OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 17 December 1998 *

I — Introduction

1. Within a few months of its judgment of 22 October 1998 in Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135, the Court is again called upon to rule on the correct transposition into national law of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain projects on the environment (hereinafter 'the Directive'). [1] The question to be addressed in the present case is whether Ireland has adopted the necessary measures to ensure the correct transposition of the Directive into its national legislation.

II — The pre-litigation stage

2. On 13 October 1989 the Commission sent Ireland a letter of formal notice, in accordance with the procedure laid down in Article 169 of the EC Treaty. In response, Ireland sent the Commission copies of the Irish legislation transposing the Directive into national law (S.I. No 349 of 1989 and S.I. No 25 of 1990).

3. After examining that legislation, the Commission sent Ireland a further letter of formal notice on 7 November 1991, to which the Irish Government replied by letter of 12 May 1992.

4. On 28 April 1993 the Commission delivered a reasoned opinion in which it alleged that Ireland had failed:

(a) to transpose Article 3 of the Directive;

(b) correctly to transpose Article 4(2) of the Directive or Annex II thereto;

(c) to make proper provision for the exemptions provided for in Article 2(3) of the Directive;

(d) correctly to define the information to be provided by the developer in

* Original language: Italian.

1 — OJ 1985 L 175, p. 40.

accordance with Article 5 of the Directive;

(e) correctly to define the information to be provided to the public in accordance with Article 6(2) of the Directive;

(f) correctly to define the information to be provided to the other Member States in accordance with Article 7 of the Directive;

(g) to transpose the Directive within the period prescribed in Article 12 thereof.

5. Following the adoption of the reasoned opinion, there was an exchange of correspondence between Ireland and the Commission. By letter of 20 August 1993 Ireland disputed part of the reasoned opinion; under cover of a letter of 7 December 1994, it sent a copy of the Local Government Regulations 1994; under cover of a letter of 7 May 1996, it sent a copy of S.I. No 101 of 1996. Yet more correspondence ensued regarding Complaint No P 95/4724 concerning afforestation and Complaint No P 95/4219 concerning peat extraction.

Legal analysis

6. The present dispute concerns the measures adopted by Ireland for the transposition of the Directive into national law.

7. As I shall explain in due course, Ireland does not deny that it has failed correctly to transpose Articles 2(3), 5 and 7 of the Directive. The allegations which I propose to consider are those concerning the measures by which Ireland has exercised the option — available to Member States under Article 4(2) of the Directive — of establishing the criteria and thresholds necessary to determine which of the projects of the classes (or categories) listed in Annex II are to be subject, pursuant to Articles 5 to 10, to a prior assessment of their environmental impact. According to the Commission, in adopting the measures in question Ireland exceeded its discretion under the Directive.

8. Those allegations essentially concern only three classes of project: use of uncul-

tivated land or semi-natural areas for intensive agricultural purposes; initial afforestation or land reclamation; and extraction of peat. As grounds for its submission that the thresholds set by the Irish authorities infringe the Directive, the Commission makes a number of general points regarding all three classes of project to be considered by the Court. It then puts forward the arguments on the basis of which the infringements imputed to Ireland should be considered to be fully borne out in respect of the separate grounds of action.

Those general points may be briefly summarised as follows.

9. The Commission maintains that Ireland failed, in setting the thresholds, to draw any distinction between areas which are of importance and value for nature conservation and areas which are not; it disregarded the fact that areas where nature conservation is important (because of their archaeological or geomorphological interest, or other environmental values) are often small in relation to the physical area over which projects may extend in view of the thresholds set, even failing to take into account the absence of other suitable mechanisms in Ireland, formally established by statutory instrument and consistent with the aims and rules of the Directive, for the prior assessment of under-threshold projects.

Likewise, the Irish authorities did not take due account of the way in which projects of the classes at issue may, because of their progressive effects over time (hereinafter 'incremental effects'), have a significant impact on the environment even though they do not exceed the thresholds set. Moreover, where various interested parties undertake a number of separate projects, none of which exceeds the thresholds, but which are carried out at the same time and in adjoining areas, their cumulative or incremental effects may cause environmental damage and should not therefore be exempted from prior assessment under the Directive.

10. Ireland contends that none of the Commission's arguments has any basis in the provisions of the Directive governing thresholds, or in the Court's interpretation of those provisions. Moreover, the Commission has failed to show that the threshold set for the classes of project at issue has in practice resulted in damage to the environment consistent with some of the grounds of action. In particular, the argument founded on the possible cumulative and incremental effects of projects which do not exceed the threshold should be regarded as inadmissible.

The objection as to admissibility raised by Ireland is a preliminary issue with respect to certain grounds of action and should be examined immediately.

Objection as to the admissibility of certain pleas and the related evidence

11. Ireland submits that the Commission did not raise the above objection either during the administrative procedure or in the reasoned opinion. Accordingly, it constitutes a new plea and is therefore inadmissible, the Court having consistently held that, in proceedings against a Member State under Article 169 of the Treaty, the Commission may not raise before the Court pleas other than those relied on during the pre-litigation procedure. Ireland also maintains that the evidence produced by the Commission in relation to the alleged environmental impact of the cumulative and incremental effects of projects — arguments which, in Ireland's view, the Commission has introduced in order to raise new pleas before the Court — is also inadmissible. In gathering that evidence, the Commission has relied largely, if not exclusively, on complaints submitted to it by individuals, to which it did not refer in the reasoned opinion and which are the subject of separate investigations conducted by the Commission and still under way.

12. In response, the Commission claims that it referred to the problem of cumulative and incremental effects with the sole and transparent aim of elucidating and developing the argument set out in the reasoned opinion to the effect that the thresholds system adopted by Ireland incorrectly transposes the Directive precisely because Ireland neglected to evaluate, not only the size-capacity factor, but also other characteristics of projects; the problem of cumulative and incremental effects should therefore be viewed in relation to that of sensitivity of location, that is to say, of the location of projects in areas of potential significance in terms of environmental impact, a point already raised by the Commission during the pre-litigation procedure.

13. As regards Ireland's contention that certain evidence is inadmissible, the Commission explains that it had produced factual examples of the practical repercussions of Ireland's failure to fulfil its obligations in the matter of thresholds. Moreover, the information produced is, in part at least, a matter of public record and is associated only incidentally with information culled from other investigations pending before the Commission, which lie outside the scope of these proceedings, and, in any event, available independently of such investigations, comprising established facts

of which the Irish authorities are themselves aware and with which they were in a position to take issue, in defence of their own standpoint, in the course of the administrative procedure.

14. I am inclined to agree with the Commission. Its argument concerning cumulation and incremental effects is unquestionably related to its complaint in the reasoned opinion, first raised during the pre-litigation procedure, that the thresholds are inconsistent with the need to take into account the location of projects in areas which are sensitive but exempted from impact evaluation. Ireland's contention in its rejoinder that, as a matter of logic, the problem of cumulative and incremental effects arises independently of sensitivity of location, or the nature and size of the project, has no bearing on the complaint's admissibility. In my view, it in no way detracts from the fact that the Commission views the consequences of the cumulative and incremental development of projects exclusively in relation to their possible impact on areas which are environmentally sensitive. The facts relied on in that regard by the Commission constitute evidence in support of the arguments set out in the reasoned opinion, but neither alter nor extend the subject-matter of the dispute as delimited in the pre-litigation procedure: the substance of the infringement alleged against Ireland, both in law and in fact, is the same in the reasoned opinion as in the application and, accordingly, Ireland was not deprived of the opportunity at the pre-litigation stage to defend itself effectively. [2] Such evidence may properly be allowed, therefore, in proceedings before the Court, pursuant to Articles 40 and 42 of the Rules of Procedure.

Substance of the pleas. Preliminary observations concerning the limits placed by the Directive on the discretionary power to set the thresholds at issue

15. Before considering the merits, I should like to make some preliminary remarks

2 — See the legal arguments set out in the Opinion of Advocate General Cosmas of 26 November 1996 in Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699: 'As the Court has repeatedly observed, the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law and to avail itself of its right to defend itself against the complaints made by the Commission. Therefore the reasoned opinion with which that procedure concludes must determine as clearly and specifically as possible the subject-matter of the dispute, that is to say, it must contain all the particulars necessary to enable the Member State concerned to understand the factual and the legal basis of the Commission's allegation that the State in question has failed to fulfil its obligations. If the reasoned opinion satisfies those requirements, the Commission's application will be admissible even though the arguments it contains, both factual (relating to the facts constituting the situation or the conduct seen by the Commission as involving a failure by the defendant State to fulfil its obligations) and legal (concerning the interpretation of the provisions of Community law which the Commission regards as having been infringed), may have been enhanced by comparison with the arguments in the reasoned opinion, provided that such enhancement does not conceal an alteration or extension to the legal and factual basis of the case as crystallised in the reasoned opinion.'

concerning the nature of the test which the Court may apply.

Yet again, the problem before the Court concerns the limits to which Member States are subject when setting thresholds pursuant to Article 4(2). In support of their respective arguments, both the Commission and Ireland have relied on the case-law clarifying the wording of that provision. The Court has consistently held that the choices which Article 4(2) leaves to Member States are discretionary but nevertheless *subject to the limitations* set by Article 2(1), which provides as follows: '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.'

16. In my view, that requirement is of fundamental importance for the correct application and transposition of the Directive as a whole. It manifestly reflects the political aim of preventing ecological damage (see the seventh recital in the preamble) and therefore lays down a general *obligation* to carry out a timely and appropriate *assessment* which must *precede* authorisation of any of the projects, public or private, envisaged by the Community legislation in point. Since Article 2(1) plays a pivotal role in the Directive's structure, it must be read in close conjunction, not only with Article 4(2), but with many other provisions as well. We need look no further than Article 3: whenever impact assessment is carried out, it is necessary to identify and assess in each individual case the direct and indirect effects of a project on a number of factors which collectively constitute the 'environment' to be protected (human beings, fauna and flora, soil, water and the landscape, and their interaction, material assets and cultural heritage).

17. The Court has considered 'absolute thresholds', that is to say, those which have been definitively established within a single class of projects corresponding, the Court has stated, not to the large groups designated numerically but to the related subheadings which are alphabetically listed. [3] A threshold of that type marks an automatic cut-off point. Projects which exceed the level set are subject to prior assessment and authorisation. The others are not. It was this effect — precluding as it does verification in the case of below-threshold projects — on which the Court focused, and in *Kraaijeveld* it laid down a test for determining whether a State has exceeded its discretion in that regard. The Court affirmed that Article 4(2) entails the need to take into account, not the characteristics of a single project, but the characteristics as a whole of projects planned which fall

3 — See Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323 and Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

within the category under consideration. That said, the Court established that the threshold may not be fixed at a level such that, in practice, all projects of the same class and nature are exempted in advance from impact assessment.

The Court went on to state in *Kraaijeveld* that such a measure falls within the limits of the discretion only if, when viewed as a whole, all the projects exempted may be regarded as unlikely to have a significant impact on the environment.

18. However, the question arises whether in the present case that is the *only* restriction to which Member States are subject under Article 2(1) in view of the underlying aim of taking preventive measures to protect the environment. I do not think so. According to the test laid down by the Court in *Kraaijeveld* and in the other judgments referred to therein, the key is to evaluate threshold levels on the basis of the *exclusory* effect they may have with regard to the prior assessment of an *entire* category of projects. No reference class may be exempted a priori from impact assessment. The classes are predetermined by the Directive and listed in either Annex I or Annex II, according to whether the projects envisaged therein (see the sixth and seventh recitals) — which are *in any event* presumed to be significant in terms of environmental impact — are subject to the assessment procedure governed by Articles 5 to 10 *directly* (Annex I), or *indirectly* (Annex II), through the choices left to Member States, such as the setting of thresholds. Member States may make the projects listed in Annex II subject to the prior assessment procedure provided for by the Directive if the *characteristics* of projects belonging to those classes so require. Article 2(1) expressly identifies *which characteristics* are to be taken into account: primarily, the nature and size of the project, and its *location*. The latter is the one most closely connected with the present case.

19. The Directive has thus categorised projects by *class* and by *characteristics*. These are *parameters* or *reference criteria* which the national legislature must respect when transposing the Directive. What implications does this have for the present case? Prior assessment is a general obligation under a rule which is both binding and endowed with direct effect. [4] The fact that an assessment must be carried out when the characteristics of projects as defined in Article 2(1) so require means that this is an obligation, one might say, as to the *result* to be achieved, which is binding on the Member States, whatever methods they may have chosen to implement Article 4(2). To put it more clearly, for present purposes: if the preferred mechanism is the threshold system, the Member States must take all measures necessary when adopting it to ensure that impact assessment is carried out whenever a project exhibits, together with the other characteristics, that of being located in a sensitive area, and is

4 — See *Kraaijeveld* (cited in footnote 3), paragraph 43.

likely to have a significant impact on the environment.

20. Moreover, as the Court observed in *Kraaijeveld*, there are certain standards which must always be met if thresholds are to be justified. There is more than one reason for this. By operation of Article 2(1), national authorities do not enjoy a *broader discretion* if they opt for thresholds than if they use *other* methods of transposition available to them under Article 4(2). There are indeed other options open to them provided, of course, that the obligation as to the result to be achieved, laid down by Article 2(1), is not thereby circumvented or breached. Let us consider, for example, the case where a Member State decides that it need not set the threshold at a level which makes sufficient allowance for *sensitivity of location*, because that would be either technically difficult or impracticable for some other reason. The State in question may make provision for the areas most at risk of environmental damage by means of specific projects subject to impact assessment, waiving the threshold in such cases and arranging for another, more suitable, method of prior verification for the projects affected.

21. Besides, the threshold is an abstract and general mechanism which by its nature sets aside all projects below the prescribed level as irrelevant for the purposes of impact assessment. As a mechanism for protecting the environment, it is inherently more limited and less secure than supervision on a case-by-case basis, which is precisely why the 'margin' — in the words of the Court — of discretion left to Member States must be assessed by reference to specific *standards*. Admittedly, in *Kraaijeveld*, the Court rejected the Commission's argument that the setting of a threshold did not relieve the State in question of the obligation to determine whether each project met the criteria laid down in Article 2(1).[5] The Court pointed out that Article 4(2) expressly permits the setting of thresholds and there is no reason why, once the Member State concerned has chosen that option, each project should still be subject to individual assessment on the basis of the criteria laid down in Article 2. That is the clear and inescapable conclusion. If, however, a threshold has *not* been set for the class of projects at issue (or if a threshold has been set, but is inconsistent with the Directive), the obligation under Article 2(1) to determine in the case of each individual project whether or not, in the light of its particular characteristics, it must undergo assessment, arises anew. Advocate General Mischo made this clear in his Opinion of 12 March 1998.[6]

22. The approach adopted by Advocate General Mischo is vindicated by the new

5 — See paragraph 49 of *Kraaijeveld*.

6 — See point 57 of the Opinion of Advocate General Mischo of 12 March 1998 in Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135.

version of Article 4(2) in Directive 97/11/EC, [7] which replaces Directive 85/337/EEC. According to the new wording of that provision, the Member States are to determine through a case-by-case examination or by means of thresholds or criteria, or by both procedures together, whether any project listed in Annex II should be made subject to an assessment in accordance with Articles 5 to 10. The *abstract* thresholds mechanism and *in concreto* verification are deemed to be *equivalent* and may even be combined. Limited discretion is conferred here, as is also true of the test to be applied to the facts at issue. The version of Article 2(1) set out in Directive 97/11/EC is substantially the same as in Directive 85/337/EEC. Where a threshold is set, it *displaces* the requirement, *which would otherwise apply*, that each individual project must be assessed. This confirms that, according to both versions of the legislation, thresholds may not be set which are at variance with the aims of *specific* assessment or in disregard of any of the characteristics on the basis of which Article 2 provides that impact assessments should be carried out.

23. If that requirement is not satisfied, the exclusory effect of the threshold will entail a breach of the criteria laid down in Article 2(1): the Member State will then have exceeded the limits of its discretion, as when operation of the threshold in practice exempts an entire class of projects from prior assessment. That is, as it were, an 'isolated' event, because the threshold ultimately defeats its own purpose — at both the theoretical and the practical level — which is to identify, for each class of project, which projects should be subject to impact assessment and which should not. Its effect, however, is to exempt a priori virtually the *entire* class to which the projects at issue belong. In the present case, however, the question is not *whether* but *how* the threshold mechanism distinguishes the projects which are significant in terms of environmental impact from the others within the same class. That problem, too, concerns the discretionary power enjoyed by the Member States and must be taken fully into account when it comes to defining the correct exercise of that power. I have already pointed this out. Let me stress that point, but with a different emphasis: if the threshold is adopted in breach of the criteria laid down in Article 2(1), the rules applying to projects (and to the related 'developers', pursuant to Article 1(2) of the Directive) will, in my view, be tainted by unlawful discrimination, according to whether prior assessment is excluded or permitted. For the purposes of prior assessment, the Directive in principle treats all the projects envisaged therein *in the same way*: Member States may at their discretion use thresholds (or similar mechanisms) in order to distinguish between projects *only if they are consistent* with the wording and purpose of Article 2(1).

24. How, then, is justification best measured in the present case? The question to ask is whether or not the threshold mechanism, as devised, operates in such a way that the Directive is not complied with, an outcome which could have been *avoided* through the use of *other* methods *available* owing to the discretion enjoyed by the

7 — Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73, p. 5).

Member States, provided, of course, that they are *consistent* with Article 2(1). In the following analysis of the separate grounds of action, that is the test that I propose to apply. [8]

25. Now that the problem has been defined in those terms, it is crucial in the context of these preliminary remarks to make an additional point regarding the matter of evidence, which is pertinent to all the issues raised in this dispute. Is the Commission under an obligation to produce firm evidence that the environmental heritage has in fact been significantly damaged as a consequence of the defendant State having set and applied thresholds exempting projects from impact assessment at the level chosen by it?

26. As I mentioned above, Ireland contends that the Commission is under such an obligation. The most important point made by the Commission in response is the following: the proceedings which it has initiated concern the conformity of the Irish measures with the Directive, and the failure imputed to the defendant State is that of not having adopted the provisions necessary to comply with the obligation of *prior* assessment; that obligation is laid down in respect of projects which are *likely* to have a significant environmental impact and those, in the Commission's view, are the projects which concern 'sensitive' areas within the meaning considered above. If this is the thrust of the pleas under examination — and, in my view, it is — the only evidence that the Commission may be required to produce is evidence to show that there are areas, identified by that institution, in which the execution of the projects at issue may, in the light of their characteristics, have adverse repercussions on the environment. It is not necessary, however, to show that the impact envisaged by the Directive as merely *potential* for the purposes of assessing its effect has *actually occurred*. Where the Commission provides such evidence as well, this would, if anything, serve to confirm the assumption that there are areas below the threshold in dispute which are exposed to the risk of considerable environmental damage, in which the activities of the class considered should, because of their *likely* effects, have been subject to prior assessment.

Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes (Annex II, point 1(b))

27. The threshold for the above class of projects is laid down in Article 24 of the First Schedule, Part II, 1(a) of S.I. No 349 of 1989. That statutory provision provides for an environmental impact assessment

8 — In a sense, the *Kraaijeveld* test can be applied in the present case. The Court devised a 'test' of 'last resort', so to speak, for use when the threshold is unlawful because it exempts an entire class of projects from impact assessment: the threshold may still be justified if the exempted projects, viewed as a whole, are unlikely to have a significant impact on the environment. In the present case, on the other hand, the question is whether the threshold is unlawful because it was set in disregard of the criterion of the project's location: the last-resort test of its justification is therefore satisfied if, on an overall appraisal of the characteristics of the exempted projects, it transpires that *none* of them is located in a *sensitive area*, which would have rendered them subject to impact assessment.

(EIA) of certain areas to be carried out in respect of projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, where the area concerned exceeds 100 hectares. The threshold was set at that level by virtue of Article 24 of the First Schedule, in conjunction with other provisions concerning land reclamation.

The Commission submits essentially that operations have been carried out in areas smaller than 100 hectares which may damage nature conservation and which should not therefore have been exempted from impact assessment. It cited the case of the Burren, County Clare, where the cumulative effects of the operations threaten to alter or to destroy a very fine and extensive limestone pavement and the rare plants which grow there. The area in question is also characterised by important archaeological remains.

28. The Commission also contests the exemption from impact assessment of approximately 60 000 hectares of semi-natural areas set aside as pasture (and in particular for sheep farming) and thus converted to intensive agriculture. Overgrazing has caused and may yet bring about serious environmental damage to many places which the Irish authorities themselves acknowledge to be so important for management of the ecosystem that their listing as Natural Heritage Areas has been proposed.

29. Ireland counters that those pleas fail to take into consideration, as they should, the entire class of projects at issue. The Commission has essentially confined its arguments to the land reclamation sector. As for the points concerning the semi-natural areas set aside for grazing, the Commission has not even identified the geographical area referred to in its application, nor demonstrated that the alleged conversion to intensive agriculture took place in areas smaller than 100 hectares and thus not subject to prior assessment. There is no evidence in any of these cases to show that action has in fact been taken which has deleterious effects for nature conservation. Ireland goes on to argue, striking a radical note, that the phrase 'intensive agricultural purposes' in Annex II, point 1(b), is not defined to a sufficient extent in the Directive, contrary to the principle of legal certainty. Consequently, Member States are entitled to regard the provision on which the Commission relies as non-existent. Furthermore, sheep grazing is outside the scope of the Directive, however the notion of intensive agriculture is construed. Grazing does not involve any interference with the natural surroundings or landscape which can or should form the basis of a project within the meaning of Article 1. That follows both from the fact that farming is inherently a free and personal activity and from the fact that farming in Ireland is traditionally practised according to the system of *commonage*, which makes it

practically unsuited to the arrangements introduced by the Directive.

30. Let me deal with that last point first. Ireland's rejoinder raises, above all, the problem of defining the category of intensive agriculture (and related projects), which Ireland maintains cannot include either sheep grazing or sheep farming. To my mind, however, the definition given in the list is clear enough to be correctly interpreted and applied in the present case. The uncultivated land and semi-natural areas referred to therein are those which undergo fundamental conversion in order to be used for intensive agricultural purposes. Grazing exploits the resources of the soil and therefore constitutes the kind of activity eligible for projects which should be subject to prior assessment (see Article 1(2)). There are intensive forms of grazing which can be measured, for example, in terms of stocking density and the number of sheep per hectare, as the Commission points out. It seems clear to me that overgrazing may affect the environment just as much as any other activity listed under point 1(b) of Annex II, all the more so when the livestock is housed in fixed installations designed for that purpose, and listed under other subheadings (see point 1(e) and (f) of Annex II). Furthermore, the Commission has raised pertinent and serious objections to Ireland's defence that the activity in question is not suited, or even amenable, to the requirements and technical aspects of the assessment procedure provided for in the Directive. Moreover, it is not unreasonable, as Ireland contends, to maintain that grazing should be subject to prior authorisation in accordance with the Directive; rather it is a simple and justifiable consequence of the protection which the Directive accords to the environment, and which applies to all forms of intensive agriculture and in general to the activities listed in the annexes, all of which are regarded as potentially damaging. Nor can the application of the Directive — which the defendant State is required to respect, and therefore to transpose accordingly — be hindered by the special features of the Irish *commonage* system in relation to grazing. The answer is clear. In this context, grazing belongs to the category of intensive agriculture.

31. The question therefore arises whether or not the 100 hectare threshold set by Irish legislation for that class of projects is consistent with the limitations to which the Member States' discretion in the matter is subject. In order to answer that question, I propose to apply the assessment criteria described above. The threshold in dispute would be in breach of the lawful bounds of discretion if it operated in such a way as to exempt from impact assessment operations in semi-natural areas of less than 100 hectares where the location of the project is likely to have a significant impact on the environment. The Commission alleges that

overgrazing, wherever practised, exhibits the characteristics which, according to the Directive, call for impact assessment. Ireland contests this on the abovementioned grounds and also argues that in Ireland the environmental impact of grazing is monitored under programmes established by Community regulations and designed to discourage intensive grazing, while the grant of financial assistance is subject to the condition that the farmers concerned must participate in the management of the Rural Environmental Protection Schemes instituted by the defendant State.

32. The Commission has demonstrated that it received from the Irish authorities themselves, in the course of their exchange of correspondence (copies of which are in the case file), information showing that approximately 60 000 hectares had been ecologically damaged or endangered by overgrazing. In my view, the Commission thereby provided sufficient evidence to substantiate its ground of action (see point 26 above).

33. How, then, to evaluate the measures for monitoring the environmental impact of grazing which apply in Ireland independently of the threshold system at issue here? To my mind, these must *comply* with Article 2(2) of the Directive which provides that impact assessment may be *integrated* into the existing authorisation procedures, or into other procedures or into procedures to be established in the legal systems of the Member States. Accordingly, all these procedures must be designed to achieve *the same aims* as the Directive: the obligation of prior assessment, as laid down by Article 2(1), is binding on the Member States when they introduce those other procedures into their respective legal systems, just as their discretion is limited in the cases provided for in Article 4(2).

The 'wide-scale monitoring' of the possible environmental impact of intensive grazing (and, more generally, of the other activities listed in the annexes) must, whatever the procedure laid down or the competent authority, bring about the result which is significant in the context of these proceedings: it must therefore be organised on the basis of statutory provisions which are specifically designed to underpin recourse to prior assessment, that is to say, which prescribe such assessment where required by the Directive but excluded by the threshold.

34. The Commission complains that there is no guarantee that the desired result can be achieved. Ireland has not put forward, it seems to me, any argument to support the opposite conclusion. From that I must infer that the authorities responsible for mon-

itoring environmental impact in under-threshold areas may exercise a broad discretion, which is in any event greater than that conferred on Member States by Article 4(2).

If that is the position, then these other internal procedures, far from supplementing the Community legislative arrangements in point, run counter to them. In any event, Ireland cannot rely on the fact that it has provided for such procedures in order to rebut the Commission's allegation.

35. The grounds for concluding that the 100 hectare threshold is not consistent with the Directive hold good, all the more so if we turn to the points made by the Commission concerning the Burren area.

That the Burren is a sensitive area, as the Commission asserts, is attested to by the report issued in 1996 by the Heritage Council, entitled *A Survey of Recent Reclamations in the Burren*. Numerous developments have taken place in the Burren (breaking up and levelling of the limestone pavement), a good many in areas classified by the Irish authorities themselves as Natural Heritage Areas. Various sites of important historical and archaeological interest have been destroyed. As well as land reclamation, this case involves breaking up the soil, which is taken into account in the context of another ground of action.

The 100 hectare threshold applies to both types of operation. And it is in relation to both that the Commission raises the question of the cumulative and incremental effects of projects. Consonant with the order in which my arguments are deployed in this Opinion, I shall address that issue immediately.

36. In bringing this problem to the Court's attention, the Commission refers once again to Ireland's obligation to determine the threshold in the light of the characteristics of projects. More specifically, however, this entails the need to gauge how projects should be evaluated in relation to each other. That is the crucial aspect of this plea. My analysis will focus on the project characteristics which have been mentioned by the parties.

37. The *size* of a project which by its *nature* converts uncultivated land or semi-natural areas to other uses is calculated, for the purposes of setting a threshold, in terms of surface area: 100 hectares. According to the Commission, that threshold is not *correlated* — or, at least, is not *logically* correlated, consistent with the proper exercise of a discretion — with the project's location, which had to be taken into account in the case of areas particularly susceptible to the effects of operations of

that particular kind. The Commission argues that the threshold set is correlated to a sufficient extent with the factor of *sensitivity of location*, only if *it is applied* having regard to:

both

(i) the *individual* projects planned for the area in question, which may affect relatively small areas, well below 100 hectares, as in the case of the Burren, where deforestation or land conversion is fragmented, involving a number of operations and different developers;

and

(ii) all the projects which, *as a whole*, affect the same area: in this context, the important factor for the purposes of prior assessment is therefore the *full impact* of the operation to which the projects, viewed individually or collectively, subject a section of the environment which is recognised as deserving special protection.

38. The assessment procedure is, therefore, set in motion every time land development of the class and characteristics described affects more than 100 hectares, regardless of whether *one* or *more* projects are involved. That is why the Commission maintains that regard must be had both to incremental effects — those which develop over time as a particular project progresses — and to the effects which may follow from the cumulation of projects planned and carried out contemporaneously by separate developers in adjoining areas which collectively encompass the 100 hectares set. Whenever a project is characterised by *sensitivity of location*, therefore, its prior assessment must be contemplated, subject always to verification that the area of land involved, if less than 100 hectares, exceeds that threshold when considered in conjunction with other areas affected by adjacent projects of the same kind.

39. Strictly speaking, this plea contests not the *level* of the threshold adopted in Ireland, but its *application* here, which the Commission regards as contrary to the Directive precisely because incremental and cumulative effects are not taken into account. The test is therefore: does it follow from Articles 2(1) and 4(2), read together, that where Member States have set thresholds, their application must be governed by the specific criterion argued for by the Commission?

40. Prior assessment concerns the characteristics of projects viewed in terms of their *effects*. The procedure is one of verification *in concreto*, and effects are therefore attributed to the *individual* project. That does not mean, however, that the Directive

excludes the cumulative and incremental effects under consideration from the range of those that are relevant. Quite the contrary. Article 3 states in fact that prior assessment is meant to *identify* the *direct and indirect* effects of every project on all the environmental factors. Incremental effects obviously flow from the individual project, and are *direct*, because they are immediately linked to the progress of the operation planned by the developer. In my view, cumulative effects are also a proper subject for prior assessment, being attributable to the individual project, where the foreseeable impact of its characteristics is *intensified* by a conjunction of circumstances which are themselves relevant to environmental protection, such as the aggregation of the individual project with other projects in the sensitive area of its location. That makes it justifiable — and, in my view, necessary — to take cumulative effects into consideration when determining whether the project exceeds the threshold and should be subject to prior assessment.

41. Ireland contends in its defence that Member States were under no obligation to take the cumulative effects of projects into account until the adoption of Directive 97/11. Directive 85/337, which applies to the present case, is silent in that respect. However, the relevant annex to Directive 97/11 lists *a series of selection criteria*, focusing on the characteristics of projects and their potential impact. Cumulation is listed as one of the project characteristics. As in the case of the other application criteria identified in the annex, the fact that the Directive specifically mentions cumulation is clearly an *inevitable consequence* of the obligation to take into account *even the indirect* effects of projects on the environment when evaluating their characteristics. Both Directive 85/337 and the more recent directive lay down that obligation in essentially the same terms (cf. Articles 2 and 3 of both directives).

42. I conclude, therefore, that the Commission's submissions are well founded: Ireland's failure to fulfil its obligations lies in the fact that it did not base the threshold at issue on the necessary provisions enabling the incremental and cumulative effects of projects to be taken into account in its application, having regard to the aforesaid conditions. It is therefore necessary for such additional rules to be adopted, assuming Ireland maintains the threshold already set and does not decide to transpose the Directive by other methods consistent with the proper exercise of its discretion.

Annex II, point 1(d): initial afforestation where this may lead to adverse ecological changes and land reclamation for the purposes of conversion to another type of land use

43. Article 24, First Schedule, Part II, 1(c)(i) of S.I. No 349 of 1989 requires an impact assessment for initial afforestation where the surface area exceeds 200 hec-

tares, and for the replacement of broadleaf high forest by conifer species where the area in question exceeds 10 hectares. S.I. No 101 of 1996 altered those thresholds, providing in conjunction with other Irish statutory provisions that an impact assessment must be carried out in the following cases: in respect of initial afforestation, when the area involved — either on its own or taken together with other adjacent wooded areas — has come over the preceding three years to cover more than 70 hectares. Where existing woods are to be replaced by conifer species, the threshold is 10 hectares. Article 24, First Schedule, Part II, 2(c)(ii) of S.I. No 349 of 1989 sets, however, a threshold of 100 hectares for projects where the area is to be reclaimed for conversion to another type of land use.

44. The Commission takes issue with that legislation in so far as it leaves below the threshold level, and thus exempts from prior assessment, afforestation projects planned for areas of blanket bog or for areas near waterways. The Commission also contests the threshold of 100 hectares set for projects concerning areas which are to be reclaimed for conversion to another type of land use. Those grounds of action should be examined separately.

(a) Afforestation of blanket bog areas

45. By letter of 6 May 1996 Ireland confirmed to the Commission that various subsidies had been granted to implement afforestation projects: in February 1994 in respect of an area of 76 hectares in Dunragh Loughs and Pettigo Plateau; in December 1994 in respect of an area of 44.1 hectares in Tullytresna Bog; and in March 1994 in respect of an area of 190 hectares in Tamur Bog. Those projects were not subjected to environmental impact assessment. According to the Commission, the afforestation of blanket bog areas involves ploughing, drainage, the use of fertilisers and radical changes of vegetation, operations which risk damaging or even destroying the ecosystem of blanket bog. In support of its allegation, the Commission produced evidence showing that in many areas, designated by the Irish authorities themselves as Natural Heritage Areas (*Dunragh Loughs, Pettigo Plateau, Tullytresna Bog, Tamur Bog*), unmonitored afforestation operations are underway. The Commission quotes scientific studies attesting to the serious or even irreversible impact which such operations may have on the areas in question,[9] and draws particular attention to the afforestation project in Dunragh Loughs and Pettigo Plateau, areas of approximately 2 000 hectares, which are considered to be of great scientific interest because of the undisturbed blanket bog. The Commission adds that the importance of that area in environmental terms has been recognised internationally (900 hectares of the Pettigo Plateau are covered by the 1986 Ramsar Convention), and in the context of Council Directive 79/409/EEC in relation to which Ireland itself designated 619.2 hectares of Pettigo Plateau as an area meriting special protection. Furthermore, Pettigo Plateau and Dunragh Loughs are mentioned in a contract concluded between the European Commission and the Irish National Parks

9 — The Commission refers on this point to Stroud, Reeds and Others, *Birds, Bogs and Forestry, the Peatlands of Caithness and Sutherland*, Nature Conservancy Council.

and Wildlife Service on 28 December 1995 in accordance with Council Regulation (EEC) No 1973/92, on the basis of which financial support was given for various management and intervention programmes designed to protect and conserve the environment. In that connection, the Commission refers to the report entitled *Survey of Breeding Birds at Pettigo Plateau, Country Fermanagh*, [10] which explains how the kind of afforestation under consideration constitutes a serious threat to the protection of the environment: conifer plantations have a fragmenting effect on the drainage system of such areas, rendering them no longer suitable as a natural habitat for various indigenous species of fauna (such as the Greenland white-fronted goose, the hen harrier and the golden plover). Other species of bird and land mammal become more vulnerable with the arrival in the plantations of new predators.

46. Ireland contends that, following the Commission's reasoned opinion, the Law of 1 October 1996 reduced the impact assessment threshold from 200 hectares to 70 hectares. Ireland has thus fulfilled its obligations under that opinion and the Commission has failed to show that projects below the new threshold have a significant impact on the environment. In any event, the afforestation projects planned for Natural Heritage Areas are subject to monitoring by the National Parks and Wildlife Service. The Habitat Regulations adopted by the Irish authorities protect the areas in question more effectively than compulsory impact assessment: authorisation for afforestation is subject to compliance with environmental protection standards equivalent to or higher than those applied to projects which exceed the Irish statutory threshold. Moreover, afforestation costs are so high that in practice the operation requires financial assistance and is not therefore exempt from the attendant supervision in the case of Natural Heritage Areas.

47. In evaluating the Commission's submissions, here as before, it should be noted that the applicant has focused on sensitive areas for which no prior assessment is required in respect of afforestation projects. The scientific reports and other evidence produced by the Commission show that the detrimental effects on the environment caused by the afforestation of peatlands is

10 — Rachel Bain and Clive Mellon, Summary Report, *Survey of Breeding Birds at Pettigo Plateau, County Fermanagh*, 1995, Royal Society for the Protection of Birds (RSPB).

considerable. The point of law at issue here is the same as was considered above in the context of uncultivated land and semi-natural areas converted to intensive agriculture. If the threshold exempts projects affecting sensitive areas from prior assessment, it cannot be concluded that in adopting that threshold the defendant State acted in the lawful exercise of its discretion. That is the position here. To my mind, therefore, the Commission's plea is well founded. Admittedly, Ireland contends that it has made provision — in respect of below-threshold projects as well — for monitoring the impact of afforestation, both generally by statute (S.I. No 94/97 European Communities Regulations 1997) and through administrative procedures: the grant of subsidies for operations of that kind is thus conditional upon strict verification of their compatibility with the protection of the environment. That contention is mostly argued on the basis of the practical need for financial assistance. Ireland points out that afforestation was initially managed by the State and only later by private enterprise, at times funded by the European Community: and whoever pays the piper calls the tune. However, the availability of subsidies, or any other financial assistance granted by the Member State to developers on condition that they respect environmental constraints is of no significance for the purposes of Article 1 of the Directive: Article 1 makes arrangements for authorisation which is unconditionally linked to the prior assessment of a project *whenever* it involves any of the matters listed in Annexes I and II. Prior assessment is incorporated in internal procedures only in accordance with the conditions which I have described above (see point 33) and these cannot be waived by the Member States. In other words, the incentive which drives the private developer to seek funding has no bearing on the controls required under the Directive: so much so that the obligation to carry out prior assessment applies whether projects are private or funded by the State.

Nor is it pertinent to point out that the Commission objected in its reasoned opinion to a 200 hectare threshold and that the defendant State then reduced it to 70 hectares. The Commission also considers the lower threshold applied as from 1 October 1996 to be inappropriate and submits that, in setting that level, the Irish legislature took no account of the incremental effect, because it exempted from prior assessment projects which do not exceed that level within three years; the developer concerned may, once the three years have elapsed, submit a new project which will always remain exempt from impact assessment provided it does not affect a surface area of more than 70 hectares. In calculating the overall effect of the project already executed and the new project, the cumulative effect over time should be borne in mind, as I explained above (see points 40 and 41), and this should always be taken into account when applying the threshold set, whatever its level.

I shall pass over the allegation that Ireland infringed Article 7 of the Directive in that it failed to fulfil its obligation to inform and consult the United Kingdom, which is an interested party, given the fact that some projects, such as Pettigo Plateau, straddle

the border. That is the subject of another ground of action, which Ireland does not contest.

(b) Afforestation of areas near waterways

48. Using the reports on *Aquafor* and *The Trophic Status of Lough Conn*, the Commission has shown that afforestation in certain areas has a serious impact on the environment because of the acidification and eutrophication of water. Ireland submits that these reports should not be relied upon because the studies to which they relate were effected before the Directive came into force. There is no evidence, therefore, to substantiate the Commission's argument. Ireland's submission cannot be upheld. It is useful to note that the two studies merely define in scientific terms the causal link between afforestation and the serious impact on the environment caused by the acidification and eutrophication of waters in certain parts of Ireland. They make an important contribution to the Court's analysis, not because they demonstrate the *fact* of environmental damage, which is not an issue here (see point 26 above), but because they provide scientific guidance to the special nature of the areas in question and to the possible impact of afforestation projects located there.

49. Both the *Aquafor* report and other scientific studies attest, moreover, to the damage caused by afforestation near waterways. [11] The plea is justified, however, in that the Commission has identified areas which are sensitive to the acidification of waters, such as the Counties of Galway, Wicklow, Donegal and Kerry. The scientific authority of the reports produced by the Commission and quoted in that regard provide clear evidence, to my mind, that afforestation should have been subject to prior assessment, whereas it is not: the threshold does not permit this, and there are no adequate alternatives by which the environmental impact of the projects at issue can be monitored.

(c) Projects for land reclamation for the purposes of conversion to another type of land use

50. The arguments set out above must also be applied to the evaluation of the 100 hectare threshold set in respect of projects for land reclamation for the purposes of conversion to another type of land use, by application of Article 24, First Schedule, Part II, 2(c)(ii) of S.I. No 349 of 1989. The important case in this context is the Burren, examined earlier. Allow me to refer to my observations in that regard (see point 35

11 — See 'Evaluation of the Effects of Forestry on Surface-Water Chemistry and Fishery Potential in Ireland', EOLAS Contract ER/90/76; N. Allott and Others, 'Stream Chemistry and Forest Cover in Ten Small Western Irish Catchments' in *Ecological Effects of Afforestation, Studies in the History and Ecology of Afforestation in Western Europe*, 1993; N. Allott and M. Brennan, 'Impact of Afforestation on Inland Waters' in *Water of Life*, Dublin, 1992.

above). There are sound reasons for believing that land reclamation represents no less a threat to the ecosystem than the conversion of land for intensive agricultural purposes. Projects involving that operation in areas such as the Burren should therefore be subject to impact assessment, even if they affect an area of less than 100 hectares.

Projects referred to in Annex II, point 2(a): extraction of peat

51. Similar considerations weigh in favour of upholding the next plea which concerns the effects on the environment of projects for the extraction of peat. Such operations may constitute — according to the Commission, and I see no reason to disagree — one of the most serious threats to the integrity of the environment, particularly in the case of the peatlands at issue. The extraction of peat in boggy areas involves drainage. That in turn leads to the drying out of peat-forming vegetation. The lowering of the water table causes shrinkage of the peat content of the bog; the slope of the bog becomes more acute, increasing the water run-off, and exacerbating the drying-out process. In that connection, the Commission cites the example of Ballyduff-Clonfinane Bog in County Tipperary, which is examined in detail in Complaint No P.95/4218. That site, which consists of two separate bogs, forms a complex of 312 hectares and was designated a Natural Hertitage Area in 1995. On 28 December 1995 a contract was concluded between the Commission and the National Parks and Wildlife Service for the grant of ECU 344 000 by way of funding for the preservation and protection of the peatlands.

52. The threshold for peat extraction projects was set at 50 hectares, as laid down in Article 24, First Schedule, Part II, 2(a) of S.I. No 349 of 1989. Ireland's defence — leaving aside the arguments disposed of above and put forward again in this connection — is essentially two-fold: (i) the Commission based its allegations almost exclusively on the exceptional case of Ballyduff-Clonfinane Bog, disregarding the test laid down in *Kraaijeveld*, which requires account to be taken of the characteristics of all the projects of the class at issue, never of one project alone; and (ii) the threshold was set at 50 hectares because the Irish legislature wished to draw a distinction between the commercial exploitation of peat and the tradition of turf-cutting, practised for centuries in rural Ireland, that is to say the hand- cutting of peat by an individual for his family needs.

53. In my view, neither defence should be upheld. As I have already explained (see point 24 above), the criterion of the location of the project is disregarded whenever the threshold effectively precludes impact assessment notwithstanding the serious potential impact of the operation in question, in view of its location. The number of

projects affected by the threshold's exclusory effect is irrelevant, in the light of the criterion relied upon by the Commission.

54. Nor does it seem to me that Ireland's approach can be validated by the argument that above-threshold operations are commercial whereas below-threshold operations are manual and traditional, hence there is no justification for subjecting them to impact assessment. In its reply, [12] the Commission maintained that the justification for that distinction is unsustainable because turf-cutting by hand has largely given way to mechanical harvesting, with the result that small and medium-scale commercial exploitation is now widespread.

55. The only relevant point here is the possible impact of peat extraction on the areas in question. It should be borne in mind that, as the Commission points out, peat extraction may provoke *irreversible* changes in the ecosystem of the bogs. The Commission acknowledges that turf cutting by hand, hallowed in Irish tradition, [13] falls outside the scope of the Directive. It is the commercial exploitation of areas of less than 50 hectares, therefore, which ought to have been taken into consideration and, so far as we can tell, it has not. On application of the criterion set out above (see point 23 above), therefore, I would conclude that the threshold set gives rise to unjustified discrimination between projects of the class at issue (and between the respective developers). It should also be borne in mind that Irish legislation treats peat-cutting differently from analogous extraction operations (the quarrying of stone, gravel, sand or shale), listed elsewhere in Annex II, for which it has set a much lower threshold (5 hectares). It has yet to be shown that projects included in those other classes are likely to have a greater impact than peat extraction in sensitive areas; therefore the rules laid down by the Irish legislature in respect of the various extraction operations listed under separate headings in Annex II may well give rise to an unjustified difference of treatment as well, all such operations being relevant in terms of their potential impact on the environment. Consequently, in my view, this ground of action is also well founded.

Infringement of Articles 2(3), 5 and 7 of the Directive

56. S.I. No 349 of 1989 makes provision for the competent minister to exempt a project from assessment wherever this is warranted by exceptional circumstances. The Commission maintains that this arrangement is not consistent with Article 2 of the Directive because: (a) the minister is not required to determine whether another form of assessment is appro-

12 — See especially paragraph 19 of the Commission's reply.

13 — And even in Irish literature: see paragraph 106 of Ireland's defence.

priate or whether the information collected should be made available to the public; and (b) the minister is not required to inform the Commission.

57. Article 2 of S.I. No 349 of 1989 provides simply that an impact study may contain information. The Commission points out that the Irish legislation does not ensure, in accordance with Article 5 of the Directive, that developers provide in an appropriate form the information specified in Annex III thereto, in the case of projects which must be subjected to impact assessment.

58. The Commission also points out that Article 17 of S.I. No 25 of 1990 fails to provide a suitable mechanism transposing into national law the rules governing the Member States' obligation to transmit the information collected under Article 5 of the Directive to another Member State, where a project is likely to have significant effects on that State's environment and where it requests the information pursuant to Article 7 of the Directive.

59. Ireland does not deny that it has failed correctly to transpose Articles 2, 5 and 7 of the Directive into national law. It has stated its intention to clarify its legislation through measures in the course of adoption.

60. Therefore, those grounds of action must also be upheld. Ireland has failed to fulfil its obligation to transpose Articles 2, 5 and 7 of the Directive into national law within the period prescribed by the Commission in its reasoned opinion.

61. To sum up: the present dispute raises the problem, on which the Court's ruling will undoubtedly shed light, of determining how the choice of threshold — the 'absolute' threshold (see point 17 above) — fits in with the methods open to the Member States, pursuant to Articles 2(1) and 4(2) read together, of transposing the Directive into national law. As I have indicated, Ireland will be able to remedy the situation by adjusting its threshold system or by adopting other measures within its discretion. However, the discretion enjoyed by the Member States must always and only be exercised within the limits set by the Court in previous judgments and which it is called upon to define in the present case. In many respects, the Directive in question is comparable to a regulation in view of the direct effect of its key provision (Article 2(1)) and the exhaustive nature of its legislative content; moreover, its approach to the protection of the environment

embraces the entire range of aims contemplated, including nature conservation. As Ireland points out in its defence, nature conservation is also subject to other Community legislation, but in my view such rules in no way prevent a Member State from fulfilling its obligations under Article 2(1), the touchstone for the Court's analysis of this case.

That said, we must not forget that the Commission has confined itself to alleging that Ireland has failed to comply with the specific, albeit fundamental, criterion of *sensitivity of location*, and has quoted cases — or rather, *examples* — which arguably show that its general criticism is well founded. The question *how* the Irish legal system may best be adjusted to take adequate account of that criterion is a matter for Ireland (as for any other Member State) in the balanced and lawful exercise of the discretion conferred on it. Furthermore, as the Commission acknowledges, aside from the points at issue in these proceedings, Ireland has not failed to transpose the Directive correctly into its national law. Should the Court decide that, for the reasons set out above, Ireland has failed to fulfil its obligations, the thresholds at issue need not necessarily be reduced — nor indeed has the Commission specified a particular level to which they ought to be reduced — as if that were the only way to pass, like Alice in Wonderland, through a magic door. If the plea is upheld, however, the Irish legislature will in any event be required to make provision, generally and in such a way as to meet the requirements of legal certainty, for situations where projects are located in sensitive areas, in order to ensure that they are subject to prior assessment in *full and proper conformity* with the Directive. This holds true whatever method is chosen in order to implement the provisions of Article 4(2).

Conclusion

In the light of the foregoing, I suggest that the Court rule as follows:

(1) By failing to adopt all the measures necessary to ensure the correct transposition of Article 4(2) into national law in respect of the projects listed under point 1(b) and (d), and point 2(a) of Annex II to Directive 85/337/EEC and by failing, in part, to transpose Articles 2(3), 5 and 7 of that Directive

into national law, Ireland has not fulfilled its obligations under Article 12 thereof or under Article 169 of the EC Treaty.

(2) Ireland is ordered to pay the costs.