

JUDGMENT OF THE COURT (Second Chamber)

20 November 2008 (*)

(Failure of a Member State to fulfil obligations – Directive 85/337/EEC – Assessment of the effects of projects on the environment – Consent given without an assessment)

In Case C-66/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 6 February 2006,

Commission of the European Communities, represented by F. Simonetti and X. Lewis, acting as Agents, F. Louis, avocat, and C. O'Daly, Solicitor, 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,

supported by:

Republic of Poland, represented by E. Ośniecka-Tamecka, acting as Agent,

intervener,

THE COURT (Second Chamber),

composed of K. Schiemann, acting for the President of the Second Chamber, J. Makarczyk (Rapporteur), P. Kūris, L. Bay Larsen and C. Toader, Judges,

Advocate General: J. Mazák,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 May 2008,

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

gives the following

Judgment

- 1 By its application, the Commission of the European Communities requests the Court to declare that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337'), all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the category of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive.

Legal context

Community legislation

2 In accordance with Article 1(2) of Directive 85/337:

'...

"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 Article 2(1) and (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 a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

...

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.

...'

4 Article 4 of the directive 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.'

5 Annex II to the directive lists the projects subject to Article 4(2).

6 Point 1 of Annex II is worded as follows:

'Agriculture, silviculture and aquaculture

- (a) Projects for the restructuring of rural land holdings;
- (b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;
- (c) Water management projects for agriculture, including irrigation and land drainage projects;
- (d) Initial afforestation and deforestation for the purposes of conversion to another type of land use;
- (e) Intensive livestock installations (projects not included in Annex I);
- (f) Intensive fish farming;
- (g) Reclamation of land from the sea.'

7 Annex III to the directive, which lists the selection criteria referred to in Article 4(3), states as follows:

'1. Characteristics of projects

The characteristics of projects must be considered having regard, in particular, to:

- the size of the project,
- the cumulation with other projects,
- the use of natural resources,
- the production of waste,
- pollution and nuisances,
- the risk of accidents, having regard in particular to substances or technologies used.

2. Location of projects

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

- the existing land use,
- the relative abundance, quality and regenerative capacity of natural resources in the area,
- the absorption capacity of the natural environment, paying particular attention to the following areas:

...

3. Characteristics of the potential impact

The potential significant effects of projects must be considered in relation to criteria set out under 1 and 2 above, and having regard in particular to:

- the extent of the impact (geographical area and size of the affected population),
...'

National legislation

- 8 Directive 85/337 has been transposed into Irish law by, in particular, the Planning and Development Act, 2000 ('the PDA'), and the Planning and Development Regulations, 2001 (S.I. No 600/2001; 'the PDR'), as amended.
- 9 Under the PDA, the carrying out of development in principle requires planning permission.
- 10 An exemption from the obligation to obtain planning permission is laid down in Article 6 of the PDR for development falling within certain classes that are set out, in particular, in Part 3 of Schedule 2 to the PDR. This exemption is, however, subject to the requirement under Article 9 of the PDR that the development concerned must not be likely to have significant effects on the environment.
- 11 Article 9 of the PDR accordingly lists a number of cases in which the exemption cannot apply on account of the application of safeguard clauses.
- 12 As provided in Article 9(1)(a), that is so inter alia if the development in question would:
- '...
- (vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan,
 - (vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan, save any excavation, pursuant to and in accordance with a licence granted under section 26 of the National Monuments Act, 1930 ...,
- ...
- (x) consist of the fencing or enclosure of any land habitually open to or used by the public during the 10 years preceding such fencing or enclosure for recreational purposes or as a means of access to any seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility,
 - (xi) obstruct any public right of way,
 - (xii) further to the provisions of section 82 of the [PDA], consist of or comprise the carrying out of works to the exterior of a structure, where the structure concerned is located within an architectural conservation area or an area specified as an architectural conservation area in a development plan for the area or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan and the development would materially affect the character of the area'.
- 13 Also, it is clear from section 176 of the PDA, in conjunction with Article 93 of the PDR and paragraph 1 of Part 2 of Schedule 5 thereto, that Ireland has chosen, for projects falling within point 1(a) to (c) of Annex II to Directive 85/337, to set, in respect of each project category, a threshold based exclusively on project size, below which an environmental impact assessment is not obligatory.
- 14 Article 103 of the PDR empowers the planning authority to require submission of an environmental impact statement for a development where a planning application is not accompanied by such a

statement. This applies in particular to development which does not exceed certain thresholds laid down by national law but which the planning authority considers would be likely to have significant effects on the environment.

- 15 In deciding whether or not a development is likely to have significant effects on the environment, the planning authority takes account of the criteria laid down in Schedule 7 to the PDR, which corresponds to Annex III to Directive 85/337.
- 16 In addition it is apparent from sections 9(1) and 10(2)(c) of the PDA that each planning authority must include objectives relating to conservation and protection of the environment in the development plan which it is required to make every six years.

Pre-litigation procedure

- 17 After sending Ireland a request for information dated 13 September 2001, on 23 October 2001 the Commission sent it a letter of formal notice relating to a trial salmon farm on the Kenmare estuary in County Kerry. Ireland replied to that letter on 21 May 2002.
- 18 On 18 October and 19 December 2002, the Commission sent Ireland further letters of formal notice.
- 19 The first of these letters set out the Commission's position that Ireland's transposition of Directive 85/337 was deficient with regard to the project categories set out in point 1(a) to (c) of Annex II to the directive. The second referred to deficient transposition of the directive with regard to projects falling within point 1(f) of Annex II. Ireland replied to those letters by letters of 9 April and 26 May 2003.
- 20 On 11 July 2003 the Commission sent Ireland a reasoned opinion calling on it to take the necessary measures to comply with the reasoned opinion within two months of its receipt.
- 21 The Commission, after finding the position adopted by Ireland in a letter of 7 November 2003 in response to the reasoned opinion to be unsatisfactory, brought the present action under the second paragraph of Article 226 EC.
- 22 By order of the President of the Court of 11 May 2007, the Republic of Poland was granted leave to intervene in the present case in support of the form of order sought by Ireland.

The action

- 23 The Commission's action is based on two complaints. According to its first complaint, the Irish legislation transposing Directive 85/337 is deficient as it does not provide, in respect of the project categories covered by point 1(a) to (c) of Annex II to the directive, for effective measures to achieve the results required by Articles 2(1) and 4(2) and (3) of the directive. In the second complaint, the Commission submits that the competent Irish authorities are not expressly required to take account of the selection criteria set out in Annex III to Directive 85/337 so far as concerns intensive fish farming installations falling within point 1(f) of Annex II to the directive and that this infringes Community requirements.
- 24 Before considering the merits of these complaints, it is necessary to rule on Ireland's plea that the present action is inadmissible.

Admissibility of the action

Arguments of the parties

- 25 Ireland contends that the present action is inadmissible, especially as it is not properly pleaded since the Commission failed, in particular, to identify precisely the provisions of national legislation against which the action is brought, in a situation where Directive 85/337 was transposed into Irish law by various legal instruments.

- 26 Ireland further contends that the Commission did not particularise its grounds of complaint sufficiently, having moreover relied on separate reasoned opinions. This caused a large measure of confusion that did not allow Ireland a proper opportunity to prepare its defence as it was unable to ascertain the precise reasons why it had allegedly failed to fulfil its obligations under Directive 85/337.
- 27 Furthermore, in Ireland's submission the Commission has not produced to the Court the material needed for the latter to determine that Ireland has failed to fulfil its obligations as alleged. The Commission has failed to adduce evidence as to the existence of development projects claimed by it to belong to a category of projects subject to the requirement for an environmental impact assessment in so far as they are likely to have significant environmental effects.
- 28 Since projects covered by the action are likely to have significant environmental effects only by reason of their particular characteristics, the Commission's failure to indicate specific development projects is fundamental and does not allow Ireland to defend itself effectively.
- 29 The Commission submits in response to this plea of inadmissibility that the present proceedings are based on a single reasoned opinion and that it and the application initiating the proceedings clearly define the grounds of complaint that are the subject-matter of the action. It adds that the application sets out the applicable national legislation and specifies the types of development at issue.

Findings of the Court

- 30 It is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (see, inter alia, Case C-195/04 *Commission v Finland* [2007] ECR I-3351, paragraph 22, and the judgment of 21 February 2008 in Case C-412/04 *Commission v Italy*, not yet published in the ECR, paragraph 103).
- 31 The Court has also held that, in the context of an action brought under 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 Community 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, Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003, paragraph 18).
- 32 In the present case, it is clear from the documents before the Court that the Commission indicated in the pre-litigation procedure, when it sent the request for information dated 13 September 2001 to Ireland, that the Irish legislation transposing Directive 85/337 which it was taking into consideration in that procedure was constituted primarily by the PDA and the PDR.
- 33 Moreover, in so far as the letters of formal notice of 18 October and 19 December 2002 expressly referred to certain of the complaints received that were cited in that letter of 13 September 2001, they left no remaining doubt as to the Irish legislation with which the Commission was concerned.
- 34 Furthermore, the single reasoned opinion, issued on 11 July 2003 at the end of the pre-litigation procedure, does not display any ambiguity either, while the application initiating the proceedings expressly cites the Irish legislation transposing Directive 85/337 – namely the PDA and the PDR – which is said to show that Ireland has not taken all the measures necessary in order for certain projects to be subject to an environmental impact assessment as established by the directive.
- 35 Finally, the projects in respect of which, according to the Commission, the Community requirements are not complied with are perfectly identifiable in the light of the project categories set out in Annex II to Directive 85/337.

36 It follows from the foregoing that the Commission's contentions in the course of the pre-litigation procedure and the procedure before the Court were sufficiently clear to enable Ireland to defend itself.

37 Accordingly, Ireland's plea of inadmissibility must be dismissed.

Substance

The first complaint

– Arguments of the parties

38 The Commission submits that the Irish legislation transposing Directive 85/337 is deficient in that it does not provide, in respect of project categories covered by point 1(a) to (c) of Annex II to the directive, for effective measures to achieve the objectives laid down in Article 2(1) and Article 4(2) and (3) of the directive.

39 Article 4(2) of Directive 85/337 permits Member States, in respect of projects listed in Annex II, to determine through a case-by-case examination and/or through thresholds or criteria set by the Member State whether a given project requires an environmental impact assessment in accordance with Articles 5 to 10 of the directive.

40 However, the thresholds based on project size adopted by Ireland fail to take account of sensitive locations, such as archaeological sites. They are, moreover, set arbitrarily and unrelated to the reality of the size of Irish land holdings. Finally, they do not permit cumulation with other projects to be taken into account.

41 Irish legislation therefore does not comply with the means for determining which projects falling within Annex II to Directive 85/337 must be subject to an environmental impact assessment, means which must take account of the selection criteria laid down in Annex III to the directive.

42 In support of its argument, the Commission sets out a number of examples which, in its submission, show that the use of uniform thresholds means that no examination at all is carried out in respect of the environmental effects of projects which are, however, likely to have significant such effects.

43 Thus, it submits that certain projects for the restructuring of rural land holdings which lead to the removal of hedgerows, in particular for agricultural purposes, are not the subject of an environmental impact assessment although the removal of hedgerows is liable to have adverse effects on biodiversity in the countryside and significant effects on the natural environment.

44 The same is true of projects for the restructuring of rural land holdings that involve the demolition of stone walls constituting field boundaries in certain regions, although their removal can result in significant archaeological loss.

45 The Commission finally makes the same criticism with regard to projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes and to water management projects for agriculture, including irrigation and land drainage projects.

46 Ireland submits first of all that the Commission has misinterpreted the scope of the Irish legislation and refers in particular to certain provisions of the PDR.

47 It adds that the interpretation of Article 4 of Directive 85/337 advocated by the Commission is irreconcilable with the wording of that article since it would effectively make reliance on thresholds impossible.

48 Directive 85/337 provides, by way of an alternative to a case-by-case examination of projects falling within Annex II, that a Member State may set thresholds for determining whether an environmental impact assessment is necessary.

- 49 Ireland states that it adopted the latter approach and set various thresholds, indeed at fairly low levels, including for the restructuring of rural land holdings, and that this system of thresholds is supplemented by Articles 103 and 109 of the PDR.
- 50 In deciding whether or not a development would be likely to have significant effects on the environment, the competent authority has regard to the criteria set out in Schedule 7 to the PDR, which corresponds to Annex III to Directive 85/337.
- 51 Ireland explains that detailed guidelines addressed to the competent local authorities deal with the screening of developments whose size is below the thresholds set by the applicable legislation and points out that those authorities can require the submission of an environmental impact statement, pursuant to Article 103 of the PDR.
- 52 Furthermore, the categories of development project at issue cannot be regarded per se as likely to have significant effects on the environment, so that it is only in the light of the characteristics specific to a given project that the possibility of such effects can be assessed.
- 53 Ireland adds that while certain classes of development, corresponding to minor development, are in principle exempted from the requirement to obtain permission, that exemption is, however, limited since, under Article 9 of the PDR, it cannot apply where a proposed development is likely to have significant effects on the environment. Article 9 of the PDR thus sets out six instances where the exemption cannot apply.
- 54 The Republic of Poland submits that the setting of uniform thresholds on the basis of the criterion of project size referred to in Annex III to Directive 85/337 does not of itself mean that the directive has been incorrectly transposed.
- 55 It observes that the Member States are entitled, for the purpose of determining which projects must be subject to an environmental impact assessment, to set thresholds without any requirement for a case-by-case examination. It adds in that regard that it is necessary, when adopting threshold values in respect of the criterion of project size, to take account of the other aspects of projects, in particular their nature and location.
- 56 The Republic of Poland concludes that Directive 85/337 can be infringed only by the setting of a threshold at a level which will fail to ensure that the objectives of the directive are achieved; a single threshold can therefore be set provided that it guarantees that all projects below the value thereby adopted have no significant effects on the environment.
- 57 Finally, the Republic of Poland states that all the selection criteria listed in Annex III to Directive 85/337 must be taken into account in the process of setting the threshold values.

– Findings of the Court

- 58 A preliminary point to note is that, by the present complaint, the Commission criticises certain provisions of the Irish legislation transposing Directive 85/337 and does not seek a declaration that Ireland has failed to fulfil its obligations under the directive in relation to specific factual situations.
- 59 Consequently, Ireland's line of argument that the Commission has not adequately established the factual basis for its action can only be rejected. Since the 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 legislation transposing it, it must be determined whether that legislation itself harbours the insufficiencies or defects in transposition of the directive which the Commission alleges, without any need to establish the actual effects of the legislation with regard to specific projects (see, to this effect, Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraphs 59 and 60).
- 60 In that regard, it must be stated first of all that the project categories covered by the present action fall within Annex II to Directive 85/337. The action therefore concerns projects in respect of which, pursuant to Article 4(2) of the directive, the Member States determine, either through a case-by-case examination or through thresholds or criteria, whether an environmental impact

assessment is required. Article 4(2) provides that Member States may also decide to apply both those procedures.

- 61 In accordance with settled case-law, where Member States have decided to have recourse to the establishment of thresholds and/or criteria, the limits of the measure of discretion which is thus conferred upon them are to be found in the obligation set out in Article 2(1) of Directive 85/337 that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment before consent is given (see, to this effect, in particular Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50, and the judgment of 28 February 2008 in Case C-2/07 *Abraham and Others*, not yet published in the ECR, paragraph 37).
- 62 In addition, pursuant to Article 4(3) of Directive 85/337, the Member States are under an obligation to take into account, when establishing those criteria or thresholds, the relevant selection criteria set out in Annex III to the directive.
- 63 Among those criteria, Annex III distinguishes (i) the characteristics of projects, which must be considered having regard, in particular, to their size, the cumulation with other projects, the use of natural resources, the production of waste, pollution and nuisances and the risk of accidents, (ii) the location of projects, so that the environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to the existing land use and the absorption capacity of the natural environment, and (iii) the characteristics of the potential impact, having regard inter alia to the geographical area and the size of the population.
- 64 It follows that a Member State which, on the basis of Article 4(2) of Directive 85/337, established thresholds and/or criteria taking account only of the size of projects, without taking into consideration the criteria noted in paragraph 63 of the present judgment, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the directive (see, to this effect, Case C-392/96 *Commission v Ireland*, paragraph 65).
- 65 Furthermore, a Member State which established those thresholds and/or criteria at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would likewise exceed the limits of that discretion, unless all the projects excluded could, when viewed as a whole, be regarded as not likely to have significant effects on the environment (see Case C-392/96 *Commission v Ireland*, paragraph 75 and the case-law cited).
- 66 It is clear from section 176 of the PDA, in conjunction with Article 93 of the PDR and paragraph 1 of Part 2 of Schedule 5 thereto, that Ireland has chosen, for projects falling within point 1(a) to (c) of Annex II to Directive 85/337, to set, in respect of each project category, a threshold based exclusively on project size, below which an environmental impact assessment is not obligatory.
- 67 Under paragraph 1(a) and (b) of Part 2 of Schedule 5 to the PDR, the threshold is 100 hectares in relation to projects for the restructuring of rural land holdings and the use of uncultivated land or semi-natural areas for intensive agricultural purposes and, under paragraph 1(c), the threshold is a catchment area of 1 000 hectares, or 20 hectares of affected wetland, in relation to water management projects for agriculture.
- 68 With a view to demonstrating that Ireland has failed to fulfil its obligations with regard to the present complaint, the Commission has set out some of the characteristics of the Irish countryside which show that projects of a size below the thresholds set by the Irish legislation are nevertheless likely to have significant effects on the environment by virtue of their nature or location, since they are liable to have a substantial, or even irreversible, impact on environmental factors such as fauna and flora, land or cultural heritage.
- 69 Thus, the Commission has established that projects for the restructuring of rural land holdings and projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes may, regardless of their size, result in the loss of field boundaries, and therefore of hedgerows, a loss which is likely, in parts of the Irish countryside, to have significant effects on biodiversity. Nor does Ireland seriously contest that water management projects for agriculture are liable to entail significant effects on the environment, since they may lead to a loss of biodiversity.

- 70 It should be noted that, according to information supplied by the Commission and confirmed by studies, the average field size in Ireland is approximately 2.4 hectares. As the Commission has demonstrated, in particular at the hearing, the effect of setting, in particular for the restructuring of rural land holdings, a threshold of 100 hectares is that a project relating to the consolidation of around 40 fields, which would entail the destruction of numerous hedgerows and other means of enclosure, could be granted consent without having been subject to an environmental impact assessment, although it is such as to have significant effects on biodiversity.
- 71 Likewise, it is common ground that, in certain areas, stone walls predominate and may have a certain archaeological importance, as is attested in particular by a case study concerning the Dingle Peninsula in County Kerry (F.H.A. Aalen, K.Whelan and M. Stout, *Atlas of the Irish Rural Landscape*, Cork University Press, 1997). Other studies establish a risk of accelerated destruction of archaeological remains that is directly connected with projects for the restructuring of rural land holdings and land drainage projects, although, in Annex III to Directive 85/337, subparagraph (h) of the third indent of point 2 mentions, among the selection criteria referred to in Article 4(3) of the directive, consideration of the environmental sensitivity of geographical areas likely to be affected by a given project in the light of the absorption capacity of the natural environment, paying particular attention to landscapes of historical, cultural or archaeological significance.
- 72 It is also common ground that, in practice, projects falling within point 1(a) to (c) of Annex II to Directive 85/337 are closely linked; the drainage of wetland thus often results in the use of semi-natural areas for intensive agricultural purposes.
- 73 While, as Ireland asserts, in the case of projects falling within point 1(a) to (c) of Annex II to Directive 85/337 that are of a size below the thresholds laid down by Schedule 5 to the PDR, planning authorities may apply Article 103 of the PDR in conjunction with Schedule 7 thereto and thus require submission of an environmental impact statement, such a possibility cannot be considered equivalent to a case-by-case examination complying with the Community requirements.
- 74 Those provisions of Irish legislation will be capable of applying only if the planning authorities have become aware of a project before it is carried out, and specifically if an application for consent has been made to them.
- 75 There is consequently no guarantee that, should those projects be likely to have significant effects on the environment, the competent authority will necessarily be able to require that an environmental impact assessment as provided for by Directive 85/337 be carried out before the decision entitling the developer to proceed with the project.
- 76 Furthermore, as Ireland acknowledges, it is apparent from Article 6 of the PDR in conjunction with Part 3 of Schedule 2 thereto that certain projects falling within point 1(a) to (c) of Annex II to Directive 85/337 are exempt from any requirement for prior consent, a fact which in principle precludes, in their regard, compliance with the procedure involving development consent and the assessment of their effects on the environment that is established by Article 2(1) of Directive 85/337.
- 77 Ireland submits, however, that such exemptions, which thus have the effect in particular that no application for planning permission is required in respect of the projects concerned, do not apply where one of the safeguard clauses contained in Article 9 of the PDR is applicable to the carrying out of the project envisaged and that the effect of the application of the safeguard clauses is that only projects which are not likely to have significant effects on the environment can benefit from those exemptions.
- 78 It should be remembered at this point that while, in proceedings under Article 226 EC for failure to fulfil obligations it is for the Commission to prove the existence of the alleged infringement and to place before the Court the information necessary for it to determine whether the infringement is made out, and in so doing the Commission may not rely on any presumption (see, to this effect, inter alia Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, paragraph 41 and the case-law cited, and Case C-441/02 *Commission v Germany* [2006] ECR I-3449, paragraph 48), the Member States are required, under Article 10 EC, to facilitate the achievement of the Commission's tasks (see, inter alia, Case C-494/01 *Commission v Ireland*, paragraph 42). It follows in particular that, where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is incumbent on the latter to challenge in substance and in detail the

information produced and the consequences flowing therefrom (Case C-494/01 *Commission v Ireland*, paragraph 44).

- 79 With regard to application of the safeguard clauses contained in Article 9 of the PDR, Ireland has not demonstrated that those clauses are such as to ensure compliance with the requirements imposed by Directive 85/337; it acknowledged moreover in the course of the procedure that recourse to an alternative strategy to implement the relevant provisions of the directive would have very significant implications for Irish agriculture and also stated that one of the Irish Government's objectives is to minimise the regulatory burden on all sectors of the economy, particularly the agricultural sector.
- 80 Those clauses are subject to the fulfilment of a number of conditions which make their application too uncertain to be capable of being regarded as limiting the operation of the exemptions in such a way that projects likely to have significant effects on the environment are systematically subject, before consent is given, to a requirement for development consent and an assessment of their environmental effects.
- 81 Most of those clauses are operative only where they fall within the framework of development plans drawn up by the planning authorities specifying that the protection of the matters of archaeological, geological, historical or ecological interest constitutes one of their objectives.
- 82 The carrying out of an environmental impact assessment in respect of a given project accordingly depends on the inclusion of those objectives in the development plan, and not solely on the effects which the project may have on the environment. Moreover, it should be pointed out that Ireland has supplied no information regarding the conservation objectives which development plans may have contained on the date when the period laid down in the reasoned opinion expired.
- 83 These factors are sufficient to establish that the application of the safeguard clauses contained in Article 9 of the PDR does not guarantee that the requirements of Directive 85/337 are observed with regard to projects falling within point 1(a) to (c) of Annex II to the directive which are likely to have significant effects on the environment and in particular that they will be subject to a requirement for development consent and an assessment of their environmental effects in accordance with Articles 5 to 10 of the directive, despite the fact that, as is recalled in recital 1 in the preamble to Directive 97/11, the assessment procedure is a fundamental instrument of environmental policy.
- 84 The first complaint is therefore well founded.
- 85 It follows that, by setting thresholds which take account only of the size of projects – to the exclusion of the other criteria laid down in Annex III to Directive 85/337 – for project categories covered by point 1(a) to (c) of Annex II to the directive and by not providing for a case-by-case examination for those project categories ensuring that projects likely to have significant effects on the environment do not escape an assessment of their environmental effects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the directive and has consequently not adopted all necessary measures to ensure that projects likely to have significant effects on the environment are made subject to a requirement for development consent and to an assessment of their environmental effects in accordance with Articles 5 to 10 of the directive.

The second complaint

– Arguments of the parties

- 86 The Commission states with regard to intensive fish farming installations that the Aquaculture (Licence Application) Regulations, 1998 (S.I. No 236/1998), which transposed Directive 85/337 in relation to aquaculture, allow an environmental impact assessment to be carried out for such an installation if the competent minister considers that the proposed aquaculture is likely to have significant effects on the environment.
- 87 Since that legislation does not, however, contain any reference to the criteria set out in Annex III to the directive, the minister is under no express obligation to take account of them in his appraisal.

- 88 The Commission cites by way of example a trial salmon farm at Kenmare Bay in County Kerry.
- 89 Ireland acknowledges that, initially, Irish legislation did not expressly provide that, when the competent minister considered whether the proposed aquaculture was likely to have significant effects on the environment, he had to have regard to the selection criteria set out in Annex III to Directive 85/337.
- 90 Ireland explains, however, that following the entry into force of the Aquaculture (Licence Application) (Amendment) Regulations, 2006 (S.I. No 197/2006), the applicable provisions henceforth expressly state that the minister must have regard to those criteria.
- Findings of the Court
- 91 First of all, it should be recalled that, in accordance with settled case-law, amendments to national legislation are irrelevant for the purposes of giving judgment on the subject-matter of an action for failure to fulfil obligations if they have not been implemented before the expiry of the period set by the reasoned opinion (see, in particular, Case C-392/96 *Commission v Ireland*, paragraph 86). It is thus inappropriate to take into account, for the purpose of assessing the merits of the present complaint, the amendments made to the Irish legislation in 2006.
- 92 As to the remainder, while the legislation referred to in paragraph 86 of the present judgment provides that the competent minister may require the submission of an environmental impact statement in the context to which the present complaint refers, it is not disputed by Ireland that the minister's decision-making power is in no way circumscribed by that legislation.
- 93 In particular, it does not follow from the legislation itself that, when the competent minister examines on a case-by-case basis applications for permission relating to intensive fish farming installations, which are projects that fall within point 1(f) of Annex II to Directive 85/337, he must take account of the selection criteria laid down in Annex III to the directive.
- 94 Consequently, the second complaint is also well founded.
- 95 It follows from all of the foregoing considerations that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Directive 85/337, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the categories of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive.

Costs

- 96 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. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the intervener in the present proceedings is to bear its own costs.

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

- 1. Declares that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the categories of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive;**

2. **Orders Ireland to pay the costs of the Commission of the European Communities;**
3. **Orders the Republic of Poland to bear its own costs.**