

JUDGMENT OF THE COURT (First Chamber)

3 March 2011 *

In Case C-50/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 February 2009,

European Commission, represented by P. Oliver, C. Clyne and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

* Language of the case: English.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, M. Ilešič and M. Berger (Rapporteur), Judges,

Advocate General: J. Mazák,
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2010,

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 requested the Court to declare that:

— by failing to transpose Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of

3 March 1997 (OJ 1997 L 73, p. 5) and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17; ‘Directive 85/337’);

- by failing to ensure that, where Irish planning authorities and the Environmental Protection Agency (‘the Agency’) both have decision-making powers on a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of that directive; and
- by excluding demolition works from the scope of its legislation transposing that directive,

Ireland has failed to fulfil its obligations under that directive.

Legal context

European Union legislation

- ² Article 1(2) and (3) of Directive 85/337 provide:

‘(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;

...

“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.’

3 Under Article 2(1) to (2a) of Directive 85/337:

‘(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.

(2a) Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Council Directive 96/61/EC of 24 September 1996 on integrated pollution prevention and control ...'

4 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,
- material assets and the cultural heritage,
- the interaction between the factors mentioned in the first, second and third indents.'

5 Article 4(1) and (2) of Directive 85/337 are worded as follows:

‘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).’

6 Articles 5 to 7 of Directive 85/337 concern the information which must be gathered and the consultations which must be undertaken for the purposes of the assessment procedure. Article 5 deals with the information which the developer must supply, Article 6 deals with the obligation to consult, on the one hand, authorities with specific environmental responsibilities and the public, on the other, and Article 7 covers the obligation, in the case of a cross-border project, to inform the other Member State concerned. Article 8 of the directive states that the results of those consultations and

the information gathered must be taken into consideration in the development consent procedure.

- 7 Articles 9 to 11 of Directive 85/337, relating to the decision taken at the conclusion of the consent procedure, cover, respectively, informing the public and the Member States concerned, respect for commercial and industrial confidentiality, the right of members of the public to bring proceedings before a court and the exchange of information between Member States and the Commission.
- 8 Under Article 12(1) of Directive 85/337, in its original version, the Member States were obliged to comply with that directive's provisions by 3 July 1988 at the latest. With regard to the amendments made to it by Directives 97/11 and 2003/35, the Member States were obliged to bring them into force at the latest by 14 March 1999 and 25 June 2005 respectively.

National legislation

The Planning and Development Act 2000

- 9 The Planning and Development Act 2000, as amended by the Strategic Infrastructure Act 2006 ('the PDA'), lays down the legal framework for issuing development consent for most of the project categories listed in Annexes I and II to Directive 85/337. For some projects, development consent under the PDA, which is termed 'planning

permission' and granted, as a rule, by a local authority, is the only form of consent required for a project to proceed. In such cases, the PDA provides that the decisions taken by local authorities may be appealed against to An Bord Pleanála (The Planning Appeals Board; 'the Board').

- 10 Part X of the PDA, comprising sections 172 to 177, is devoted to environmental impact assessments. Section 176 provides for ministerial regulations to identify projects requiring such an assessment. Section 172 provides that, for projects covered by regulations made under section 176, applications for planning permission are to be accompanied by an environmental impact statement. Under section 173, where a planning authority receives an application for planning permission accompanied by an environmental impact statement, that authority and, on appeal, the Board must have regard to that statement. Section 177 provides that the information to be included in such a statement is to be prescribed by ministerial regulation.
- 11 Detailed measures for the implementation of the PDA are set out in the Planning and Development Regulations 2001, as amended by the Planning and Development Regulations 2008 ('the PDR'), which were adopted pursuant to, among others, sections 176 and 177 of the PDA.
- 12 Part 2 of the PDR concerns projects which are exempt from an environmental impact assessment. Article 6 thereof refers in that regard to Part 1 of Schedule 2 to the PDR, which, in Category 50, refers to 'the demolition of a building or other structure'.

Articles 9 and 10 of the PDR lay down the conditions under which a project as a rule exempted must none the less be made subject to a consent procedure.

- ¹³ Part 10 of the PDR is devoted to environmental impact assessments. Article 93 thereof, in combination with Schedule 5 thereto, defines the categories of projects for which such an assessment is required. Article 94 of the PDR, which lists the information that should be found in an environmental impact statement, is worded as follows:

‘An environmental impact statement shall contain:

- (a) the information specified in paragraph 1 of Schedule 6,
- (b) the information specified in paragraph 2 of Schedule 6 to the extent that
 - (i) such information is relevant to a given stage of the consent procedure and to the specific characteristics of the development or type of development concerned and of the environmental features likely to be affected, and
 - (ii) the person or persons preparing the statement may reasonably be required to compile such information having regard, among other things, to current knowledge and methods of assessment, and,

(c) a summary in non-technical language of the information required under paragraphs (a) and (b).’

- ¹⁴ Schedule 6 to the PDR specifies the information to be contained in an environmental impact statement. Paragraph 2(b) of Schedule 6 stipulates that it must contain:

‘A description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular:

- human beings, fauna and flora,
- soil, water, air, climatic factors and the landscape,
- material assets, including the architectural and archaeological heritage, and the cultural heritage,
- the inter-relationship between the above factors.’

- ¹⁵ Under Article 108 of the PDR, the competent planning authority is obliged to establish whether the information contained in an environmental impact statement complies with the requirements laid down in the PDR.

The Environmental Protection Agency Act 1992

- ¹⁶ The Environmental Protection Agency Act 1992 ('the EPAA') introduced, among other things, a new system of integrated pollution control under which many industrial activities require a licence granted by the Agency. Where the activity is new and/or involves new construction, it must also obtain planning permission as provided for by the PDA.
- ¹⁷ Section 98 of the EPAA, which precluded planning authorities from taking into consideration aspects connected with pollution risks in considering an application for planning permission, was amended by section 256 of the PDA to the effect that, whilst it precluded planning authorities from including any pollution control conditions in planning permissions for activities also requiring a licence from the Agency, they could nevertheless, where appropriate, refuse to grant planning permission on environmental grounds. Section 98 of the EPAA, as amended, provides that planning authorities may ask the Agency for an opinion, in particular on an environmental impact statement. However, the Agency is not required to respond to such a request.
- ¹⁸ Under the Environmental Protection Agency (Licensing) Regulations 1994 ('the EPAR'), the Agency may notify a planning authority of a licence application. There is, however, no obligation on the planning authority to respond to such a notification.

The National Monuments Act 1930

- ¹⁹ The National Monuments Act 1930 ('the NMA') governs the protection of Ireland's most culturally significant archaeological remains, which are classed as 'national monuments'. It was amended by the National Monuments (Amendment) Act 2004, to relax the constraints imposed under earlier legislation concerning proposals to alter or remove national monuments.

- ²⁰ Section 14 of the NMA confers on the Irish Minister for the Environment, Heritage and Local Government ('the Minister') discretion to consent to the destruction of a national monument. Where a national monument is discovered during the carrying out of a road development which has been subject to an environmental impact assessment, section 14A of the NMA provides that it is, in principle, prohibited to carry out any works on the monument pending directions by the Minister. Those directions can relate to 'the doing to the monument of [various] matters,' including its demolition. There is no provision for any assessment to be made, for the adoption of such directions, of the effects on the environment. However, section 14B of the NMA provides that the Minister's directions must be notified to the Board. If those directions envisage an alteration to the approved road development, the Board must consider whether or not that alteration is likely to have significant adverse effects on the environment. If it is of that opinion, it must require the submission of an environmental impact statement.

Pre-litigation procedure

- ²¹ Following the examination of a complaint regarding Ireland's transposition of Directive 85/337, the Commission took the view that Ireland had failed to ensure its full and correct transposition and, by letter of 19 November 1998, gave Ireland formal notice, to submit its observations, in accordance with the procedure for failure to fulfil Treaty obligations. A further letter of formal notice was sent to Ireland on 9 February 2001.
- ²² After examining the observations received in response to those letters, the Commission, on 6 August 2001, sent the Irish authorities a reasoned opinion in which it claimed that Ireland had not correctly transposed Articles 2 to 6, 8 and 9 of Directive 85/337. In reply, Ireland stated that the legislative amendments necessary to bring about the transposition were being adopted and requested that the proceedings be stayed.
- ²³ Following further complaints, the Commission, on 2 May 2006, sent an additional letter of formal notice to Ireland.
- ²⁴ As the Commission was not satisfied with the replies received, on 29 June 2007 it addressed an additional reasoned opinion to Ireland in which it claimed that Ireland had not correctly transposed Directive 85/337, in particular Articles 2 to 4 thereof, and called upon it to comply with that reasoned opinion within a period of two months from the date of its receipt. In reply, Ireland maintained its position that the Irish legislation in force now constitutes adequate transposition of that directive.
- ²⁵ The Commission then brought the present action.

The action

The first complaint, alleging failure to transpose Article 3 of Directive 85/337

Arguments of the parties

- ²⁶ According to the Commission, Article 3 of Directive 85/337 is of pivotal importance, since it sets out what constitutes an environmental impact assessment and must therefore be transposed explicitly. The provisions relied upon by Ireland as adequate transposition of Article 3 of the directive are insufficient.
- ²⁷ Thus, section 173 of the PDA, which requires planning authorities to have regard to the information contained in an environmental impact statement submitted by a developer, relates to the obligation, under Article 8 of Directive 85/337, to take into consideration the information gathered pursuant to Articles 5 to 7 thereof. By contrast, section 173 does not correspond to the wider obligation, imposed by Article 3 of Directive 85/337 on the competent authority, to ensure that there is carried out an environmental impact assessment which identifies, describes and assesses all the matters referred to in that article.
- ²⁸ As for Articles 94, 108 and 111 of, and Schedule 6 to, the PDR, the Commission observes that they are confined, first, to setting out the matters on which the developer must supply information in its environmental impact statement and, second, to specifying the obligation on the competent authorities to establish that the information

is complete. The obligations laid down by those provisions are different from that, imposed by Article 3 of Directive 85/337 on the competent authority, of carrying out a full environmental impact assessment

- 29 With regard to the relevance of the Irish courts' case-law on the application of the provisions of national law at issue, the Commission points out that while those courts may interpret ambiguous provisions so as to ensure their compatibility with a directive; they cannot plug legal gaps in the national legislation. Moreover, the extracts from the decisions cited by Ireland concern, in the Commission's submission, not the interpretation of that legislation but the interpretation of Directive 85/337 itself.
- 30 Ireland disputes the significance which the Commission attaches to Article 3 of that directive. It submits that that provision, drafted in general terms, is confined to stating that an environmental impact assessment must be made in accordance with Articles 4 to 11 of the directive. By transposing Articles 4 to 11 into national law, a Member State thereby, in Ireland's submission, ensures the transposition of Article 3.
- 31 Ireland maintains that Article 3 of Directive 85/337 is fully transposed by sections 172(1) and 173 of the PDA and Articles 94 and 108 of, and Schedule 6 to, the PDR. It points out that the Supreme Court (Ireland) has confirmed, in two separate judgments of 2003 and 2007, namely *O'Connell v Environmental Protection Agency* and *Martin v An Bord Pleanála*, that Irish law requires planning authorities and the Agency to assess the factors referred to in Article 3 and the interaction between them. Those judgments, which, Ireland submits, should be taken into account when assessing the scope of the national provisions at issue, do not fill a legal gap but are confined to holding that the applicable national legislation imposes an obligation on the

competent authorities to carry out an environmental impact assessment of a development in the light of the criteria laid down in Article 3 of Directive 85/337.

- ³² In the alternative, Ireland refers to the concept of ‘proper planning and sustainable development’ referred to in section 34 of the PDA. It is, in Ireland’s submission, the principal criterion which must be taken into consideration by any planning authority when deciding on an application for planning permission. That concept is in addition to all the criteria referred to in section 34 of the PDA, as well as in other provisions of that Act, including section 173, the application of which it reinforces.
- ³³ Finally, Ireland submits that the Commission does not respect the discretion which a Member State enjoys under Article 249 EC as to the form and methods for transposing a directive. By requiring the literal transposition of Article 3 of Directive 85/337, the Commission is disregarding the body of legislation and case-law built up in Ireland over 45 years surrounding the concepts of ‘proper planning’ and ‘sustainable development’.

Findings of the Court

- ³⁴ At the outset, it is to be noted that the Commission and Ireland give a different reading to Article 3 of Directive 85/337 and a different analysis of its relationship with Articles 4 to 11 thereof. The Commission maintains that Article 3 lays down obligations which go beyond those required by Articles 4 to 11, whereas Ireland submits that it

is merely a provision drafted in general terms and that the details of the process of environmental impact assessment are specified in Articles 4 to 11.

- ³⁵ In that regard, whilst Article 3 of Directive 85/337 provides that the environmental impact assessment is to take place ‘in accordance with Articles 4 to 11’ thereof, the obligations referred to by those articles differ from that under Article 3 itself.
- ³⁶ Article 3 of Directive 85/337 makes the competent environmental authority responsible for carrying out an environmental impact assessment which must include a description of a project’s direct and indirect effects on the factors set out in the first three indents of that article and the interaction between those factors (judgment of 16 March 2006 in Case C-332/04 *Commission v Spain*, paragraph 33). As stated in Article 2(1) of the directive, that assessment is to be carried out before the consent applied for to proceed with a project is given.
- ³⁷ In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project’s direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case.
- ³⁸ That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive.

- 39 Admittedly, Article 8 of Directive 85/337 provides that the results of the consultations and the information gathered pursuant to Articles 5 to 7 must be taken into consideration in the development consent procedure.
- 40 However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors.
- 41 It follows therefore both from the wording of the provisions at issue of Directive 85/337 and from its general scheme that Article 3 is a fundamental provision. The transposition of Articles 4 to 11 alone cannot be regarded as automatically transposing Article 3.
- 42 It is in the light of those considerations that the Court must consider whether the national provisions upon which Ireland relies constitute proper transposition of Article 3 of Directive 85/337.
- 43 It can be seen from the wording of section 172 of the PDA and of Article 94 of, and Schedule 6 to, the PDR that those provisions relate to the developer's obligation to supply an environmental impact statement, which corresponds, as the Commission correctly claims, to the obligation imposed upon the developer by Article 5 of

Directive 85/337. Article 108 of the PDR imposes no obligation on the planning authority other than that of establishing the completeness of that information.

- ⁴⁴ As regards section 173 of the PDA, according to which the planning authority, where it receives an application for planning permission accompanied by an environmental impact statement, must take that statement into account as well as any additional information provided to it, it is clear from the very wording of that article that it is confined to laying down an obligation similar to that provided for in Article 8 of Directive 85/337, namely that of taking the results of the consultations and the information gathered for the purposes of the consent procedure into consideration. That obligation does not correspond to the broader one, imposed by Article 3 of Directive 85/337 on the competent environmental authority, to carry out itself an environmental impact assessment in the light of the factors set out in that provision.
- ⁴⁵ In those circumstances, it must be held that the national provisions invoked by Ireland cannot attain the result pursued by Article 3 of Directive 85/337.
- ⁴⁶ Whilst it is true that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, in particular, Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, paragraph 54 and the case-law cited), the fact remains that, according to equally settled case-law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which

requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, in particular, *Commission v Ireland*, paragraph 55 and the case-law cited).

⁴⁷ In that regard, the judgment of the Supreme Court in *O'Connell v Environmental Protection Agency* gives, admittedly, in the passage upon which Ireland relies, an interpretation of the provisions of domestic law consistent with Directive 85/337. However, according to the Court's settled case-law, such a consistent interpretation of the provisions of domestic law cannot in itself achieve the clarity and precision needed to meet the requirement of legal certainty (see, in particular, Case C-508/04 *Commission v Austria* [2007] ECR I-3787, paragraph 79 and the case-law cited). The passage in the judgment of the same court in *Martin v An Bord Pleanála*, to which Ireland also refers, concerns the question of whether all the factors referred to in Article 3 of Directive 85/337 are mentioned in the consent procedures put in place by the Irish legislation. By contrast, it has no bearing on the question, which is decisive for the purposes of determining the first complaint, of what the examination of those factors by the competent national authorities should comprise.

⁴⁸ As regards the concepts of 'proper planning' and 'sustainable development' to which Ireland also refers, it must be held that, even if those concepts encompass the criteria referred to in Article 3 of Directive 85/337, it is not established that they require that those criteria be taken into account in all cases for which an environmental impact assessment is required.

⁴⁹ It follows that neither the national case-law nor the concepts of 'proper planning' and 'sustainable development' can be invoked to remedy the failure to transpose into the Irish legal order Article 3 of Directive 85/337.

- 50 The Commission's first complaint in support of its action must therefore be held to be well founded.

The second complaint, alleging failure to ensure full compliance with Articles 2 to 4 of Directive 85/337 where several authorities are involved in the decision-making process

Arguments of the parties

- 51 For the Commission, it is of the essence that the environmental impact assessment be carried out as part of a holistic process. In Ireland, following the Agency's creation, certain projects requiring such an assessment are subject to two separate decision-making processes: one process involves decision-making on land-use aspects by planning authorities, while the other involves decision-making by the Agency on pollution aspects. The Commission accepts that planning permission and an Agency licence may be regarded, as has been held in Irish case-law (*Martin v An Bord Pleanála*), as together constituting 'development consent' within the meaning of Article 1(2) of Directive 85/337 and it does not object to such consent being given in two successive stages. However, the Commission criticises the fact that the Irish legislation fails to impose any obligation on planning authorities and the Agency to coordinate their activities. In the Commission's submission, that situation is contrary to Articles 2 to 4 of Directive 85/337.
- 52 As regards Article 2 of Directive 85/337, the Commission notes that it requires an environmental impact assessment to be undertaken for a project covered by Article 4 'before consent is given'. The Commission submits that there is a possibility under the

Irish legislation that part of the decision-making process will take place in disregard of that requirement. First, the Irish legislation does not require that an application for planning permission be lodged with the planning authorities before a licence application is submitted to the Agency, which is not empowered to undertake an environmental impact assessment. Second, the planning authorities are not obliged to take into account, in their assessment, the impact of pollution, which might not be assessed at all.

⁵³ Referring to the Court's case-law (see, in particular, judgment of 20 November 2008 in Case C-66/06 *Commission v Ireland*, paragraph 59), the Commission states that it is not obliged to wait until the application of the transposing legislation produces harmful effects or to establish that it does so, where the wording of the legislation itself is insufficient or defective.

⁵⁴ As regards Article 3 of Directive 85/337, the Commission submits that where there is more than one competent body, the procedures followed by each of them must, when taken together, ensure that the assessment required by Article 3 is fully carried out. The strict demarcation of the separate roles of the planning authorities on the one hand and the Agency on the other, as laid down by the Irish legislation, fails to take formally into account the concept of 'environment' in the decision-making. None of the bodies involved in the consent process is responsible for assessing and taking into consideration the interaction between the factors referred to in the first to third indents of Article 3, which fall respectively within the separate spheres of the powers of each of those authorities.

- 55 In that regard, the Commission, referring to section 98 of the EPAA, as amended, and to the EPAR, observes that there is no formal link, in the form of an obligation, for the competent authorities, to consult each other between the process of planning permission followed by the planning authority and the licensing process followed by the Agency.
- 56 In order to illustrate its analysis, the Commission refers to the projects relating to the installation of an incinerator at Duleek, in County Meath, and to the wood-processing factory at Leap, in County Offaly.
- 57 Referring to Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003, Ireland contests the admissibility of the Commission's second complaint in support of its action, on the ground that, in Ireland's submission, the Commission has failed to indicate precisely the reason why Ireland's designation of two competent authorities infringes the requirements of Directive 85/337. Ireland submits that the failure has interfered with the preparation of its defence.
- 58 On the substance, Ireland contends that the consequence of involving a number of different competent authorities in the decision-making process, which is permitted by Articles 1(3) and 2(2) of Directive 85/337, is that their involvement and their obligations will be different and will occur at different stages prior to 'development consent' being given. Relying on *Martin v An Bord Pleanála*, Ireland contends that nowhere in that directive is it in any sense suggested that a single competent body must carry out a 'global assessment' of the impact on the environment.
- 59 Ireland denies that there is a strict demarcation between the powers of the two decision-making bodies and submits that there is, rather, overlap between them. The concept of 'proper planning and sustainable development', to which the PDA refers,

is a very broad one, which includes, in particular, environmental pollution. Planning authorities are required to assess environmental pollution in the context of a decision relating to planning permission. They are moreover empowered under various provisions to refuse planning permission on environmental grounds.

⁶⁰ Replying to the Commission's argument that it is possible for a licence application to be made to the Agency before an application for planning permission has been made to the planning authority, and thus before an environmental impact assessment has been carried out, Ireland contends that under Irish law 'development consent' requires both planning permission from the competent planning authority and a licence from the Agency. In those circumstances, there is no practical benefit in the developer applying for a licence from the Agency without making a contemporaneous application to the planning authority; such separate applications do not therefore occur in practice.

⁶¹ In addition, Ireland argues that, contrary to the Commission's assertion that the Agency cannot undertake an environmental impact assessment, there is in several instances an obligation, particularly for waste recovery or waste disposal licence applications and for applications for integrated pollution control and prevention licences, to submit an environmental impact statement to the Agency independently of any earlier application for planning permission lodged with a planning authority. In addition, in such cases the Agency is expressly empowered to request further information from an applicant and may therefore request information which is substantially similar to that contained in an environmental impact statement.

- ⁶² Ireland submits that an obligation on the planning authority and the Agency to consult in every case would be inappropriate. It would be more appropriate to allow such consultation whilst affording a discretion to the relevant decision-makers as to whether, in each particular case, to undertake such consultation.
- ⁶³ Finally, the judgment in Case C-66/06 *Commission v Ireland*, to which the Commission refers in order to avoid having to adduce proof of its allegations, is not relevant to the present case. In Ireland's submission, the alleged infringement, in that case, concerned the manner in which Directive 85/337 had been transposed into Irish domestic law, whereas the present case concerns the application of the legislation transposing that directive. Whilst a comprehensive scheme has been put in place by the Irish legislation on the environmental impact assessment, the Commission claims that that legislation may not always be applied properly in practice. In that regard, the onus of proof lies with the Commission, which has failed to discharge it. The references to the projects at Duleek and Leap offer no support whatsoever for the Commission's allegations.

Findings of the Court

— Admissibility of the second complaint

- ⁶⁴ It is settled case-law that, in the context of an action brought on the basis of Article 226 EC, the reasoned opinion and the action must set out the Commission's

complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the scope of the infringement of European Union law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged (see, in particular, *Commission v United Kingdom*, paragraph 18, and Case C-66/06 *Commission v Ireland*, paragraph 31).

⁶⁵ In this case, it is apparent from the documents in the court file that, in the pre-litigation procedure, both paragraphs 3.2.2 to 3.2.5 of the reasoned opinion of 6 August 2001 and paragraphs 2.17 and 2.18 of the additional reasoned opinion of 29 June 2007 set forth the reason for which the strict demarcation between the separate roles assigned to the planning authorities, on the one hand, and the Agency, on the other, does not satisfy, in the Commission's submission, the requirements of Directive 85/337. It is there explained that such sharing of powers is incompatible with the fact that the concept of 'environment', as it must be taken into account in the decision-making process laid down by that directive, involves taking into consideration the interaction between the factors falling within the separate spheres of responsibility of each of those decision-making authorities.

⁶⁶ That complaint is set out in identical or similar terms in paragraphs 55 et seq. of the application in this action which, in addition, contains, in its paragraphs 9 to 20, a summary of the relevant provisions of the Irish legislation.

⁶⁷ It follows from those findings that the Commission's allegations in the course of the pre-litigation procedure and the proceedings before the Court were sufficiently clear to enable Ireland properly to defend itself.

⁶⁸ Accordingly, Ireland's plea of inadmissibility in respect of the Commission's second complaint must be rejected.

— Substance

⁶⁹ At the outset, it is to be noted that, by its second complaint, the Commission is criticising the transposition by the Irish legislation at issue of Articles 2 to 4 of Directive 85/337, on the ground that the procedures put in place by that legislation do not ensure full compliance with those articles where several national authorities take part in the decision-making process.

⁷⁰ Consequently, Ireland's line of argument that the Commission has not adequately established the factual basis for its action must immediately be rejected. As the Commission claimed, since its action for failure to fulfil obligations is concerned with the way in which Directive 85/337 has been transposed, and not with the actual result of the application of the national legislation relating to that transposition, it must be determined whether that legislation itself harbours the insufficiencies or defects in the transposition of the directive which the Commission alleges, without any need to establish the actual effects of the national legislation effecting that transposition with regard to specific projects (see Case C-66/06 *Commission v Ireland*, paragraph 59).

⁷¹ Article 1(2) of Directive 85/337 defines the term 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Article 1(3) states that the competent authorities are to be that or those which the Member States designate as responsible for performing the duties arising from that directive.

- ⁷² For the purposes of the freedom thus left to them to determine the competent authorities for giving development consent, for the purposes of that directive, the Member States may decide to entrust that task to several entities, as the Commission has moreover expressly accepted.
- ⁷³ Article 2(2) of Directive 85/337 adds that the environmental impact statement may be integrated into the existing procedures for consent to projects or failing that, into other procedures or into procedures to be established to comply with the aims of that directive.
- ⁷⁴ That provision means that the liberty left to the Member States extends to the determination of the rules of procedure and requirements for the grant of the development consent in question.
- ⁷⁵ However, that freedom may be exercised only within the limits imposed by that directive and provided that the choices made by the Member States ensure full compliance with its aims.
- ⁷⁶ Article 2(1) of Directive 85/337 thus states that the environmental impact assessment must take place ‘before the giving of consent’. That entails that the examination of a project’s direct and indirect effects on the factors referred to in Article 3 of that directive and on the interaction between those factors be fully carried out before consent is given.
- ⁷⁷ In those circumstances, while nothing precludes Ireland’s choice to entrust the attainment of that directive’s aims to two different authorities, namely planning authorities on the one hand and the Agency on the other, that is subject to those authorities’ respective powers and the rules governing their implementation ensuring that an

environmental impact assessment is carried out fully and in good time, that is to say before the giving of consent, within the meaning of that directive.

78 In that regard, the Commission maintains that it has identified, in the Irish legislation, a gap arising from the combination of two factors. The first is the lack of any right on the part of the Agency, where it receives an application for a licence for a project as regards pollution aspects, to require an environmental impact assessment. The second is the possibility that the Agency might receive an application and decide on questions of pollution before an application is made to the planning authority, which alone can require the developer to make an environmental impact statement.

79 In its defence, Ireland, which does not deny that, generally, the Agency is not empowered to require a developer to produce such a statement, contends that there is no practical benefit for a developer in seeking a licence from the Agency without simultaneously making an application for planning permission to the planning authority, since he needs a consent from both those authorities. However, Ireland has neither established, nor even alleged, that it is legally impossible for a developer to obtain a decision from the Agency where he has not applied to the planning authority for permission.

80 Admittedly, the EPAR give the Agency the right to notify a licence application to the planning authority. However, it is common ground between the parties that it is not an obligation and, moreover, an authority which has received such notification is not bound to reply to it.

- ⁸¹ It is therefore not inconceivable that the Agency, as the authority responsible for licensing a project as regards pollution aspects, may make its decision without an environmental impact assessment being carried out in accordance with Articles 2 to 4 of Directive 85/337.
- ⁸² Ireland contends that, in certain cases, relating particularly to licences for the recovery or disposal of waste and integrated pollution control and prevention licences, the Agency is empowered to require an environmental impact statement, which it must take into account. However, such specific rules cannot fill the gap in the Irish legislation identified in the preceding paragraph.
- ⁸³ Ireland submits also that planning authorities are empowered, since the amendment of the EPAA by section 256 of the PDA, to refuse, where appropriate, planning permission on environmental grounds and that the concepts of ‘proper planning’ and ‘sustainable development’ confer on those authorities, generally, such power.
- ⁸⁴ Such an extension of the planning authority’s powers may, as Ireland argues, create in certain cases an overlap of the respective powers of the authorities responsible for environmental matters. None the less, it must be held that such an overlap cannot fill the gap pointed out in paragraph 81 of the present judgment, which leaves open the possibility that the Agency will alone decide, without an environmental impact assessment complying with Articles 2 to 4 of Directive 85/337, on a project as regards pollution aspects.

- 85 In those circumstances, it must be held that the Commission's second complaint in support of its action for failure to fulfil obligations is well founded.

The third complaint, alleging failure to apply Directive 85/337 to demolition works

Arguments of the parties

- 86 In the Commission's submission, demolition works may constitute a 'project' within the meaning of Article 1(2) of Directive 85/337, since they fall within the concept of 'other interventions in the natural surroundings and landscape'. However, in the PDR, Ireland purported to exempt nearly all demolition works from the obligation to carry out an environmental impact assessment. After the end of the two-month period laid down in the additional reasoned opinion of 29 June 2007, Ireland admittedly notified the Commission of new legislation, which amended the PDR by significantly narrowing the scope of the exemption for demolition works. However, that legislation cannot, the Commission submits, be taken into account in the present infringement action.
- 87 The Commission claims that Ireland's interpretation that demolition works fall outside the scope of the directive is reflected in the NMA, and refers in that regard to sections 14, 14A and 14B of that Act which relate to the demolition of a national monument.

- 88 By way of illustration of how, in contravention of Directive 85/337, the exclusion of demolition works allowed, by virtue of section 14A of the NMA, a national monument to be demolished without an environmental impact assessment being undertaken, the Commission cites the ministerial decision of 13 June 2007 ordering the destruction of a national monument in order to permit the M3 motorway project to proceed.
- 89 As a preliminary point, Ireland objects that the Commission's third complaint is, in so far as it concerns section 14 of the NMA, inadmissible, since that provision was not mentioned in the additional reasoned opinion of 29 June 2007.
- 90 In Ireland's submission, demolition works do not fall within the scope of Directive 85/337, since they are not mentioned in Annex I or II thereto. In addition, Ireland submits that section 10 of the PDA and Article 9 of the PDR, when read together, make clear that the exemption from the obligation to obtain planning permission in respect of demolition works can apply only if the project is unlikely to have significant effects on the environment.
- 91 As regards the obligation to carry out further assessments, Ireland argues that the essence of Directive 85/337 is that the environmental impact assessment be carried out at the earliest possible stage, before the development starts. The only occasion when it is ever necessary to carry out a fresh assessment is, in accordance with the first indent of point 13 in Annex II to the directive, where the development project has been changed or extended.
- 92 With regard to the scope of ministerial directions issued under section 14A of the NMA, Ireland states that that provision applies only in the context of a road development previously approved by the Board, on the basis of an environmental impact assessment. Only the Board may authorise an alteration to a road development and

it must in such a case assess whether that alteration is likely to have adverse environmental consequences. In those circumstances, the Minister's power to issue ministerial directions cannot be equated with the giving of consent for the motorway project. Those directions are issued only, if at all, following the commencement of the development works and the discovery of a new national monument and are designed only to regulate how the newly discovered national monument is to be dealt with. Also, Ireland denies that a ministerial decision was taken ordering the destruction of a national monument in order to allow the M3 motorway project to proceed.

Findings of the Court

— Admissibility of the third complaint

⁹³ According to the Court's settled case-law, the subject-matter of proceedings brought under Article 226 EC is delimited by the administrative pre-litigation procedure governed by that article and the application must be founded on the same grounds and pleas as those stated in the reasoned opinion (see, in particular, Case C-340/02 *Commission v France* [2004] ECR I-9845, paragraph 26 and the case-law cited).

⁹⁴ In this case, it is clear from the wording of the additional reasoned opinion of 29 June 2007 that the Commission, in paragraphs 2.34 to 2.38 thereof, complained that Ireland had excluded demolition works from the scope of the national legislation transposing Directive 85/337. In paragraphs 2.39 and 2.40 of the same opinion, the Commission

stated that Ireland's interpretation of that directive was reflected not only in the PDA, but also in other more specific legislative provisions, such as the NMA, and it took as an example the carrying-out of the M3 motorway project.

- ⁹⁵ It follows that, while the Commission did not expressly refer to section 14 of the NMA in that reasoned opinion, it none the less referred clearly to the decision-making mechanism laid down by that section as part of its analysis of the deficiencies which, in its submission, that Act entails.
- ⁹⁶ In those circumstances, Ireland's plea of inadmissibility against the Commission's third complaint must be rejected.

— Substance

- ⁹⁷ As regards the question whether demolition works come within the scope of Directive 85/337, as the Commission maintains in its pleadings, or whether, as Ireland contends, they are excluded, it is appropriate to note, at the outset, that the definition of the word 'project' in Article 1(2) of that directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition. Such works can, indeed, be described as 'other interventions in the natural surroundings and landscape.'
- ⁹⁸ That interpretation is supported by the fact that, if demolition works were excluded from the scope of that directive, the references to 'the cultural heritage' in

Article 3 thereof, to ‘landscapes of historical, cultural or archaeological significance’ in point 2(h) of Annex III to that directive and to ‘the architectural and archaeological heritage’ in point 3 of Annex IV thereto would have no purpose.

- 99 It is true that, under Article 4 of Directive 85/337, for a project to require an environmental impact assessment, it must come within one of the categories in Annexes I and II to that directive. However, as Ireland contends, they make no express reference to demolition works except, irrelevantly for the purposes of the present action, the dismantling of nuclear power stations and other nuclear reactors, referred to in point 2 of Annex I.
- 100 However, it must be borne in mind that those annexes refer rather to sectoral categories of projects, without describing the precise nature of the works provided for. As an illustration it may be noted, as did the Commission, that ‘urban development projects’ referred to in point 10(b) of Annex II often involve the demolition of existing structures.
- 101 It follows that demolition works come within the scope of Directive 85/337 and, in that respect, may constitute a ‘project’ within the meaning of Article 1(2) thereof.
- 102 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion (see, in particular, Case C-427/07 *Commission v Ireland*, paragraph 64 and the case-law cited).

103 Ireland does not deny that, under the national legislation in force at the date of the additional reasoned opinion, demolition works were not subject, as a general rule, to an environmental impact assessment but, on the contrary, were entitled to an exemption in principle.

104 It is clear from the rules laid down in sections 14 to 14B of the NMA as regards the demolition of a national monument that, as the Commission claims, they take no account of the possibility that such demolition works might constitute, in themselves, a ‘project’ within the meaning of Articles 1 and 4 of Directive 85/337 and, in that respect, require a prior environmental impact assessment. However, since the insufficiency of that directive’s transposition into the Irish legal order has been established, there is no need to consider what that legislation’s actual effects are in the light of the carrying-out of specific projects, such as that of the M3 motorway.

105 As regards the legislative changes subsequent to the action for failure to fulfil obligations being brought, they cannot be taken into consideration by the Court (see, in particular, Case C-427/07 *Commission v Ireland*, paragraph 65 and the case-law cited).

106 In those circumstances, the Commission’s third complaint in support of its action must be held to be well founded.

107 Accordingly, it must be declared that:

— by failing to transpose Article 3 of Directive 85/337;

- by failing to ensure that, where planning authorities and the Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of that directive; and
- by excluding demolition works from the scope of its legislation transposing that directive,

Ireland has failed to fulfil its obligations under that directive.

Costs

- ¹⁰⁸ 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 and Ireland has been unsuccessful the latter must be ordered to pay the costs.

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

1. Declares that:

- **by failing to transpose Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and pri-**

vate projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003;

- by failing to ensure that, where Irish planning authorities and the Environmental Protection Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of Directive 85/337, as amended by Directive 2003/35; and**

- by excluding demolition works from the scope of its legislation transposing Directive 85/337, as amended by Directive 2003/35,**

Ireland has failed to fulfil its obligations under that directive;

2. Orders Ireland to pay the costs.

[Signatures]