OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 15 January 2009 [1]

I — Introduction

1. The present proceedings are based on two different pre-litigation procedures. First, the Commission complains that Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, [2] as amended by Council Directive 97/11/EC of 3 March 1997 [3] ('the EIA Directive'), has not been transposed by Ireland in relation to private roads. Second, the Commission alleges that Ireland has not transposed (fully) Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [4] and not informed the Commission regarding such transposition.

2. Access to justice under Irish planning law is the focal point of the action. In this context it is necessary in particular to deal with a contradiction in the Commission's submissions: on the one hand, it insists that it is complaining only about the lack of implementing measures and not about the quality of such measures while, on the other, it discusses assiduously the quality of Irish measures, that is to say whether certain Irish measures satisfy the requirements of Directive 2003/35.

II — Legal context

3. The aim of Directive 2003/35 is to implement certain provisions of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [5] ('the Aarhus Convention'), which the Community signed on 25 June 1998 in Aarhus (Denmark). [6]

1 — Original language: German.
2 — OJ 1985 L 175, p. 40.
3 — OJ 1997 L 73, p. 5.
4 — OJ 2003 L 156, p. 17.
5 — OJ 2005 L 124, p. 4.
6 — The Convention was approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1). The text of the Convention is attached to the decision.

A — *The Aarhus Convention*

4. Article 2(5) of the Aarhus Convention defines 'the public concerned' and, in this connection, the benefiting non-governmental organisations:

'For the purposes of this Convention,

…

5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

5. Article 3(1) lays down how the parties to the Convention are to implement it:

'Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.'

6. Article 3(8) is to be noted in so far as it makes reference to costs in judicial proceedings:

'Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.'

7. Article 6 contains provisions regarding public participation in the context of the authorisation of certain projects which are either expressly listed in Annex I to the Convention or may have significant effects on the environment.

8. Article 9(2) governs access to justice in the context of the public participation provided for in the Convention:

'Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.'

9. Article 9(4) and (5) contain further requirements in respect of judicial procedures:

'4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this Article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.'

B — *Directive 2003/35*

10. Article 3 of Directive 2003/35 contains amendments to the EIA Directive.

11. Article 3(1) defines 'the public concerned' as follows:

'the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.

12. Article 3(7) concerns access to justice:

'The following Article shall be inserted:

"*Article 10a*

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."'

13. Article 4 of Directive 2003/35 contains amendments to Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.[7] The wording in Article 4(4) is essentially the

7 — OJ 1996 L 257, p. 26, codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8).

same as that of the freshly inserted Article 10a of the EIA Directive.

C — *Irish law*

14. The principal matter of dispute between the parties is the transposition of the above-mentioned provisions by the Planning and Development Act 2000 [8] as amended by the Planning and Development (Strategic Infrastructure) Act 2006. [9] Sections 50 and 50A govern the actions which may be brought against certain planning measures.

15. The necessary interest in an action is governed by section 50A(3):

'(3) The Court shall not grant section 50 leave unless it is satisfied that—

(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a substantial interest in the matter which is the subject of the application, or

(ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176, for the time being in force, as being development which may have significant effects on the environment, the applicant—

(I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,

8 — Law No 30 of 2000.
9 — Law No 27 of 2006.

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) satisfies such requirements (if any) as a body or organisation, if it were to make an appeal under section 37(4)(c), would have to satisfy by virtue of section 37(4)(d)(iii) (and, for this purpose, any requirement prescribed under section 37(4)(e)(iv) shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls were a reference to the class of matter into which the decision or act, the subject of the application for section 50 leave, falls).'

16. Section 50A(4) makes it clear that the substantial interest referred to is not limited to an interest in land or other financial interest.

17. Section 50A(10) and (11)(b) enjoin the courts, in determining the proceedings covered, to act as expeditiously as possible consistent with the administration of justice. Section 50A(12) permits the adoption of further rules for the expeditious hearing of applications.

III — Pre-litigation procedure and forms of order sought

18. The present action is based on two investigatory procedures conducted by the Commission.

19. In the first procedure, the Commission objected that private road projects did not as such fall within the Irish environmental impact assessment legislation. On 18 October 2002 it requested Ireland to submit its observations. Following Ireland's response on 5 March 2003, the Commission issued a reasoned opinion on 11 June 2003. Ireland replied by a letter of 10 November 2003.

20. The second procedure concerns the transposition of Directive 2003/35. On 28 July 2005 the Commission requested Ireland to submit its observations in respect of a failure to inform the Commission of implementing measures. Ireland replied on 7 September 2005. The Commission then issued a first reasoned opinion on 19 December 2005, to which Ireland replied on 14 February 2006. A further reasoned opinion followed on 18 October 2006, in which the Commission gave Ireland a final period of two months, that is to say until 18 December 2006, to transpose the directive. After giving notification on 30 November 2006, 18 December 2006 and 18 January 2007

of amendments to Irish law, Ireland replied on 27 February 2007.

21. The Commission then joined the two procedures and brought the present action by application dated 7 September 2007.

22. The Commission claims that the Court should:

— declare that by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment as amended by Council Directive 97/11/EC, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II to Directive 85/337 are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under Directive 85/337;

— declare that by failing to adopt the laws, regulations or administrative provisions necessary to comply with Articles 3(1) and (3) to (7) and 4(1) to (6) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC or, in any event, by failing to adequately notify such provisions to the Commission, Ireland has failed to fulfil its obligations under Article 6 of that directive;

— order Ireland to pay the costs.

23. Ireland contends that the Court should dismiss the action.

24. After the written procedure had been carried out, the parties presented oral argument to the Court on 27 November 2008.

IV — Legal appraisal

25. I will begin by dealing with the points that are hardly disputed between the parties or entirely undisputed, and then concentrate on access to justice.

A — *The provisions concerning private roads*

26. In the Commission's submission, Ireland has not adopted all measures to ensure that projects in the category 'construction of roads' in point 10(e) of Annex II to the EIA Directive are made subject to the requirements of the directive, as private roads are not covered.

27. The concept of 'road' in the EIA Directive does not involve a distinction according to whether a road is a private or a public one. It would therefore be incompatible with the wide scope of the directive to exclude private roads. [10] Nor does Ireland contest that 'road' within the meaning of this project category in principle encompasses private road-construction projects too. Rather, Ireland has supplemented the pertinent provisions in this regard. However, since these amendments were not made until after the period set in the reasoned opinion had expired, they cannot be taken into account in the present proceedings.

28. The requirements of the EIA Directive must in any event be applied to private roads too. Before the most recent amendments, private roads as such unquestionably did not yet fall within the scope of the relevant provision of Irish law. It is true that Ireland submits that in almost every case such roads form a part of other developments. This is not however sufficient, as not every case would be covered.

29. Thus, by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of the EIA Directive, all measures to ensure adequately that, before consent is given, projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10, Ireland has failed to fulfil its obligations under that directive.

B — *Undisputed points regarding the transposition of Directive 2003/35*

30. The parties are in agreement that at the material time Article 3(3), (4), (5) and (6) of Directive 2003/35 were not yet transposed in

10 — In Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-0000, paragraph 28, the Court held that an exception for urban roads 'cannot be accepted'.

respect of all Irish consent systems. Ireland mentions specifically the Dublin Docklands Development Authority Act 1997, the Fisheries Act 1980, the Foreshore Act 1993, the Dumping at Sea Acts 1996 to 2006 and the Arterial Drainage Acts 1945 and 1995.

31. Also, the Commission withdrew its complaints with regard to Article 4(1), (5) and (6) of Directive 2003/35 after Ireland communicated implementing measures. In so far as Ireland accepts, however, that further amendments to Irish law are necessary to transpose Article 4(2) and (3) of Directive 2003/35, the Commission maintains the complaint of incomplete transposition. In this connection, Ireland mentions the Environmental Protection Agency (Licensing) Regulations 1994 to 2004 and the Waste Management (Licensing) Regulations 2004.

32. In so far as Ireland communicated further implementing measures for those consent systems after the period set in the reasoned opinion had expired, these measures cannot be taken into account in the present proceedings.

33. Thus, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Article 3(3), (4), (5) and (6) and Article 4(2) and (3) of Directive 2003/35, Ireland has failed to fulfil its obligations under Article 6 of that directive.

C — *The term 'the public concerned'*

34. The parties are in dispute as to whether the term 'the public concerned' must be transposed. The Commission points out that Directive 2003/35 accords the public concerned certain rights. It submits that in particular the rights of non-governmental organisations which result therefrom are not adequately safeguarded in Ireland.

35. Definitions of terms that are set out in a directive do not have to be transposed verbatim in every case. The Court has thus held that the term 'special area of conservation' in Article 1(l) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [11] does not require express transposition. It is sufficient if the areas covered by that term and the protective measures to be taken are defined with sufficient legal precision in national law. [12]

36. The decisive question, therefore, is whether the persons covered by the term 'the public concerned' have the rights which Directive 2003/35 accords them. Ireland submits in this regard that the relevant rights are already granted to the general

11 — OJ 1992 L 206, p. 7.
12 — Case C-508/04 *Commission* v *Austria* [2007] ECR I-3787, paragraph 66 et seq.

public and that a specific definition of the public concerned is not therefore needed.

37. To defeat this submission the Commission would have had to show which rights of the public concerned are not adequately transposed. However, it restricts itself in this regard to access of non-governmental organisations to justice. This aspect of the transposition of Article 3(1) is to be examined separately below in the context of the access of non-governmental organisations to justice. [13]

38. As regards the other rights of the public concerned, the Commission has not proved inadequate transposition. The action should therefore be dismissed in relation to this point.

D — *Access to justice*

39. The Commission puts forward two complaints in relation to the transposition of Article 3(7) and Article 4(4) of Directive 2003/35, that is to say in relation to Article 10a of the EIA Directive and Article 15a of Directive 96/61. First, the Irish measures existing upon expiry of the period set in the reasoned opinion do not transpose those provisions and, second, Ireland did not communicate all measures taken for the purposes of transposition.

1. Lack of implementing measures

40. The allegation that Ireland has not transposed Article 10a of the EIA Directive and Article 15a of Directive 96/61 corresponds to the original subject-matter of the request that Ireland submit its observations (the letter of formal notice), which related solely to the lack of implementing measures. Ireland informed the Commission throughout in relation to access to justice as governed by those provisions that such access was already ensured under Irish law.

41. Accordingly, in the pre-litigation procedure and in the proceedings before the Court, the parties increasingly extended their dispute to the quality of the implementing measures pleaded by Ireland, the Commission reacting each time to the freshly submitted Irish arguments and information by deepening its criticism.

13 — See below, point 73 et seq.

a) Admissibility of the Commission's submissions

42. It is in principle permissible in an action to convert a complaint of complete failure to transpose into a complaint of inadequate transposition, [14] at any rate if the Member State communicates its existing implementing measures only belatedly and thus makes it difficult for the Commission to complain about defects of transposition at an early stage. A complaint of poor transposition is in principle included in a complaint of failure to transpose. [15]

43. Such cases do not occur frequently simply because implementing measures which are not adopted until after the period set in the reasoned opinion has expired cannot be taken into account and, after implementing measures have been communicated, the Commission regularly ends Treaty infringement proceedings concerning a failure to communicate measures, in order to examine any deficiencies in transposition in another procedure.

44. In the present case, however, the Commission expressly emphasises both in the application (point 5.26) and in the reply (paragraph 18) that the action is limited to the question whether there has been transposition. The Commission reserves the right to examine the quality of transposition in subsequent proceedings.

45. In so far as the Commission subsequently nevertheless complains about qualitative deficiencies in Irish law, its submissions are contradictory and therefore inadmissible. [16] If the Court were to express a view in the present proceedings on the points in question, there would moreover be the risk of forestalling subsequent proceedings regarding whether national law is compliant, which the Commission expressly reserves the right to bring.

46. Consequently, in respect of the allegation that Ireland has not transposed Article 10a of the EIA Directive and Article 15a of Directive 96/61, the action should be dismissed as inadmissible in so far as it relates to the quality of the Irish measures. Only the question whether Ireland has adopted implementing measures at all should be examined.

47. It cannot, however, be ruled out that the Court will assess the admissibility of this plea differently. I will therefore, if applicable,

14 — Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 19 et seq., and Case C-32/05 *Commission* v *Luxembourg* [2006] ECR I-11323, paragraph 52 et seq.

15 — *Commission* v *Italy*, cited in footnote 14, paragraph 40.

16 — Case C-235/04 *Commission* v *Spain* [2007] ECR I-5415, paragraphs 47 and 48.

examine in the alternative whether the Commission has demonstrated that Article 10a of the EIA Directive and Article 15a of Directive 96/61 were not transposed adequately in Ireland.

51. Ireland informed the Court in answer to a question at the hearing and in a subsequent written communication that the relevant provisions of the amending Act of 2006 entered into force on 31 January 2007. Those provisions are constituted by section 13 of the 2006 Act, which inserted a new version of section 50 and the additional section 50A into the original Act of 2000. Ireland refers in this regard to an order concerning the application of portions of the amending Act. [17]

b) Sufficient interest

48. The first point at issue concerns access of members of the public concerned to a review procedure before a court of law or another independent and impartial body established by law.

52. The Court cannot, however, take account in the present proceedings of any amendments to Irish law which entered into force after expiry of the period set by the Commission in the reasoned opinion. This period ended on 18 December 2006. Therefore, on the basis of the information provided by Ireland, examination of the provisions referred to appears to be precluded.

49. Under subparagraph (a) of the first paragraph of Article 10a of the EIA Directive and subparagraph (a) of the first paragraph of Article 15a of Directive 96/61, the Member States can make this access conditional upon the applicant having a sufficient interest.

53. However, it is apparent from the documents submitted with the defence that this submission regarding entry into force of the amending Act of 2006 is based on an error. The order mentioned by Ireland governs the application of other portions of the 2006 Act. The new provisions relevant here, that is to say section 13 of the 2006 Act, had entered into force on 17 October 2006, [18] hence before the period expired.

50. The parties are in disagreement in this regard in respect only of transposition within the field of application of the Planning and Development Act 2000 as amended by the Planning and Development (Strategic Infrastructure) Act 2006.

17 — Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) (No 3) Order 2006 of 21 December 2006, S.I. No 684 of 2006.

18 — Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) Order 2006 of 11 October 2006, S. I. No 525 of 2006.

54. The Court can therefore consider in particular the Commission's objections to section 50A(3)(b)(i) of the Planning and Development Act 2000 as amended by the Planning and Development (Strategic Infrastructure) Act 2006. It objects to the fact that under that provision judicial review can be sought only by an applicant having a 'substantial interest'.

55. The Commission submits first of all that the relevant Irish legislation, which was enacted after Directive 2003/35, contains no reference to that directive. This — although not criticised in such terms by the Commission in the present proceedings — constitutes an infringement of the second paragraph of Article 6 of the directive, which requires such a reference. It could also be seen as an indication that the Irish legislature did not take account of the directive in other respects either in the case of this legislation. However, the absence of a reference to the directive does not prove that the legislation in question does not transpose the directive.

56. The Commission considers the second judgment of the Irish High Court in *Friends of the Curragh Environment* to be the fundamental proof of the failure to transpose. [19] The High Court states in the context of the examination of 'substantial interest' that Directive 2003/35 is not implemented in Ireland. Ireland relies in rebuttal on the more recent judgment of the same court in *Sweetman*, [20] which revises that assessment.

57. Ultimately it can remain undecided in the present case which pronouncement of the High Court on the transposition of Directive 2003/35 is correct. The decisive point is that Irish law provides for access to a judicial review procedure on the basis of the applicant's interest. The Commission cannot therefore reproach Ireland for a complete lack of implementing measures. Whether the measures conform to the directive's requirements is, on the other hand, a question of their quality.

58. In relation to this point, therefore, the action is unfounded in so far as it is concerned with the complete lack of implementing measures and inadmissible as regards the quality of the implementing measures.

59. In the event that the Court nevertheless deals with this point in greater detail, consideration is to be given first of all to the

19 — *Friends of the Curragh Environment Limited* v *An Bord Pleanála* [2006] IEHC 390.

20 — *Sweetman* v *An Bord Pleanála* [2007] IEHC 153.

Commission's further criticism that *Sweetman* does not cover private projects. However, no distinction in respect of private and public developers is discernible either in the pertinent provisions of Irish law or in the Irish judgments placed before the Court. [21]

60. It is true that it is expressly pointed out in *Sweetman* that the developer is a public body whereas the *Friends of the Curragh Environment* judgments concerned a private project. [22] However, these pronouncements have no perceptible effect on the application of Irish law, since they concerned a direct application of Directive 2003/35 which was discussed merely hypothetically.

61. It is therefore to be assumed that the same rules apply in respect of access to review procedures for private and for public projects.

62. The Commission also objects that the Irish transposition is in any event not sufficiently clear and that an interpretation of Irish law in conformity with the directive, as suggested in *Sweetman*, cannot be sufficient for transposition to be effected.

63. In order to succeed with this submission, which is valid in principle, [23] the Commission would, however, have to show first that the transposition is not sufficiently clear. In this regard its submission is essentially limited to the findings of the Irish High Court regarding the alleged failure to transpose Directive 2003/35 which are contained in the second *Friends of the Curragh Environment* judgment. [24]

64. The Commission cites in particular the High Court's pronouncement that the test of 'substantial interest' is more restrictive than that of 'sufficient interest'. [25] This statement relates, however, not to Directive 2003/35 but to a condition governing admissibility under Irish law which formerly applied within the field of application of the Planning and Development Act and is still to be applied in other areas where judicial review is available.

65. Ireland therefore counters this submission correctly — in accordance with the High Court in *Sweetman* — in stating that 'suffi-

21 — In addition to the judgments of the High Court referred to in footnotes 19 and 20, mention should also be made in particular, in this context, of the judgment of the Irish Supreme Court in *Harding* v *Cork County Council & Anor* [2008] IESC 27.

22 — Judgment cited in footnote 20, point 3.10.

23 — See Case C-144/99 *Commission* v *Netherlands* [2001] ECR I-3541, paragraph 21; Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459, paragraph 12 et seq.; and Case C-507/04 *Commission* v *Austria* [2007] ECR I-5939, paragraph 137.

24 — Cited in footnote 19.

25 — See also *Harding*, cited in footnote 21, and *Sweetman*, cited in footnote 20.

cient interest' within the meaning of Directive 2003/35 and 'sufficient interest' under Irish procedural law are different concepts.

66. Under Directive 2003/35, that is to say under the first sentence of the third paragraph of Article 10a of the EIA Directive and the first sentence of the third paragraph of Article 15a of Directive 96/61, the Member States are to determine what constitutes a sufficient interest and impairment of a right. This is admittedly to be done consistently with the objective of giving the public concerned wide access to justice. However, an even more restrictive access rule is also possible, namely the requirement to maintain the impairment of a right. The directive thus leaves it to the Member States to define 'sufficient interest', without laying down any mandatory minimum standard.

67. Ireland has decided that only a substantial interest is 'sufficient' for the purposes of the directive. [26] The Act explicitly makes it clear that a substantial interest is not limited to an interest in land or other financial interest. [27] According to a judgment delivered quite recently by the Irish Supreme Court, the applicant must prove a peculiar and personal interest of significant weight which is affected by or connected with the development in question. [28] The Commission puts forward no argument as to why this standard should be incompatible with the directive.

68. It could at most be wondered whether the restriction on rights of action is compatible with the express objective of granting wide access to justice. The earlier more generous rules regarding the necessary interest show that wider access to the courts is in principle possible under the Irish legal system.

69. However, in order to determine what constitutes sufficient interest to bring an action, a balance must necessarily be struck. Effective enforcement of the law militates in favour of wide access to the courts. On the other hand, it is possible that many court actions are unnecessary because the law has not been infringed. Unnecessary actions not only burden the courts, but also in some cases adversely affect projects, whose implementation can be delayed. Factors such as an increasing amount of legislation or a growing litigiousness of citizens, but also a change in environmental conditions, can

26 — Section 50A(3)(b) of the Planning and Development Act 2000 as amended by the Planning and Development (Strategic Infrastructure) Act 2006.

27 — Section 50A(4) of the Planning and Development Act 2000 as amended by the Planning and Development (Strategic Infrastructure) Act 2006.

28 — See *Harding*, cited in footnote 21. With regard to the possibility of interpreting Irish law in conformity with the directive, this judgment comes to the surprising result that a different interpretation of the (open) concept 'substantial interest' would be incompatible with the Irish Act (*contra legem*).

affect the outcome of that balancing exercise. Accordingly, it cannot be automatically inferred from more generous access to the courts that was previously available that a more restrictive approach would be incompatible with the objective of wide access.

70. Finally, the Commission put forward the view at the hearing that the principle of equivalence also precludes the criterion of substantial interest. Under this principle, while the detailed procedural rules applicable are, in cases affected by Community law too, a matter for the domestic legal order of each Member State, they are not, however, to be less favourable than those governing similar domestic situations. [29]

71. The Commission considers that less favourable treatment is involved because, in areas other than planning law, only a sufficient interest is required for access to Irish courts. This view could be convincing, however, only if solely Community law claims were to be enforced under planning law, but there is no indication that this is so. As far as can be seen, legal actions under planning law can, rather, also concern questions of purely domestic law. Those actions are also subject to the access requirement of a substantial interest. Therefore this admissibility requirement for actions under planning law does not result in less favourable treatment of cases affected by Community law.

72. Thus, there is nothing to suggest that the Irish transposition of subparagraph (a) of the first paragraph of Article 10a of the EIA Directive and subparagraph (a) of the first paragraph of Article 15a of Directive 96/61 is not sufficiently clear with regard to the interest required for actions brought by individuals. Even if the Court were to hold this submission admissible, it would in any event be unfounded.

c) The rights of non-governmental organisations (legal action by an association)

73. The Commission's second complaint in relation to Article 10a of the EIA Directive and Article 15a of Directive 96/61 concerns the position of non-governmental organisations. Under the second sentence of the third paragraph of each of those articles, the interest of certain non-governmental organisations is to be deemed sufficient to enable them to bring an action.

29 — Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67.

74. The Commission further objects in this context that Ireland has not transposed the terms 'the public' and 'the public concerned'. Those terms are defined for the EIA Directive in Article 3(1) of Directive 2003/35. Under that provision, non-governmental organisations promoting environmental protection and meeting any requirements under national law are to be deemed to have an interest in environmental decision-making procedures that include an environmental impact assessment.

75. Definitions of terms that are set out in a directive do not have to be transposed verbatim in every case. It is sufficient if the legal consequences which a term involves are defined with sufficient legal precision in national law. [30]

76. It must therefore be examined here whether non-governmental organisations are recognised under Irish law to form part of the public concerned in such a way that they can bring actions as envisaged by Directive 2003/35.

77. Ireland contends in this regard that section 50A(3)(b)(ii) of the Planning and Development Act 2000 as amended by the Planning and Development (Strategic Infrastructure) Act 2006 exempts non-governmental organisations from the need to prove a substantial interest. Given the text of the relevant provisions, this submission cannot be immediately rejected.

78. The Commission counters that the second judgment of the High Court in *Friends of the Curragh Environment* [31] concerned an action of a non-governmental organisation for which leave was not granted in the absence of a sufficient interest.

79. However, the High Court did not apply the amended version of the Planning and Development Act. According to Ireland, that version was inapplicable *ratione temporis*. Therefore no pronouncement regarding the new rules on non-governmental organisations can be inferred from the judgment.

80. The Commission has consequently not shown that the Irish rules concerning access of non-governmental organisations to justice are contrary to Directive 2003/35, that is to say to the third paragraph of Article 10a of the EIA Directive and the third paragraph of

30 — See above, point 35.

31 — Cited in footnote 19.

Article 15a of Directive 96/61. The allegation of failure to transpose is accordingly unfounded in relation to this point too. The Commission does not raise objections regarding the quality of the transposition.

d) The scope of review before Irish courts

81. The Commission's third complaint in relation to Article 10a of the EIA Directive and Article 15a of Directive 96/61 concerns the scope of review. Under the first paragraph of each of those articles, the applicant may challenge the substantive or procedural legality of decisions, acts or omissions. The Commission objects that this point too remains untransposed according to the second judgment of the High Court in *Friends of the Curragh Environment* [32] and that *Sweetman* does not make up for that deficiency.

82. In that regard, given the existence of a relevant form of action in Irish law, namely judicial review, the allegation of a complete lack of implementing measures must likewise be rejected as unfounded.

83. The Commission does not raise specific objections to the possible scope of judicial review. It is true that *Sweetman* [33] and the first judgment of the High Court in *Friends of the Curragh Environment* [34] discuss possible objections to the scope of review under Irish law, but the extent to which the Commission adopts the objections cannot be discerned. In relation to this point, therefore, submissions in respect of the quality of transposition are not to be ruled upon.

e) The timely conduct of judicial proceedings

84. The Commission's fourth complaint in relation to Article 10a of the EIA Directive and Article 15a of Directive 96/61 concerns the duration of proceedings. Under the fifth paragraph of both articles, conduct of the proceedings in question must be timely. In this regard too, the Commission relies on the statement in the second *Friends of the Curragh Environment* judgment [35] that the directive was not transposed.

32 — Cited in footnote 19.

33 — Cited in footnote 20, point 6.11 et seq.

34 — *Friends of the Curragh Environment Limited* [2006] IEHC 243.

35 — Cited in footnote 19.

85. Ireland counters by pleading section 50A (10) and (11)(b) of the Planning and Development Act 2000 as amended by the Planning and Development (Strategic Infrastructure) Act 2006. Under those provisions the courts having jurisdiction are to act as expeditiously as possible consistent with the administration of justice. Also section 50A(12) provides for the adoption of rules for the expeditious conduct of proceedings.

86. The Commission cannot therefore prove in relation to this point either that there has been no transposition at all. Since it puts forward no specific complaints concerning the quality of those provisions, no further examination is necessary.

f) Legal costs

87. The Commission's fifth complaint in relation to Article 10a of the EIA Directive and Article 15a of Directive 96/61 concerns legal costs. Under the fifth paragraph of both articles, the procedures in question are not to be prohibitively expensive.

88. The dispute between the parties concerns neither court fees nor a successful applicant's claim to reimbursement of his legal costs. [36] Rather, it concerns the extent to which the applicant must be protected against being ordered to pay the other side's costs if he is unsuccessful.

89. Ireland puts forward the view that Directive 2003/35 contains no provision on costs incurred by the parties to proceedings. It relies in this regard on provisions of the Aarhus Convention which are not expressly implemented in the directive. First, Article 9(5) of the Convention provides that the parties to the Convention are to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. Also, the second sentence of Article 3(8) states that the powers of national courts to award reasonable costs in judicial proceedings are not to be affected.

90. This submission is, however, not convincing. The second sentence of Article 3(8) of the Convention must be read in conjunction with the first sentence, which provides that persons exercising their rights in conformity

36 — It also does not concern security for legal costs, as decided upon in the judgment of the Irish Supreme Court in *Lancefort Ltd* v *An Bord Pleanála (No 2)* [1999] 2 IR 270, or the possibility, provided for in section 50A(6) of the Planning and Development Act 2000 as amended by the Planning and Development (Strategic Infrastructure) Act 2006, of making the grant of leave to bring proceedings conditional upon an undertaking as to damages being given.

with the provisions of the Convention are not to be penalised, persecuted or harassed. The second sentence merely makes it clear that the award of costs in respect of judicial proceedings is not to be regarded as a penalty, persecution or harassment.

91. Article 9(5) of the Aarhus Convention must, regardless of any express mention in Directive 2003/35, be taken into account when interpreting Article 9(4) of the Convention and the directive's corresponding implementing provisions. It shows that the parties to the Convention had the need for assistance mechanisms entirely in mind when they laid down that procedures are not to be prohibitively expensive.

92. Besides, the third paragraph of Article 47 of the Charter of Fundamental Rights of the European Union [37] also requires legal aid to be granted in so far as such aid is necessary to ensure effective access to justice. Since the Treaty of Lisbon has not yet been ratified, the charter as such admittedly does not yet have any binding legal effect comparable to that of primary law. However, as a source of legal guidance it sheds light on the fundamental rights [38] which are to be observed when interpreting Community law. [39]

93. The ban on prohibitively expensive procedures therefore extends to all legal costs incurred by the parties involved.

94. There is, however, no absolute ban precluding costs from being awarded against applicants who are covered by Directive 2003/35. This is shown not only by the wording, which forbids only prohibitive costs, but also in particular by Article 3(8) of the Aarhus Convention, which presupposes that costs can be imposed.

95. The Commission founds its objection that there is insufficient protection against prohibitive costs in particular on the basis that the costs of successful parties can be very high in Ireland, stating that costs of hundreds of thousands of euro are possible.

37 — The charter was solemnly proclaimed first on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) and then again on 12 December 2007 in Strassbourg (OJ 2007 C 303, p. 1).

38 — See, in this regard, also Case C-540/03 *Parliament* v *Council* (family reunification) [2006] ECR I-5769, paragraph 38, and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37.

39 — Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 65; Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87; and *Parliament* v *Council*, cited in footnote 38, paragraph 105.

96. In this regard, Ireland's submissions that rules providing for legal aid — the Attorney General's Scheme — exist and that, furthermore, potential applicants can make use of the Ombudsman procedure which is free of charge are hardly compelling. The Attorney General's Scheme is, according to its wording, inapplicable to the procedures covered by the directive. It cannot therefore be acknowledged to be an implementing measure. The Ombudsman may offer an unbureaucratic alternative to court proceedings but, according to Ireland's own submissions, he can only make recommendations and cannot make binding decisions.

97. As the Commission acknowledges and Ireland emphasises, Irish courts can though, in the exercise of their discretion, refrain from awarding costs against the unsuccessful party and even order the successful party to pay his costs. Therefore, a possibility of limiting the risk of prohibitive costs exists.

98. This possibility of limiting the risk of costs is, in my view, sufficient to prove that implementing measures exist. The Commission's action is therefore unfounded in relation to this point too.

99. I wish to make the supplementary observation that the Commission's wider objection that Irish law does not oblige Irish courts to comply with the requirements of the directive when exercising their discretion as to costs is correct. In accordance with settled case-law, a discretion which may be exercised in accordance with a directive is not sufficient to implement provisions of a directive since such a practice can be changed at any time. [40] However, this objection already concerns the quality of the implementing measure and is therefore inadmissible.

g) Informing the public

100. Finally, the Commission's sixth complaint in relation to Article 10a of the EIA Directive and Article 15a of Directive 96/61 concerns the informing of the public of its rights under the directive. In order to further the effectiveness of the provisions of those articles, Member States are required under the sixth paragraph of each of them to ensure that practical information is made available to the public on access to administrative and judicial review procedures.

40 — Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraph 14; Case C-358/98 *Commission* v *Italy* [2000] ECR I-1255, paragraph 17; Case C-145/99 *Commission* v *Italy* [2002] ECR I-2235, paragraph 30; and Case C-33/03 *Commission* v *United Kingdom* [2005] ECR I-1865, paragraph 25.

101. In this context too, the Commission relies on both *Friends of the Curragh Environment* judgments.[41] It submits that, irrespective of the rules that actually existed, the Irish public had to assume after those judgments that the directive was not yet transposed.

102. It must be found that Ireland's submission regarding *Sweetman* cannot be taken into account since this judgment was not delivered until after the period set in the Commission's reasoned opinion had expired.

103. On the other hand, when the period expired the Planning and Development Act 2000 as amended by the Planning and Development (Strategic Infrastructure) Act 2006 had already been promulgated and had entered into force. This argument would, however, have greater weight if the amendments to planning law had referred expressly to Directive 2003/35 which was being transposed, but they did not.

104. Furthermore, the second *Friends of the Curragh Environment* judgment[42] in particular shows that possibly not even the courts were sufficiently informed of those provisions. That judgment concerned a non-governmental organisation's rights which would possibly have been strengthened by the Planning and Development (Strategic Infrastructure) Act 2006 that had entered into force a short time earlier, but this alteration to statute was not even mentioned.

105. The decisive point, though, is that the obligation to inform the public cannot be limited to the publication of implementing legislation. Legislation implementing directives must invariably be published. The express obligation to inform the public must therefore extend further.

106. In particular, the Member States must, as is expressly laid down, disseminate practical information concerning access to justice. Merely publishing legislation is not sufficient to meet this obligation.

107. Ireland does not plead further measures informing the public, however.

108. Therefore, by not making practical information on access to administrative and judicial review procedures available to the public in accordance with the sixth paragraph

41 — Cited in footnotes 19 and 34.
42 — Cited in footnote 19.

of Article 10a of the EIA Directive and the sixth paragraph of Article 15a of Directive 96/61, Ireland has failed to fulfil its obligations under Article 6 of Directive 2003/35.

2. Informing the Commission

109. It must now be examined whether Ireland advised the Commission adequately of the transposition of Article 10a of the EIA Directive and Article 15a of Directive 96/61. According to the Commission, the information concerning the transposition of the rules on the costs of judicial proceedings [43] and on access to justice generally was insufficient.

110. The first paragraph of Article 6 of Directive 2003/35 provides that Member States are to inform the Commission forthwith of the laws, regulations and administrative provisions transposing the directive.

111. In accordance with settled case-law, it is for the Member States, 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 EC Treaty and the measures taken by the institutions pursuant thereto are applied. [44] Similarly to comparable provisions of other directives, Article 6 of Directive 2003/35 therefore imposes upon the Member States an obligation to provide information. [45]

112. The information which the Member States are thus obliged to supply to the Commission must be clear and precise. It must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive completely. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 226 EC in order to establish the failure to fulfil the obligation. [46]

43 — See above, point 87 et seq.

44 — Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 7, and Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraphs 15 and 16.

45 — See Case 96/81 *Commission* v *Netherlands*, cited in footnote 44, paragraph 7, and *Commission* v *Italy*, cited in footnote 14, paragraph 26.

46 — Case 96/81 *Commission* v *Netherlands*, cited in footnote 44, paragraph 8, and *Commission* v *Italy*, cited in footnote 14, paragraph 27.

113. As regards the costs of judicial proceedings, Ireland referred, in the reply to the first reasoned opinion, to the power of Irish courts to make a decision on costs in favour of an unsuccessful applicant.

114. As to the remainder, access to justice is essentially ensured by the Planning and Development Act 2000 as amended by the Planning and Development (Strategic Infrastructure) Act 2006. The latter was notified by Ireland to the Commission on 30 November 2006, that is to say before the period set in the second reasoned opinion expired.

115. Ireland therefore notified the Commission of the essential measures for transposing Directive 2003/35.

116. The Commission objects, however, that Ireland did not communicate both judgments of the Irish High Court in *Friends of the Curragh Environment*. [47]

117. Ireland counters by stating, first, that the Member States are not obliged to inform the Commission of *existing* provisions that transpose Directive 2003/35. It is the case that both judgments relate to the Planning and Development Act as worded prior to the adoption of Directive 2003/35.

118. As the Commission observes, the Court has already decided this question in a manner contrary to the Irish view: even if the Member States are allowed to secure the substantive transposition of a directive by means of their domestic legal rules in force, this does not in any event absolve them from the formal obligation to inform the Commission of the existence of those rules so that it can be in a position to assess whether the rules comply with the directive. [48]

119. Ireland further submits that it is difficult to give an account in the context of a reply to a reasoned opinion of how Irish case-law transposes the provisions of the directive on access to justice. In its view, an unspecific reference to that case-law in conjunction with a reference to the relevant chapter of the leading textbook on administrative law in Ireland must suffice. It also states that the pronouncements of the High Court are *obiter dicta* which would not call an adequate transposition into question. It was not until after the last letter to the Commission that the High Court delivered a judgment that was correct. [49]

47 — Cited in footnotes 19 and 34.

48 — *Commission* v *Italy*, cited in footnote 14, paragraph 30.

49 — Cited in footnote 20.

120. With these submissions, Ireland misapprehends, however, the obligations owed by Member States when transposing directives. Those obligations apply irrespective of whether a Member State transposes a directive by means of existing case-law or by legislative measures. In each case, every provision of the directive must be examined individually in order to determine what measures are necessary to transpose the provision. In so far as the Member State might wish to rely on the continuing validity of existing law, it must identify that law before determining that further measures are unnecessary.

121. It is this very examination that the Member State can (and must) disclose to the Commission without appreciable additional outlay. The difficulties of a system of judicial precedent lie not in setting out an account of that examination, but in the examination itself. However, the Member State must carry out the examination irrespective of the obligation to provide information.

122. The Commission is right in stating that the information on the transposition of provisions of a directive cannot exclude information which gives reason to doubt that the directive has been correctly transposed. Judgments stating that a directive has not yet been transposed are important precisely when a Member State is proceeding on the basis that the existing case-law already transposes the directive adequately.

123. Ireland therefore should have submitted to the Commission an account of the Irish case-law showing that the provisions of Directive 2003/35 on access to justice were transposed adequately. In this context Ireland could have clarified the scope of the relevant pronouncements.

124. It must therefore be found that, by not informing the Commission of both judgments of the High Court in *Friends of the Curragh Environment*, Ireland has infringed its duty under Article 6 of Directive 2003/35 to provide information in relation to the transposition of Article 10a of the EIA Directive and Article 15a of Directive 96/61.

V — Costs

125. 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. Only the Commission has applied for costs. While it succeeds on some points, it is unsuccessful in relation to essential parts of the action. Each party should therefore bear its own costs.

VI — Conclusion

126. I therefore propose that the Court should:

1. declare that by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment as amended by Council Directive 97/11/EC, all measures to ensure adequately that, before consent is given, projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10, Ireland has failed to fulfil its obligations under that directive;

2. declare that:

— by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Article 3(3), (4), (5) and (6) and Article 4(2) and (3) of Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC,

— by not making practical information on access to administrative and judicial review procedures available to the public in accordance with Article 10a of Directive 85/337 as amended by Directive 2003/35 and with Article 15a of Council Directive 96/61 concerning integrated pollution prevention and control as amended by Directive 2003/35, and

— by not informing the Commission of both judgments of the High Court in *Friends of the Curragh Environment*,

— Ireland has failed to fulfil its obligations under Article 6 of Directive 2003/35;

3. dismiss the action as to the remainder;

4. order Ireland and the Commission each to bear their own costs.