre-litigation procedure is to give the State concerned the opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission (*Commission* v *Ireland*, cited above, paragraph 51).

54 In the present case, the Commission had the opportunity to present its complaints against the Portuguese Republic and the latter had the opportunity to submit the observations it considered relevant. The pre-litigation procedure has achieved its objective to that effect.

55 The plea of inadmissibility raised by the Portuguese Republic on the basis that Directive 85/337 was mentioned only in the alternative during the pre-litigation procedure, while the complaint based on that directive is the sole infringement complaint and the centre of the proceedings, cannot be upheld. Suffice it to note that that complaint was in fact one of the complaints referred to in the letter of formal notice and the reasoned opinion and that it was set out there in a summary but sufficient manner. The alternative nature of the complaint in no way prevented the Portuguese Republic from submitting observations on it.

56 The alleged failure by the Commission to provide explanations regarding the infringement by the Portuguese authorities of Directive 85/337 when consent was given to a plan for a tourism complex in the area of Ponta do Abano must be considered with the substance of the action.

Substance

Arguments of the parties

57 In its application, the Commission disputes the argument of the Portuguese Republic, expressed during the pre-litigation procedure, that review of the use of the discretion left to Member States is relevant only as regards the correct transposition of a directive. It recalls the case-law of the Court in that regard (Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraphs 49 and 50; Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 44; *Commission* v *Ireland*, cited above, paragraph 64). It concludes that correct transposition of Article 2(1) and Article 4(2) of Directive 85/337 cannot properly be relied on by the Portuguese Republic in order to exclude from the assessment obligation laid down in Article 2(1) a particular project which, like the project relating to the works carried out in the area of Ponta do Abano, can, although it comes under Annex II to that directive, have significant effects on the environment by virtue of its nature, size or location.

58 The Commission denies that assessment of the effects of a project on the environment may give rise to 'legal uncertainty for public authorities and citizens, exposed to the uncertainty of a legal framework permanently threatened by subsequent case-by-case review on the part of Community bodies'. First, it recalls that the infringement procedure makes it possible to determine the exact scope of the obligations imposed on Member States where interpretations diverge.

59 Secondly, it points out that, faced with a project which falls within Annex II to Directive 85/337 but which does not satisfy the criteria or does not reach the thresholds set by national legislation, the national authorities must, having regard to the nature, size or location of the project, examine in the particular case a possible significant effect on the environment which would warrant an impact assessment in accordance with Directive 85/337.

60 Finally, the Commission recalls that so long as no administrative decision has been taken giving consent to the projects submitted, the developers have acquired no vested interest (Opinion of Advocate General Mischo, Case C-150/97 *Commission* v *Portugal* [1999] ECR I-259, point 22).

61 In the light of that case-law, the Commission takes the view that it is not sufficient to assert, as the Portuguese authorities have done, that, on account of its size, the project in question did not satisfy the legal conditions for an assessment of the effects on the environment. It points out that, on the contrary, Regulatory Decrees No 8/94 and 9/94 describe the Sintra-Cascais natural park, which includes the Ponta do Abano area, as a territory:

— where these are natural values of unquestionable interest, which represent a national and even universal heritage;

— which constitutes a highly sensitive area.

62 It concludes that, in the light of those circumstances, even though the project did not reach the size provided for under national legislation, the Portuguese authorities should have carried out an assessment of its effects before adopting a decision to consent to its location.

63 In its defence, the Portuguese Republic takes the view that the decision approving the location of the project did not infringe the terms of Directive 85/337.

64 The Portuguese authorities in fact undertook an analysis of possible significant effects on the environment, in accordance with Article 2(1) of Directive 85/337. That analysis took place at two levels, through the examination of:

— the nature and location of the project, by means of the legislation transposing Directive 85/337, and

— the nature, size and location of the project, by ascertaining its compatibility with the development plan for the Sintra-Cascais natural park, namely Regulatory Decree No 9/94.

65 The Portuguese Republic points out that the national legislation which transposes Directive 85/337 set out two criteria for making planned tourism complexes subject to an assessment of their effects on the environment, namely that they are not provided for in land-use planning measures and that they present certain characteristics (size or occupancy rate). Since the project is in an area defined in the development plan for Sintra-Cascais natural park as favouring tourism, the Portuguese authorities were in possession of the information which allowed them to conclude that, although located in an area of high environmental value, the project was not likely to have significant effects on the environment by virtue of its nature and location.

66 The Portuguese Republic explains that the development plan for Sintra-Cascais natural park was preceded by a plan, in force from 1981 to 1994, which broadly divided the territory into areas, and that those two plans were preceded by numerous natural heritage studies and by very extensive public discussions, which involved not merely civil society and non-governmental organisations but also various university institutes and public bodies.

67 The development plan for Sintra-Cascais natural park includes priority nature protection areas, rural environment areas, urban environment areas and areas favouring tourism and leisure activities. The Portuguese Republic points out that important natural values, including those subsequently identified by the Portuguese authorities as including species and habitats referred to in the annexes to Directive 92/43, have been duly protected by the classification of areas containing those species and habitats as priority nature protection areas, defined in the development plan. That plan is an adequate instrument for managing the values targeted by the creation of the Sintra-Cascais natural park. Approval of the project by the Portuguese authorities should be assessed in the light of those values.

68 The area favourable to tourism and leisure activities, where any holiday villages must be constructed, has been duly distinguished from the perspective of natural heritage. It is an area primarily colonised by secondary plant communities, which are degraded and structurally simplified, made up of Mediterranean bushes resulting from the natural regeneration of other, more evolved communities previously destroyed by successive fires over time, as well as small residual patches of eucalyptus, pinaster, umbrella pine and Aleppo pine.

69 The Portuguese authorities therefore ascertained that the project was compatible with the specifications laid down in the development plan, inter alia as regards compliance with environmental, landscape and architectural quality standards, and compatible with the parameters established for its size and occupancy rate, in accordance with Article 21 of Regulatory Decree No 9/94 approving the development plan. The project was authorised only after a favourable opinion from the natural park management committee, which determined that it satisfied environmental, landscape and architectural quality standards, in the terms laid down by Articles 20 and 4 of Regulatory Decree No 9/94.

70 The Portuguese Republic therefore disputes the Commission's argument that the project would inevitably give rise to significant effects on the environment simply because it is located in Sintra-Cascais natural park. It points out that the sensitivity of the area where it is located, as well as the nature and size of the project, were duly taken into account. Consequently, the Portuguese authorities have not failed to fulfil their obligations under Directive 85/337, since they carried out a specific examination of the project as regards possible significant effects on the environment, in accordance with Article 2(1) of that directive.

71 In its reply, the Commission takes the view that the details provided by the Portuguese Government in the defence confirm that the authorities did not in actual fact carry out an assessment but merely determined that the project satisfied the conditions laid down in national legislation. The infringement is proved, for the reasons put forward in the application and in the light of the Court's case-law.

72 The information provided by the Portuguese Government bears out the Commission's position. Thus the fact that a project is located in an area defined by national legislation as 'favouring tourism' does not ensure that it will not have a significant effect on the environment in a specific case. Moreover, the information provided shows that the project in question is located in an extremely sensitive area where the flora has already deteriorated, at the very least, which bears out the Commission's conviction that an impact assessment should have been carried out.

73 Finally, the Commission observes that the argument that the development plan for Sintra-Cascais natural park is an adequate instrument for the management of the conservation values related to the creation of that park cannot be reconciled with the information provided by the Portuguese authorities in their letter of 30 March 2000 that a decision had been taken to review and suspend with immediate effect that development plan and to prohibit new construction projects in areas favouring tourism and leisure activities.

74 In its rejoinder, the Portuguese Republic observes that the Commission appears to be confusing the area of Ponta do Abano, where the projects were approved, and Sintra-Cascais natural park. The latter has always been densely inhabited and includes urban, rural and leisure areas in addition to areas of substantial environmental value.

75 The recognition by the Portuguese authorities of the environmental values in Sintra-Cascais natural park is not at issue in the present proceedings. Nevertheless, that is the sole argument relied on by the Commission as grounds for its action.

76 In the light of the arguments put forward in the reply, the Portuguese Republic contends that the Commission is not correctly interpreting Directive 85/337. It is confusing the assessment procedure laid down in Articles 5 to 10 of that directive and the assessment of whether or not there are significant effects on the environment, which is a simple 'screening' operation preceding any formal assessment procedure. That preliminary verification was carried out in the present case by examining the nature, size and location of the project at the time its compatibility under the development plan was analysed, an analysis confirmed by the favourable opinion of the management committee of Sintra-Cascais natural park, which was essential for approval of its location under the system laid down by Regulatory Decree No 9/94. It is therefore not correct to state that 'the fact that a project is located in an area defined by national legislation as favouring tourism in no way ensures that it will not have a significant effect on the environment in a specific case'.

77 The nature of each parcel of land in Sintra-Cascais natural park was defined at the end of multiple studies which made it possible to trace the contours set out in the development plan and to draw up the regulation establishing authorised standards, typologies and occupation indices for areas likely to be urbanised, as in the case of areas favouring tourism and leisure activities, where the project at issue was authorised.

78 The Portuguese Republic denies that the choice to locate the project in an area where the vegetation is degraded and simplified bears out the argument that an impact assessment was necessary. It is not possible to maintain that the protection

objectives upheld by Community and national provisions might seek to restore natural conditions which disappeared prior to the classification of conservation areas or before those areas were populated. Moreover, the Commission does not have the capacity to call in question the management criteria for the environmental values of a national protection area, which were established well before the date when Member States were required to have transposed Directive 92/43.

79 As regards the suspension of the development plan for Sintra-Cascais natural park, the Portuguese Government explains that it wanted to revise the plan on the basis of an examination of its various underlying factors, inter alia the fact that the transposition into national law of Directive 92/43 imposed additional obligations on the Portuguese State as regards its contribution to creating the Natura 2000 network. However, analysis of compliance with obligations following from Community law must be carried out in the light of the conservation values protected by the legislation which applied at the time the natural park was created, and not in the light of the values of Directive 92/43.

Findings of the Court

80 It is settled case-law that in proceedings for failure to fulfil obligations brought under Article 226 EC, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to provide the Court with all the evidence necessary to enable it to establish that the obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption (see, inter alia, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 26; and Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21).

81 In this case, the Commission relies on Directive 85/337, as interpreted by the Court, to allege that the Portuguese Republic failed to carry out an impact assessment prior to authorising a project which, although it does not exceed the thresholds set by the Member State in accordance with Article 4(2) of the Directive, is nevertheless likely to have significant effects on the environment because of its nature and its location in the Ponta do Abano area of the Sintra-Cascais natural park.

82 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 all measures necessary to ascertain whether a project which does not reach the thresholds referred to 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 determine that a project likely to have significant effects on the environment was not the subject of an impact assessment although it should have been.

83 In the present case, the Portuguese Republic has asserted that, because of the existence of the development plan for the Sintra-Cascais natural park and the consent procedures required under that plan, all measures necessary were adopted to ensure that, before consent is given for a project located in that park, the authorities check whether the project is likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location, and whether it is therefore to be made the subject of an impact assessment.

84 The Commission has not however disputed that assertion. Nor has it demonstrated that in the present case the Portuguese authorities acted in breach of the discretion available to them by failing to require an impact assessment before consenting to that project although it was likely to have significant effects on the environment.

85 It is not sufficient to establish that a project is to be carried out in a national park in order to assume that the project will have significant effects on the environment. At the very least, the Commission must furnish a minimum of proof of the effects that the project is likely to have on the environment.

86 In the present case, the Commission has not dealt with the arguments of the Portuguese Republic that:

— the Sintra-Cascais natural park includes not only areas of high environmental value but also urban, rural and leisure activity areas;

— the areas favouring tourism and leisure activities where the projects were to be carried out were chosen precisely because of the degraded state of their vegetation.

87 It is not sufficient in that regard to make a general statement that the location of a project in an area defined by national legislation as 'favouring tourism' cannot ensure that the project will not have a significant effect on the environment in a

specific case. Similarly, the Commission cannot merely point out that the information provided shows that the project in question is located in a highly sensitive area where the flora has already deteriorated, at the very least, without presenting specific evidence to demonstrate that the Portuguese authorities made a manifest error of assessment when they gave consent to the location of the project in an area specifically envisaged for projects of that type.

88 It must be held that the file presented by the Commission is based on the assumption that a project located in a national park is likely to have significant effects on the environment. Such an assumption is insufficient for the purpose of establishing the existence of an infringement of Article 2(1) of Directive 85/337. In any event, the Commission has not rebutted to the requisite legal standard the relevant explanations put forward by the Portuguese Republic.

89 Accordingly, the infringement is not proved and the action must be dismissed.

Costs

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

On those grounds,

THE COURT (Fifth Chamber)

hereby

1. **Dismisses the application;**

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

Rosas La Pergola von Bahr

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President