OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 14 July 2005 [1]

1. The Commission seeks a declaration, pursuant to Article 226 EC, that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 2(1) and 4 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. [2]

2. The defendant Member State accepts that its town planning legislation may allow situations in breach of the directive to arise, and that admission would have allowed the dispute to be settled without an opinion of the Advocate General, despite the intensity of the debate sparked, which is irrelevant for the purposes of responding to the Commission's claims.

I — Directive 85/337

3. The Directive [3] seeks to prevent damage to the environment by assessing the effects of any *project* with a view to prevention (first and sixth recitals; Article 1(1)).

4. '*Project*' means the execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. '*Developer*' means the applicant for authorisation for a private project or the public authority which initiates a project. Finally, '*development consent*' means the decision of the competent authority or authorities which entitles the developer to proceed with the project (Article 1(2) of the directive).

1 — Original language: Spanish.

2 — OJ 1985 L 175, p. 40.

3 — The relevant wording is that resulting from the amendment made by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5).

5. Under Article 2(1):

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.'

6. Article 4 provides:

'1. Subject to Article 2(3), [4] projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

4 — This paragraph makes it possible to waive the application of the directive in exceptional cases.

II — The United Kingdom legislation

7. The Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991, lays down the relevant national law.

8. Planning permission is required for the carrying out of building, engineering, mining or other operations on or under land, or the making of any material change in the use of any buildings or other land. Planning permission is granted by local planning authorities with the possibility of appeal to the Secretary of State, who is also empowered to step in in the absence of a response and to rule on applications made (sections 55, 57, 77 and 78).

9. Part VII of the Act deals with the powers of the local authorities to remedy breaches of planning control, in particular operations carried out without planning permission or without compliance with the conditions and limitations attached to its grant, which section 171A defines as breaches of planning control. Those powers, which are discretionary in nature, [5] are also conferred on the Secretary of State.

5 — The United Kingdom Government stated (in paragraph 34 of the defence) that its Parliament had rejected amendments to the Planning and Compensation Bill which would have turned that discretion into a duty.

10. The notice referred to in section 172 is the main enforcement measure, subject to review by the Secretary of State on the application of those concerned who may rely inter alia on the ground, set out in section 174(2)(d), that, on the date of its issue, no enforcement action was applicable to them.

11. That ground of appeal is the corollary of section 171B which prevents action to restore legality after the end of the period of four years after the completion of the operations in breach of planning control or after the unlawful change of use of a building to use as a dwelling house (paragraphs 1 and 2), and after the end of the period of ten years after any other breach (paragraph 3).

12. It is in this context that the use of Lawful Development Certificates ('LDC'), regulated by section 191 of the Town and Country Planning Act 1990, arises.

13. Paragraph 1 of that provision lays down a right to enquire as to the lawfulness of the use of buildings, of operations carried out in, on, over or under land, and of any other matter constituting a failure to comply with

conditions subject to which planning permission has been granted, specifying the land and describing the other relevant details.

14. Paragraph 2 provides that uses and operations are lawful if:

'(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.' [6]

15. In similar terms paragraph 3 deals with any matter constituting a failure to comply with conditions subject to which planning permission has been granted, where the time for taking action has expired and it does not constitute a contravention of the requirements of a notice in force.

16. For its part, paragraph 4 requires the issue of an LDC where the information provided by the applicant attests to the 'lawfulness' of the operation at issue, which is to be presumed *iuris et de iure* pursuant to paragraph 6. Under paragraph 7, the certificate has the same effect as planning permission in certain cases. [7]

III — Prior administrative procedure

17. The Commission's attention was drawn to the system in the United Kingdom described in the preceding points by a complaint received concerning a scrap yard which had been operating without planning permission and for which LDCs were issued in 1993, and again in 1998 in respect of a larger site.

6 — Footnote not relevant in English.

7 — That is to say, in the case of licences under section 3(3) of the Caravan Sites and Control of Development Act 1960, section 5(2) of the Control of Pollution Act 1974 and section 36(2) of the Environmental Protection Act 1990.

18. On 8 February 2001 the Commission wrote to the United Kingdom Government requesting information on that system, which was provided on 31 August in a document from which the Commission inferred that securing an LDC was a means of evading the consent procedure set up by Directive 85/337. On 23 October 2001 it therefore gave the United Kingdom Government formal notice that it should submit its observations within two months.

19. As it was not satisfied by the arguments put forward in justification on 19 December 2001, the Commission sent a reasoned opinion a year later, calling on the United Kingdom to take steps to bring the situation into line with Community law.

20. The United Kingdom authorities replied by letter of 3 April 2003, conceding that a lacuna existed in theory in the legislation and undertaking to adopt the measures necessary to remedy it, while maintaining their position that it was not caused by the issuing of LDCs but by the conduct of the local authorities who, in the exercise of their discretion, may decide not to take any enforcement action in respect of an activity in breach of the development consent legislation (paragraphs 17 to 25 of the letter).

IV — Forms of order sought and procedure before the Court of Justice

21. As it considered the reply received unsatisfactory and had not been notified of the measures promised, on 26 February 2004 the Commission brought this action under Article 226 EC. It sought a declaration by the Court of Justice that the United Kingdom had failed to fulfil its obligations under Articles 2(1) and 4 of Directive 85/377, a claim which the Member State contested.

22. At the hearing held on 30 June 2005, the parties' representatives confirmed their respective positions.

V — Analysis of the alleged breach

23. The objective of the directive is that any project likely to have significant effects on the environment should undergo an assessment of its impact prior to authorisation [8] in two stages. During the first stage, checks are

8 — This is apparent from the judgments in Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 45; and in Case C-201/02 *Delena Wells* [2004] ECR I-723, paragraph 42.

made to ascertain whether the planned works are liable to have significant effects on the environment; during the second stage, those effects are assessed in accordance with the provisions of Articles 5 to 10 of the directive. [9]

24. There are projects which are subject to a presumption in law that they will have significant effects on ecosystems and their effects, therefore, always have to be assessed. They are those listed in Annex I to the directive and referred to in Article 4(1).

25. On the other hand, the effect of other projects is not so clear, requiring Member States to judge whether they have to follow the procedure laid down by Articles 5 to 10. That is the case for the projects listed in Annex II, with regard to which the Member States must determine those which must be assessed, on a case-by-case basis, establishing the criteria and thresholds necessary for making that determination, applying both methods in accordance with the parameters set out in Annex III (Article 4(2) and (3)); they thus have a certain discretion in the selection of projects, including those in Annex II, which require an assessment of their effects on the environment.

26. In a way, the limits of that discretion are to be found in Article 2(1) of the directive, which defines its fundamental objective in such a way that projects with a significant effect are always subject to an impact assessment. [10]

27. In other words, to achieve its proper purpose, does not exempt any project with those characteristics from assessment, [11] with the result that, although the national public authorities have a wide discretion, Community law precludes implementation of such projects without prior authorisation and, if appropriate, without assessment of their impact, where implementation becomes irreversible with the passage of time.

28. That is precisely the effect of the United Kingdom system, which, as the case of the

9 — I made this point in my opinion of 8 January 2004 in Case C-87/02 *Commission* v *Italy* in which judgment was delivered on 10 June 2004, echoing the opinion of Advocate General Geelhoed of 12 July 2001 in Case C-24/99 *Commission* v *Germany* which was removed from the register without judgment by order of 18 February 2002.

10 — See judgments in Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50; Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135, paragraph 45; *WWF and Others*, cited above, paragraphs 36 and 45; Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 64; and *Commission* v *Italy*, cited above, paragraph 44.

11 — Judgments in *WWF and Others* paragraph 45, and *Commission* v *Italy*, paragraph 44.

scrap yard over which these proceedings arose demonstrates, and as the defendant Government accepts, allows action to be taken in breach of the directive, without prior evaluation or impact assessment, and to be legitimised by the passage of time so that the situation can no longer be remedied.

29. The analysis of the breach ought to end at this point, in the light of the prior admission; however, since the parties have become embroiled in a dispute as heated as it is pointless, I feel obliged to clarify a few matters.

30. It is of little importance whether the ground of the breach relates to the date on which the local authorities, in the exercise of their discretion, took no action or to the point in time when the LDC was issued, precluding any breach; it is of still less relevance whether the certificate in question is in the nature of a decision or is merely declaratory. The crucial point is that, for reasons of convenience, it was decided not to intervene and a situation in breach of arose, whereas, wide as the discretion of the administration is, it may not give rise to a result contrary to the central objective of the Community legislation set out in Article 2(1) thereof.

31. Without doubt, as the United Kingdom Government pointed out in paragraph 89 of its defence, reiterating paragraph 20 of its response to the reasoned opinion of the Commission, the discretion under discussion is not unfettered, since it would otherwise border on arbitrariness. Therefore, the competent authorities have to assess in each case whether to put an end to the breach because it unacceptably affects public amenity or whether, rather, it is necessary to allow the unlawful use of the property to continue in the public interest, despite its negative effect on the environment. However, the availability of that option reveals the breach complained of by the Commission, since it opens the door to situations where, weighing up the requirements at issue, 'the planning authority may decide to exercise its discretion not to bring enforcement proceedings. And it is here that any possible breach of the directive could occur' (final part of paragraph 20 of the response to the reasoned opinion).

32. Therefore, the debate should not focus on whether it is appropriate for national legislation to provide for a limitation period for enforcement action in respect of breaches of Community law, such that, once that period has expired, no remedy is available, as a general principle entailed by

the principle of legal certainty. [12] Rather, it is a matter of analysing whether, regardless of the passage of time, the United Kingdom legislation allows the possibility that activities included in the first two annexes to might be carried out without approval and without the required consent; as we have already seen, that question must be answered unequivocally in the affirmative.

33. If those responsible for monitoring the lawfulness of town planning do not react on learning that a facility is operating without an assessment of its effects on the environment having been carried out, or, where its scale is evident, do not require its assessment, they are tacitly consenting to it and, thereby, contravening the directive. The fact that, by reason of the passage of time and in the light of the principle of legal certainty, it was not appropriate to take enforcement action, does not make conduct which was previously on the margins of the law 'lawful'; it merely precludes any reassessment of the past in order to safeguard the stability of legal relations, which is one of the pillars of our coexistence in society. That conclusion does not preclude those harmed by the unlawful conduct from obtaining compensation on other grounds such as the responsibility of the State in breach to safeguard property rights, which the position of the United Kingdom Government would undermine.

34. In short, the obligation on the Community Member States to adopt the rules necessary to achieve the result sought by the directive is binding on all public authorities under the third paragraph of Article 249 EC, so that national legislation which allows the administration to take no action and allow a project awaiting consent and assessment of its effects on the environment to be implemented without those assessments being made infringes Articles 2(1) and 4 of the directive, as the United Kingdom Government accepts.

VI — Costs

35. Under Article 69(2) of the Rules of Procedure the defendant Member State must bear the costs.

12 — The judgment in Case C-188/95 *Fantask and Others* [1997] ECR I-6783, which the parties in the case analysed, is a good illustration of this point.

VII — Conclusion

36. In the light of the foregoing considerations, I propose that the Court of Justice should:

(1) declare that by maintaining in force legislation which, by granting competent local authorities a discretion to take enforcement action in respect of uses of land contrary to the town planning legislation, allows projects included in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment to be carried out without prior consent and, where appropriate, without assessment of their effects on the environment the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 2(1) and 4 of that directive;

(2) order the United Kingdom of Great Britain and Northern Ireland to pay the costs.