JUDGMENT OF THE COURT (Second Chamber)

3 July 2008 *

In Case C-215/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 11 May 2006,

Commission of the European Communities, represented by D. Recchia and D. Lawunmi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, J. Connolly SC and G. Simons BL, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, J. Makarczyk (Rapporteur), P. Kūris and J.-C. Bonichot, Judges,

Advocate General: J. Mazák,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 February 2008,

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

gives the following

Judgment

1 By its action the Commission of the European Communities seeks a declaration from the Court that:

— by failing to adopt all measures necessary to ensure that projects which are within the scope 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) either before or after amendment by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and

— by failing to adopt all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of Directive 85/337,

Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

Legal context

Community legislation

2 By its action the Commission seeks a declaration that Ireland has failed to fulfil its obligations under Directive 85/337 both in its original version and in the version as amended by Directive 97/11.

Directive 85/337

3 The wording of Article 1(2) and (3) of Directive 85/337 is as follows:

‘2. For the purposes of this Directive:

“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;

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

3. The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this Directive.'

4 Article 2(1) and (2) and the first subparagraph of Article 2(3) of Directive 85/337 provide:

'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 an assessment with regard to their effects.

These projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.'

5 Article 3 of Directive 85/337 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the inter-action between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

6 Article 4 of that directive is worded as follows:

'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.'

7 Article 5 of Directive 85/337 states:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

— a description of the project comprising information on the site, design and size of the project,

— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

— the data required to identify and assess the main effects which the project is likely to have on the environment,

— a non-technical summary of the information mentioned in indents 1 to 3.

3. Where they consider it necessary, Member States shall ensure that any authorities with relevant information in their possession make this information available to the developer.'

8 Article 6 of Directive 85/337 is worded as follows:

'1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or in each case when the request for consent is made. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. Member States shall ensure that:

— any request for development consent and any information gathered pursuant to Article 5 are made available to the public,

— the public concerned is given the opportunity to express an opinion before the project is initiated.

…'

9 Article 7 of Directive 85/337 provides:

'Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article 5 to the other Member State at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.'

10 Article 8 of Directive 85/337 states:

'Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.'

11 Article 9 of that directive is worded as follows:

'When a decision has been taken, the competent authority or authorities shall inform the public concerned of:

— the content of the decision and any conditions attached thereto,

— the reasons and considerations on which the decision is based where the Member States' legislation so provides.

The detailed arrangements for such information shall be determined by the Member States.

If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question.'

12 Article 10 of that directive provides:

'The provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national regulations and administrative provisions and accepted legal practices with regard to industrial and commercial secrecy and the safeguarding of the public interest.

Where Article 7 applies, the transmission of information to another Member State and the reception of information by another Member State shall be subject to the limitations in force in the Member State in which the project is proposed.'

13 Annex II to Directive 85/337 lists projects subject to Article 4(2) of that directive, namely those for which an environmental impact assessment is necessary only where the Member States consider that their characteristics so require. Projects referred to in that annex include, in point 2(a), extraction of peat, and in point 2(c), extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash.

14 Projects listed in point 10(d) of Annex II include the construction of roads.

Directive 97/11

15 Article 3 of Directive 97/11 is worded as follows:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 March 1999 at the latest. They shall forthwith inform the Commission thereof.

…

2. If a request for development consent is submitted to a competent authority before the end of the time-limit laid down in paragraph 1, the provisions of Directive 85/337/EEC prior to these amendments shall continue to apply.'

Directive 85/337 as amended by Directive 97/11 ('Directive 85/337 as amended')

16 In the interests of clarity, reference will be made only to the amendments to Directive 85/337 which have direct relevance to the alleged failure by Ireland to fulfil

its obligations. Accordingly, reference will not be made to amendments introduced by Directive 97/11 to Articles 5 to 10 of Directive 85/337, since those have no bearing on the determination of this action which the Court is called upon to make.

17 Under Article 2(1) and (2) and the first subparagraph of Article 2(3) of Directive 85/337 as amended:

'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.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

...

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.'

18 Article 3 of Directive 85/337 as amended provides:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora;

— soil, water, air, climate and the landscape;

— material assets and the cultural heritage;

— the interaction between the factors mentioned in the first, second and third indents.'

19 Article 4 of Directive 85/337 as amended provides:

'1. Subject to Article 2(3), 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.'

20 Point 3(i) of Annex II to Directive 85/337 as amended specifies installations for the harnessing of wind power for energy production (wind farms).

21 By virtue of point 13 of Annex II, any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (being a change or extension not listed in Annex I) must be regarded as a project within the scope of Article 4(2) of Directive 85/337 as amended.

22 Annex III to Directive 85/337 as amended, relating to the selection criteria referred to in Article 4(3) of that directive, provides that the characteristics of projects must be considered in relation, inter alia, to pollution and nuisances, and to the risk of accidents having regard in particular to technologies used. That annex also indicates that the environmental sensitivity of geographical areas likely to be affected by projects must be considered having regard, inter alia, to the absorption capacity of the natural environment, paying particular attention to certain areas, including mountain and forest areas.

National legislation

23 The requirements of Directive 85/337 as amended have been transposed into national law by, in particular, the Planning and Development Act, 2000, as amended ('the PDA'), and the Planning and Development Regulations, 2001.

24 Section 32(1)(a) of the PDA lays down a general obligation to obtain consent for all development projects within the scope of Annexes I and II to Directive 85/337 as amended; the application for permission must be lodged and the permission obtained before the commencement of works. In addition, section 32(1)(b) of the PDA

provides that permission can be obtained to regularise unauthorised development (retention permission).

25 On receipt of an application for permission, the planning authority must decide whether the proposed development should be subject to an environmental impact assessment.

26 Section 151 of the PDA provides that any person who has carried out or is carrying out unauthorised development is guilty of an offence.

27 It is clear from sections 152 and 153 of the PDA that, on receipt of a complaint, planning authorities are, as a general rule, under an obligation to issue a warning letter, and must then decide whether or not it is appropriate to issue an enforcement notice. Failure to comply with the requirements of an enforcement notice constitutes an offence.

28 Under section 160 of the PDA:

'(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.'

29 Section 162 of the PDA makes clear that an application for retention permission does not entail any ongoing enforcement action being stayed or withdrawn.

Pre-litigation procedure

30 After sending a letter of formal notice on 5 April 2001, the Commission sent to Ireland a reasoned opinion dated 21 December 2001.

31 On 7 July 2004, the Commission sent an additional letter of formal notice to Ireland.

32 On 5 January 2005, after the receipt of Ireland's observations as set out in a letter dated 6 December 2004, an additional reasoned opinion was sent to Ireland.

33 Since the Commission considered that Ireland's response to that reasoned opinion, in letters of 8 March, 17 June and 1 December 2005, was unsatisfactory, it brought this action under the second paragraph of Article 226 EC.

The action

The first complaint

34 The Commission's complaint is that Ireland has not taken all the measures necessary to comply with Articles 2, 4 and 5 to 10 of Directive 85/337 either in its original version or as amended by Directive 97/11. This complaint will be examined, first, in relation to Directive 85/337 as amended.

35 The first complaint, that transposition of Directive 85/337 as amended is incomplete and that, as a result, the directive is not properly implemented is based on three pleas in law.

36 First, the Commission claims that Ireland has not taken the measures necessary in order to ensure that checks are made to ascertain, in accordance with Article 2(1) of Directive 85/337 as amended, whether proposed works are likely to have significant effects on the environment, and, if that is the case, in order to render it obligatory that an environmental impact assessment be carried out, as laid down by that provision, before the grant of development consent.

37 Secondly, the Commission considers that the Irish legislation which allows an application for retention permission to be made after a development has been executed in whole or in part without consent undermines the preventive objectives of Directive 85/337 as amended.

38 Thirdly, the Commission claims that the enforcement regime established by Ireland does not guarantee the effective application of the directive, and that Ireland has thereby failed to fulfil its general obligation under Article 249 EC.

39 In support of the third plea in law, the Commission reports a number of examples which, in its opinion, illustrate the deficiencies in the application of the system of enforcement.

The first two pleas in law

— Arguments of the parties

40 The Commission claims that since it is possible, under the national legislation, to comply with the obligations imposed by Directive 85/337 as amended during or after execution of a development, there is no clear obligation to subject developments to an assessment of their effects on the environment before they are carried out.

41 In accepting that projects can be scrutinised, in an environmental impact assessment, after their execution, when the principal objective pursued by Directive 85/337 as amended is that effects on the environment should be taken into account at the earliest possible stage in all planning and decision-making processes, the national

legislation in question recognises a possibility of regularisation which results in the undermining of that directive's effectiveness.

42 The Commission adds that the rules relating to retention permission are incorporated within the general provisions applicable to normal planning permission, and that there is nothing to indicate that applications for retention permission and the grant of such permission are limited to exceptional cases.

43 Ireland contends that the Commission's analysis of the Irish legislation which transposes Directive 85/337 as amended is not accurate. Ireland states that Irish law expressly requires that permission be obtained for any new development before the commencement of works and that, as regards development which must be subject to an environmental impact assessment, the assessment must be carried out before the works. Failure to comply with those obligations is, moreover, a criminal offence and may result in enforcement action.

44 Ireland contends, in addition, that retention permission, established by the PDA and the Planning and Development Regulations, 2001, is an exception to the general rule which requires permission to be obtained before the commencement of a development, and best meets the objectives of Directive 85/337 as amended, in particular the general objective of protection of the environment, since the removal of an unauthorised development may not be the most appropriate measure to achieve that protection.

45 According to that Member State, the requirements of Directive 85/337 as amended are wholly procedural and are silent as to whether there may or may not be an exception by virtue of which an environmental impact assessment might, in certain cases, be carried out after commencement of works. Ireland adds that nowhere in the directive is it expressly stated that an assessment can solely be carried out before the execution of a project, and refers to the definition of the term 'development consent' given by Directive 85/337 as amended to argue that the use of 'proceed' is significant,

that term not being confined to the commencement of works but also applying to the continuation of a development project.

46 Ireland contends, in addition, that retention permission is a reasonable fall-back mechanism to be resorted to in exceptional circumstances, designed to take account of the fact that some projects will inevitably, for various reasons, commence before the grant of development consent within the meaning of Directive 85/337 as amended.

47 On that point, Ireland relies on Case C-201/02 *Wells* [2004] ECR I-723 to argue that a remedial assessment may be carried out at a later stage, by way of exception to the general rule that the assessment must be carried out at the earliest possible stage in the decision-making process.

48 That Member State considers also that it would be disproportionate to order the removal of some structures in circumstances where, after consideration of an application for retention permission, retention is held to be compatible with proper planning and sustainable development.

— Findings of the Court

49 Member States must implement Directive 85/337 as amended in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a requirement for development consent and an assessment with regard to their effects (see, to that effect, Case

C-287/98 *Linster* [2004] ECR I-723, paragraph 52, and Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 36).

50 Further, development consent, under Article 1(2) of Directive 85/337 as amended, is the decision of the competent authority or authorities which entitles the developer to proceed with the project.

51 Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.

52 That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.

53 A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.

54 As the Irish legislation stands, it is undisputed that environmental impact assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitutes under Irish law a contravention of the planning rules.

55 However, it is also undisputed that the Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed.

56 In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.

57 While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

59 Lastly, Ireland cannot usefully rely on *Wells*. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in

order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60 This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.

61 It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then — before the grant of development consent and, therefore, necessarily before they are carried out — must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive.

62 Consequently, the first two pleas in law are well founded.

The third plea in law

— Arguments of the parties

63 According to the Commission, there are shortcomings in the Irish legislation relating to enforcement measures and in the resulting enforcement practices which

undermine the proper transposition and implementation of Directive 85/337 as amended, when, under that directive, an effective system of control and enforcement is mandatory.

64 First, the Commission claims that the enforcement measures provided for by Irish planning legislation do not offset the absence of provisions requiring compliance with the obligations as to an environmental impact assessment before development is carried out.

65 Secondly, the Commission claims that enforcement practices undermine the proper transposition of Directive 85/337 as amended. The Commission refers to specific situations which illustrate, in its opinion, the deficiencies of the Irish legislation regarding supervising compliance with the rules established by that directive.

66 As regards the procedure relating to enforcement, Ireland contends the choice and form of enforcement is a matter within the discretion of Member States, in particular as there has been no harmonisation at Community level of planning and environmental controls.

67 In any event, Ireland states that the system of enforcement established by the Irish legislation is comprehensive and effective. The Member State adds that, under environmental law, the applicable provisions are legally binding.

68 Thus, the legislation places planning authorities under the obligation of sending a warning letter when they learn that an unauthorised development is being carried out, unless they consider that the development is of minor importance.

69 Once the warning letter has been sent, the planning authorities must decide whether it is appropriate to issue an enforcement notice.

70 The warning letter is intended to enable the persons responsible for unauthorised developments to undertake remedial action before the enforcement notice and the other stages of enforcement proceedings.

71 If an enforcement notice is issued, that sets out obligations and failure to comply with its requirements constitutes an offence.

72 Ireland adds that the enforcement regime must take account of various competing rights held by developers, landowners, the public and individuals directly affected by the development, and the weight of those various rights must be measured in order to reach a fair result.

73 Lastly, Ireland does not accept that the examples reported by the Commission prove the alleged failure to fulfil its obligations, since the Commission limits itself to general assertions.

— Findings of the Court

74 It is undisputed that, in Ireland, the absence of an environmental impact assessment required by Directive 85/337 as amended can be remedied by obtaining a retention permission which makes it possible, in particular, to leave projects which were not properly authorised undisturbed, provided that the application for such a permission is made before the commencement of enforcement proceedings.

75 The consequence of that possibility, as indeed Ireland recognises, may be that the competent authorities do not take action to suspend or put an end to a project that is within the scope of Directive 85/337 as amended and is being carried out or has already been carried out with no regard to the requirements relating to development consent and to an environmental impact assessment prior to issue of that development consent, and that they refrain from initiating the enforcement procedure provided for by the PDA, in relation to which Ireland points out that the powers are discretionary.

76 The inadequacy of the enforcement system set up by Ireland is accordingly demonstrated inasmuch as the existence of retention permission deprives it of any effectiveness, and that inadequacy is the direct consequence of the Member State's failure to fulfil its obligations which was found in the course of consideration of the first two pleas in law.

77 That conclusion is not affected by the fact that, according to Ireland, the enforcement regime must take account of the various competing rights held by developers, landowners, the public and individuals directly affected by the development. The need to weigh those interests cannot in itself provide justification for the ineffectiveness of a system of control and enforcement.

78 Accordingly, it becomes superfluous to analyse the various examples put forward by the Commission to illustrate the deficiencies in application of the enforcement measures, since those deficiencies are the direct result of the inadequacies of the Irish legislation itself.

79 Consequently, the third plea in law is also well founded, and therefore the first complaint must be upheld on all of the pleas in law.

80 Lastly, the decision that the first complaint is well founded holds good both with regard to Directive 85/337 as amended and with regard to Directive 85/337. Under

both the original and the amended version of the directive, projects likely to have significant effects on the environment must be subject to an assessment of their effects before the grant of development consent, the definition of development consent moreover remaining unchanged. In addition, the characteristics of the retention permission that are specified by the Irish legislation have remained the same.

81 It follows from the foregoing that, by failing to adopt all measures necessary to ensure that projects which are within the scope of Directive 85/337 either before or after amendment by Directive 97/11 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of that directive, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

The second complaint

82 This complaint relates to the circumstances obtaining for the construction of a wind farm at Derrybrien, County Galway, in relation to which it is useful first to note the various consents obtained.

83 As is clear from the documents before the Court, applications for consent relating to the first two phases of the development, each involving 23 wind turbines, were submitted on 4 and 18 December 1997. Fresh applications were lodged on 23 January 1998, since the earlier applications for consent were held to be invalid. Permission was issued on 12 March 1998. On 5 October 2000, an application was made for consent for a third phase of works relating, inter alia, to 25 turbines and service

roadways, which was approved on 15 November 2001. On 20 June 2002, the developer applied for consent to alter the first two phases of the development, and those changes were authorised on 30 July 2002. In October 2003, when the consent granted for the first two phases of the works had expired, the developer applied for renewal of that consent, which was granted in November 2003.

Arguments of the parties

84 By this complaint, the Commission claims that Ireland did not take all the measures necessary to ensure that the development consents relating to the wind farm and associated works were preceded by an assessment of the environmental effects of the project, in accordance with Articles 5 to 10 of Directive 85/337 and of Directive 85/337 as amended.

85 The Commission argues that, while, pursuant to the Irish legislation, environmental impact assessments were carried out for various constituent parts of the development, those assessments were deficient.

86 In particular, the environmental impact assessment carried out in 1998 did not properly address the environmental risks attached to execution of the various constituent parts of the development. The impact assessment carried out for the third phase of the development was vitiated by the same inadequacies.

87 The Commission adds that the wind farm is the largest terrestrial wind-energy development ever planned in Ireland and one of the largest in Europe.

88 The Commission claims also that the construction of the wind farm required the destruction of large areas of coniferous forest amounting to 263 hectares, a felling licence having been granted on 20 May 2003. However, no environmental impact assessment was carried out for that operation, contrary to the very requirements of the Irish legislation.

89 The Commission adds that, after the landslide which occurred on 16 October 2003 and the consequent ecological disaster, when the mass of peat which was dislodged from an area under development for the wind farm polluted the Owendalulleegh river, causing the death of about 50 000 fish and lasting damage to the fish spawning beds, Ireland carried out no fresh environmental impact assessment of this construction before the resumption of work on the site by the developer in 2004.

90 Ireland contends that, when consents were applied for, in 1997 and in 1998, for the first two phases of construction of the wind farm, neither Annex I nor Annex II to Directive 85/337 referred to that category of project as being among those within its scope. Accordingly, it was not necessary that consent be preceded by an environmental impact assessment as governed by that directive. Ireland adds that the applications submitted in 1998 were, however, accompanied, in accordance with the Irish legislation, by an environmental impact statement.

91 Ireland considers, moreover, that it is artificial to attempt to suggest that ancillary aspects of the wind farm project, such as road construction, peat extraction, quarrying or electricity transmission, were of such importance that they made an environmental impact assessment within the meaning of Directive 85/337 necessary.

92 Ireland considers, in addition, that an application to extend the duration of a planning permission does not constitute 'development consent' within the meaning of Directive 85/337 as amended.

93 Ireland contends lastly that the landslide was caused by the construction methods used and that there was no question of difficulties which could have been anticipated by an environmental impact assessment, even one in conformity with the Community requirements. It also states that, in order to ensure the safe completion of the wind farm, construction work practices were changed, after construction work had been suspended and an investigation carried out.

Findings of the Court

94 First, as regards the circumstances in which the consents relating to the first two phases of construction of the wind farm project were granted on 12 March 1998 following applications submitted on 23 January 1998, it is necessary to begin by deciding whether Directive 85/337 is applicable.

95 It is clear from Article 3 of Directive 97/11 that if an application for development consent was submitted to a competent authority before 14 March 1999, the provisions of Directive 85/337 continued to apply.

96 Moreover, while it is common ground that installations for the harnessing of wind power for energy production are not listed in either Annex I or Annex II to Directive 85/337, it is not disputed by Ireland that the first two phases of construction of the wind farm required a number of works, including the extraction of peat and of minerals other than metalliferous and energy-producing minerals, and also road construction, which are listed in Annex II to that directive, respectively in point 2(a) and (c) and in point 10(d).

97 Consequently, Directive 85/337 was applicable to the first two phases of construction of the wind farm in so far as they involved specifically the carrying out of work on projects referred to in Annex II to that directive.

98 It follows that Ireland was bound to subject the work on the projects to an impact assessment if they were likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50, and Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paragraph 37).

99 However, Ireland states that the competent authorities took the view that Annex II to Directive 85/337 was not applicable, since the ancillary works of peat extraction and road construction were minor aspects of the project of wind farm construction itself.

100 The competent authorities therefore considered that there was no need either to investigate whether the intended projects were likely to have significant effects on the environment or, accordingly, to conduct an environmental impact assessment meeting the requirements of Directive 85/337 prior to granting the consents.

101 However, the fact that the abovementioned projects falling under Annex II to that directive may have been of secondary importance vis-à-vis the wind farm construction project taken as a whole did not mean that, by virtue of that fact alone, those projects were not likely to have significant effects on the environment.

102 The intended projects of peat and mineral extraction and road construction were not insignificant in terms of scale by comparison with the overall area of the wind farm project which covered 200 hectares of peat bog and which was the largest project of its kind in Ireland, and they were moreover essential both to the installation of the turbines and to the progress of the construction works as a whole. In addition, those works were carried out on the slopes of Cashlaundrumlahan Mountain, where there are layers of peat up to 5.5 metres in depth, largely covered by plantation forestry.

103 It follows from those factors, which are not disputed by Ireland, that the location and size of the projects of peat and mineral extraction and road construction, and the proximity of the site to a river, all constitute specific characteristics which demonstrate that those projects, which were inseparable from the installation of 46 wind turbines, had to be regarded as likely to have significant effects on the environment and, accordingly, had to be subject to an assessment of their effects on the environment.

104 The purpose of carrying out an environmental impact assessment in conformity with the requirements of Directive 85/337 is to identify, describe and assess in an appropriate manner the direct and indirect effects of a project on factors such as fauna and flora, soil and water and the interaction of those factors. In the present case, the environmental impact statements supplied by the developer had certain deficiencies and did not examine, in particular, the question of soil stability, although that is fundamental when excavation is intended.

105 Consequently, by failing to take all measures necessary to ensure that the grant of development consents relating to the first two phases of construction of the wind farm was preceded by an environmental impact assessment in conformity with Articles 5 to 10 of Directive 85/337 and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under that directive.

106 Secondly, as regards the application for consent relating to the third phase of construction of the wind farm, submitted on 5 October 2000, and the application for consent to alter the first two originally authorised phases of construction, lodged on 20 June 2002, the complaint must be considered in the light of Directive 85/337 as amended, since the applications for consent concerned were submitted after 14 March 1999.

107 It is not disputed, first, that the competent authorities gave their approval to the change in the type of wind turbines originally planned without requiring an

environmental impact assessment in conformity with Directive 85/337 as amended and, secondly, that the consent given for the third phase of construction was also not accompanied by such an assessment. In addition, such an assessment did not precede the deforestation authorised in May 2003, contrary to the requirements of the Irish legislation.

108 However, point 3(i) of Annex II to Directive 85/337 as amended refers to installations for the harnessing of wind power for energy production (wind farms) and point 13 of that annex refers to any change or extension of projects listed in Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.

109 In addition, the relevant selection criteria in Annex III to Directive 85/337 as amended, which are applicable to the projects listed in Annex II and are referred to in Article 4(3) of that directive, include the risk of accidents having regard inter alia to the technologies used. Noteworthy among those criteria is the environmental sensitivity of the geographical area, which must be considered having regard, inter alia, to 'the absorption capacity of the natural environment', paying particular attention to mountain and forest areas.

110 Since the installation of 25 new turbines, the construction of new service roadways and the change in the type of wind turbines initially authorised, which was intended to increase the production of electricity, are projects which are referred to in Annex II to Directive 85/337 as amended and which were likely, having regard to the specific features of the site noted in paragraph 102 of this judgment and the criteria referred to in the preceding paragraph of this judgment, to have significant effects on the environment, they should, before being authorised, have been subject to a requirement for development consent and to an assessment of their effects on the environment, in conformity with the conditions laid down in Articles 5 to 10 of Directive 85/337 as amended.

111 Consequently, by failing to take all measures necessary to ensure that the grant of the amending consents and the consent relating to the third phase of construction of the wind farm was preceded by such an assessment, and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under Directive 85/337 as amended.

112 It follows from the foregoing that, by failing to take all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

Costs

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

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

1. Declares that, by failing to adopt all measures necessary to ensure that:

— projects which are within the scope 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 either before or after amendment by Council Directive 97/11/EC of 3 March 1997 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and

— the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11,

Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive;

2. Orders Ireland to pay the costs.

[Signatures]