JUDGMENT OF THE COURT (Fifth Chamber)

21 September 1999 *

In Case C-392/96,

Commission of the European Communities, represented by Richard B. Wainwright, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Ireland, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, Philip O'Sullivan SC and Niamh Hyland BL, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

defendant,

APPLICATION for a declaration that, by failing to adopt all the necessary measures to ensure the correct transposition 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), Ireland has failed to fulfil its

* Language of the case: English.

obligations under that directive, in particular Article 12 thereof, and under the EC Treaty,

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, D.A.O. Edward and L. Sevón (Rapporteur), Judges,

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 September 1998, at which the Commission was represented by Richard B. Wainwright and the Irish Government by James Connolly SC and Niamh Hyland,

after hearing the Opinion of the Advocate General at the sitting on 17 December 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 5 December 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by failing to adopt all the necessary measures to ensure the correct transposition 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, hereinafter 'the Directive'), Ireland has failed to fulfil its obligations under the Directive, in particular Article 12 thereof, and under the EC Treaty.

2 The Commission alleges that Ireland has incorrectly transposed Article 4(2) of the Directive and points 1(b) and (d) and 2(a) of Annex II thereto, as well as Articles 2(3), 5 and 7.

3 Article 2(1) of the Directive specifies the types of projects which are to be subject to an assessment:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

4 An assessment is always required for certain projects, set out in Annex I to the Directive.

5 As regards other types of projects, Article 4(2) provides:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

6 Annex II lists a number of projects, including:

'1. Agriculture

...

(b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;

...

(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;

...

2. Extractive industry

(a) Extraction of peat

...'

7 Article 2(3) of the Directive states:

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

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;

(b) make available to the public concerned the information relating to the exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the Council on the application of this paragraph.'

8 Article 3 provides that an environmental impact assessment is to identify, describe and assess the direct and indirect effects of a project, in particular on human beings, fauna and flora, soil, water, air, climate, landscape, material assets and cultural heritage.

9 Article 5 states:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member

States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

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

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

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

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

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

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

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

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

10 Article 7 provides:

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

11 Under Article 12(1) of the Directive, the Member States had to take the measures necessary to comply with the Directive within three years of its notification. As the Directive was notified on 3 July 1985, that period expired on 3 July 1988.

12 Since the Commission considered that Ireland had not transposed the Directive correctly, on 13 October 1989 it sent a first letter of formal notice, in which it alleged that Articles 2 and 4 of the Directive had been inadequately transposed, having regard to the projects listed in Annexes I and II, and that Articles 5 to 9 had not been transposed.

13 In reply to that letter, Ireland sent the text of two legislative measures:

— the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No 349 of 1989) (hereinafter 'S.I. No 349 of 1989'); and

— the Local Government (Planning and Development) Regulations, 1990 (S.I. No 25 of 1990) (hereinafter 'S.I. No 25 of 1990').

14 However, since the Commission took the view that this new legislation still did not produce a correct transposition of the Directive, it sent Ireland a further letter of formal notice on 7 November 1991.

15 By letter of 12 May 1992 Ireland replied that the provisions of the Directive were, in practice, complied with.

16 On 28 April 1993 the Commission, dissatisfied with that reply, sent Ireland a reasoned opinion in which it alleged, in particular, that Ireland had failed:

— to transpose properly Article 4(2) of the Directive and Annex II thereto;

— to make proper provision for exemptions under Article 2(3) of the Directive;

— to specify properly the information to be supplied by the developer in accordance with Article 5 of the Directive; and

— to make proper provision for the information to be supplied to other Member States in accordance with Article 7 of the Directive.

17 By letter of 20 August 1993 Ireland disputed some of the objections formulated in its regard. It then sent, by letter of 7 December 1994, the text of the Local Government (Planning and Development) Regulations 1994 and last, by letter of 7 May 1996, the text of the European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1996 (S.I. No 101 of 1996) (hereinafter 'S.I. No 101 of 1996').

18 In addition, after the reasoned opinion had been sent, correspondence was exchanged regarding complaints related to classes of projects at issue in this action, namely Complaint No P 95/4724 concerning afforestation on Pettigo Plateau and Complaint No P 95/4219 concerning peat extraction, in particular from Clonfinane Bog.

Infringement of Article 4(2) of the Directive and points 1(b) and (d) and 2(a) of Annex II thereto

19 The Commission alleges that Ireland has transposed Article 4(2) of the Directive incorrectly by setting absolute thresholds for the classes of projects covered by points 1(b) (use of uncultivated land or semi-natural areas for intensive agricultural purposes), 1(d) (initial afforestation/land reclamation) and 2(a) (extraction of peat) of Annex II to the Directive. The absolute nature of the thresholds means that it is not possible to ensure that every project likely to have significant effects on the environment is subject to an impact assessment, because the mere fact that a project does not reach the threshold is sufficient for it not to

subjected to such assessment, regardless of its other characteristics. Under Article 4(2) of the Directive, however, account must be taken of all the characteristics of a project, not the single factor of size or capacity. Furthermore, Article 2(1) refers also to a project's nature and location as criteria for assessing whether it is likely to have significant environmental effects. The Commission considers that this analysis is consistent with the judgments of the Court in Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323 and in Case C-72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

20 According to the Commission, projects which do not exceed the thresholds set may none the less have significant environmental effects. Two factors are important in that regard.

21 The first factor is that certain sites which are particularly sensitive or valuable may be damaged by projects which do not exceed the thresholds set. That is the case with areas identified as valuable and important for nature conservation and areas of particular archaeological or geomorphological interest.

22 The second factor is that the legislation fails to take account of the cumulative effect of projects. A number of separate projects, which individually do not exceed the threshold set and therefore do not require an impact assessment may, taken together, have significant environmental effects.

23 The Commission considers that the setting of absolute thresholds for the classes of projects covered by points 1(b) (use of uncultivated land or semi-natural areas for intensive agricultural purposes), 1(d) (initial afforestation/land reclamation) and 2(a) (extraction of peat) of Annex II to the Directive infringes Article 4(2) because one or both factors apply. It gives a number of examples of projects which are likely to have, or have had, significant environmental effects but which have not been the subject of any impact assessment because of the absolute nature of the thresholds.

24 As regards projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, covered by point 1(b) of Annex II to the Directive, the Commission challenges the threshold of 100 ha set by Article 24 of S.I. No 349 of 1989 and paragraph 1(a) of Part II of the First Schedule thereto, in conjunction with other provisions of the Irish legislation transposing the Directive. It states that 60 000 ha of semi-natural terrain in the west of Ireland have come to be used for intensive sheep farming and are suffering from serious degradation. The increase in sheep numbers should, in its view, have been the subject of an impact assessment, in which the intensity of use could have been determined by reference to a criterion of stocking density per hectare. Furthermore, 'project' is defined broadly in the Directive and also covers an 'intervention' relating to open land such as sheep grazing. Projects of that type have significant environmental effects in that they involve an alteration in uncultivated land or semi-natural areas through overgrazing which leads to soil degradation and erosion.

25 So far as concerns initial afforestation covered by point 1(d) of Annex II to the Directive, the Commission contests in particular the threshold of 70 ha prescribed by S.I. No 101 of 1996. According to that provision, an impact assessment is to be carried out in the case of initial afforestation only where the area involved, either on its own or taken together with any adjacent area planted by or on behalf of the applicant within the previous three years, would result in a total area planted exceeding 70 ha.

26 The Commission states that afforestation projects may have a significant effect on the environment even where they fall below the 70 ha threshold.

27 In that regard, it refers to the acidification and eutrophication of waters caused by afforestation. It cites the report *The Trophic Status of Lough Conn, An Investigation into the Causes of Recent Accelerated Eutrophication* (McGarrigle and others on behalf of the Lough Conn Committee, published by Mayo County Council in association with the Environmental Protection Agency, Central Fisheries Board, North Western Fisheries Board, Teagasc, Bord na Mona, Department of Agriculture and Department of Marine, December 1993) and *A*

Study of the Effects of Stream Hydrology and Water Quality in Forested Catchments on Fish and Invertebrates (known as the 'Aquafor Report').

28 It also points out the failure of the Irish legislation to take account of the significant environmental effects which afforestation projects may have in areas of active blanket bog. Since afforestation entails ploughing, drainage, the use of fertilisers and a radical change in vegetation, it transforms the peatland ecosystem so fundamentally that it is effectively destroyed. The Commission refers in that regard to *Birds, Bogs and Forestry, the Peatlands of Caithness and Sutherland* (Strout, Reeds and Others, Nature Conservancy Council, United Kingdom), which analyses the effects of afforestation on blanket bog.

29 The Commission cites, by way of example, the afforestation carried out at Dunragh Loughs and Pettigo Plateau which was brought to its attention by Complaint No P 95/4724. Those sites are included in the list of Natural Heritage Areas (hereinafter 'NHAs') drawn up by the Irish authorities. Pettigo Plateau, in particular, is a vast intact blanket bog (approximately 2 097 ha) of great scientific interest and is one of the sites covered by the contract entered into on 28 December 1995 between the Commission and the National Parks and Wildlife Service pursuant to Council Regulation (EEC) No 1973/92 of 21 May 1992 establishing a financial instrument for the environment (LIFE) (OJ 1992 L 206, p. 1). Part of the plateau (619.2 ha) has been classified as a special protection area under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). It is also a cross-border site in that the plateau extends into County Fermanagh in the United Kingdom, which proposes to classify the portion of the plateau in its territory as a special protection area under Directive 79/409 and as a special area of conservation under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7). There is a risk that the part of the plateau in the United Kingdom will be subjected to the significant effects of the afforestation projects on the environment, since planting is liable to affect adversely the hydrology of the peatlands on both sides of the border. Notwithstanding the interest of that area, planting, some grant-aided, has been carried out there, without the threshold set being exceeded in any case.

30 The Commission acknowledges that S.I. No 101 of 1996 is an improvement on the previous legislation inasmuch as it has lowered the threshold from 200 ha to 70 ha. Nevertheless, the protection remains inadequate because the whole of a proposed NHA could, in theory, be afforested without an impact assessment being required if the afforestation were carried out by different developers who all kept within the threshold of 70 ha over three years. The Irish legislation fails to take sufficient account of the cumulative effect of projects.

31 As regards land reclamation for the purposes of conversion to another type of land use, covered by point 1(d) of Annex II to the Directive, the Commission objects to the threshold of 100 ha set by the Irish legislation (Article 24 of S.I. No 349 of 1989 and paragraph 1(c)(ii) of Part II of the First Schedule thereto, in conjunction with other provisions of the Irish legislation transposing the Directive) and retained in the more recent legislation (S.I. No 101 of 1996).

32 It considers that the Irish legislation fails to ensure that a prior assessment is carried out with regard to the significant environmental effects of land reclamation projects which, because of their size, do not have to be the subject of an impact assessment but, considered together, are nevertheless likely to have such effects.

33 It refers in that regard to the reclamation which has taken place in the Burren, an extensive area of limestone pavement in County Clare which is of exceptional interest for its fauna, flora and natural landscape and rich in archaeological remains. The cumulative effects of this reclamation drew the attention of the Heritage Council and a report in 1996 commissioned by it, entitled 'A survey of recent reclamation in the Burren', shows that there are 59 'new' reclamation sites totalling 256 ha in that area, including 31 sites in proposed NHAs. The interventions involve the levelling of limestone pavement with bulldozers, the clearance of scrub (hazel bushes are a characteristic feature of that habitat) and the seeding and fertilisation of the cleared land. The report also records the loss of numerous archaeological and historical remains, such as holy wells and ancient field systems.

34 As regards, finally, peat extraction projects, covered by point 2(a) of Annex II to the Directive, the Commission objects to the threshold of 50 ha set by Article 24 of S.I. No 349 of 1989 and paragraph 2(a) of Part II of the First Schedule thereto, in conjunction with other provisions of the Irish legislation transposing the Directive.

35 It explains that peat extraction entails drainage, which has a drying effect on the plants which form the peat. The vegetation changes from a sphagnum and peatmoss-dominated community to a vegetation dominated by dry bog species, after which the bog is colonised by trees. The lowering of the water table causes a reduction in peat volume. The sloping of the bog increases water run-off, which exacerbates the drying-out process. Peat extraction accordingly has significant and irreversible environmental effects.

36 The Commission cites the example of Ballyduff-Clonfinane Bog in County Tipperary, which it examined specifically following Complaint No P 95/4219. That site of approximately 312 ha comprises two bogs, Ballyduff and Clonfinane (187 ha). Following a survey carried out by the National Parks and Wildlife Service in 1983, the site was designated as an area of scientific interest (ASI). Under a report prepared in 1990 for the Irish Minister of Finance the site was to become part of a raised bog nature reserve network. In 1995 it became a proposed NHA. The site was also among those covered by the contract entered into on 28 December 1995 between the Commission and the National Parks and Wildlife Service pursuant to Regulation No 1973/92. In addition, it benefited from Commission Decision C(96) 2113 of 29 July 1996 in respect of the Cohesion Fund, which approved the grant of ECU 344 000 for the preservation of the bogs. None the less, a peat extraction project began in 1994 at Clonfinane without an impact assessment being required, as the area being developed was below the 50 ha threshold. When, in 1996, the question was raised as to whether an impact assessment was required, the development already covered more than 50 ha.

37 The Commission compares the threshold applicable to bogs (50 ha) with that applicable to the extraction of stone, gravel, sand or clay (5 ha) and notes that in the latter case an impact assessment is required below an area of 5 ha where the competent local authority considers that significant effects on the environment

are likely (Article 24 of S.I. No 349 of 1989, paragraph 2 of Part II of the First Schedule thereto, and Articles 4(1) and 6(1) of S.I. No 25 of 1990). The absolute nature of the threshold applicable to bogs precludes any real assessment as to whether a project might have significant environmental effects.

38 The Commission notes that there are at least 49 peat-producing companies, that the economics of small-scale extraction have been transformed by the introduction of new peat-extraction equipment and that the quantity of peat extracted by small producers has therefore increased considerably since 1980. The fact that no peat extraction project has given rise to an assessment, despite continuing losses harmful to nature conservation, shows that the Irish threshold is such that the Directive has no impact with regard to bogs of conservation importance.

39 In its defence, Ireland contests the admissibility of the objection relating to the cumulative effect of projects on the ground that it was not raised during the pre-litigation procedure and, in particular, in the reasoned opinion. It also maintains that the complaints to which the Commission refers cannot be used in evidence because they were not mentioned in the reasoned opinion and are the subject of separate investigation.

40 Generally, Ireland submits that the Commission has failed to prove actual abuse of thresholds through cumulative projects. The theoretical possibility of such abuse does not make the use of thresholds unlawful: their use is envisaged by the Directive and has been approved in the two cases considered by the Court (*Commission* v *Belgium* and *Kraaijeveld*, both cited above). It is only Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337 (OJ 1997 L 73, p. 5) which has required account to be taken of the cumulation of projects.

41 As regards projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, covered by point 1(b) of Annex II to the

Directive, Ireland disputes that sheep grazing as practised in its territory comes under intensive agriculture and can be considered to be a project within the meaning of Article 1(2) of the Directive. It is not an intervention in the natural surroundings and landscape within the meaning of that provision and it would be absurd to suggest that a farmer is obliged to seek prior consent whenever he wants to increase the number of sheep able to graze on a piece of land. That suggestion is particularly impracticable because much of the land used for the grazing of sheep is commonage, shared between a number of farmers who all have the right to graze their sheep there.

42 Ireland considers that the Directive was never intended to cover certain types of agriculture, such as sheep farming on vast areas of land, and is unsuited to such practices, in particular because of the cost of carrying out impact assessments in relation to the farmers' income. On the other hand, environmental protection is the object of the scheme established by Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 L 215, p. 85), implemented by Commission Regulation (EC) No 746/96 of 24 April 1996 laying down detailed rules for the application of Regulation No 2078/92 (OJ 1996 L 102, p. 19). More than 15% of Irish farmers already participate in that Rural Environment Protection Scheme, which seeks to stop farmers from farming their land intensively, and the Minister for Agriculture submitted proposals to the Commission pursuant to the Operational Programme for Agriculture, Rural Development and Forestry under the Community Support Framework for Ireland 1994-99 to the effect that, from 1 January 1998, farmers in degraded areas are entitled to sheep/ewe headage premium grants only if they are participating in the Rural Environment Protection Scheme.

43 As regards the objection relating to afforestation, Ireland submits that the Commission has adduced no objectively verifiable evidence that afforestation below the threshold has had significant effects on waters. It failed to annex to the application the two reports which it cites (the report on Lough Conn and the Aquafor Report), one of which, moreover, is not yet final.

44 Nor is there any evidence that afforestation on peatland has had significant environmental effects. Besides, little forestry development takes place on peatland, because of the minimum productivity requirements of the grant system and the fact that peatland has a lower forestry yield per hectare than other types of land.

45 Ireland contends, furthermore, that the Commission's presentation of the issues relating to Pettigo Plateau is inaccurate. The afforestation took place on a very small area only and therefore did not require consultation with the United Kingdom authorities under Article 7 of the Directive. Furthermore, the part of Pettigo classified as a special protection area under Directive 79/409 belongs to the National Parks and Wildlife Service and was not affected by the afforestation. Finally, it was only after the afforestation grant was given that the National Parks and Wildlife Service decided to designate the area as a proposed NHA, without knowing that afforestation was to take place there. In any event, the allegations made in that complaint concern only the management of the regime and not Ireland's implementation of Article 4(2) of the Directive or Annex II thereto.

46 As regards land reclamation, covered by point 1(d) of Annex II to the Directive, Ireland states that the only example given by the Commission is the unique area of the Burren. The Commission relies on an unpublished and incomplete study and fails to identify the land reclamation which has taken place. Besides, the total area surveyed in the report which the Commission cites (approximately 250 ha) is not significant given the size of the Burren as a whole (approximately 30 000 ha). In the light of those factors, the Commission has not carried out an overall assessment of land reclamation projects in Ireland, as required by the judgment in *Kraaijeveld*, cited above.

47 Ireland puts forward the same argument in relation to peat extraction projects, referred to in point 2(a) of Annex II to the Directive, alleging that the Commission has provided just one example of an extraction project below the threshold which has supposedly had significant effects on the environment.

48 Also, the Commission's objections relate only to peat extraction from bogs which are of conservation interest. Legal and administrative measures exist to protect such bogs, namely the Habitats Regulations and the designation of areas as NHAs. The complaint concerning peat extraction from Ballyduff-Clonfinane Bog simply demonstrates the need for conservation measures. Ireland accepts that different thresholds could have been set but, given the adoption of special areas of conservation under the Habitats Regulations, it had not considered that to be necessary.

49 As for bogs which are not subject to the Habitats Regulations, Ireland justifies the threshold of 50 ha by stating that it is intended to distinguish between commercial peat extraction, which may have significant effects on the environment, and the non-commercial cutting of turf, which is a traditional activity in Irish rural life. The Directive was not intended to be interpreted as requiring an impact assessment for small-scale non-commercial peat extraction. The effect of requiring impact assessments for very small areas of bog would be to prevent all extraction because of the cost of an assessment compared with the likely return. Such an interpretation of the Directive would frustrate the traditional rights of landowning and tenant farmers to cut turf from the bog for their own needs.

Findings of the Court

50 It is necessary to consider first of all the plea raised by Ireland that the objection relating to the cumulative effect of projects is inadmissible on the ground that it was not relied on during the pre-litigation procedure and, in particular, in the reasoned opinion.

51 It should be remembered that the purpose of the pre-litigation procedure is to give the State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. The subject-matter of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article. Consequently, the action cannot be founded on any objections other than those set out in the reasoned opinion (see, in particular, Case C-206/96 *Commission* v *Luxembourg* [1998] ECR I-3401, paragraph 13).

52 In the present case, it is apparent from an examination of the documents exchanged in the course of the pre-litigation procedure that, while the Commission did not expressly use the words 'cumulative effect of projects', it was nevertheless addressing this question as part of the more general problem of the setting of thresholds and made the very point that a developer can avoid an impact assessment by splitting an initial project into a number of projects which do not exceed the threshold.

53 In those circumstances, it cannot be considered that the pre-litigation procedure did not allow Ireland to avail itself of its right to defend itself against the objection relating to the cumulative effect of projects.

54 Ireland also defends itself by pleading that the Commission cannot use complaints not mentioned in the reasoned opinion as evidence of an infringement, because they were received subsequent to the reasoned opinion and are still the subject of separate investigation.

55 This plea is linked, however, to the question of proof of the infringement, which should be examined as a whole.

56 Ireland disputes that the Commission has demonstrated that thresholds have actually been misused. In its view, such proof is necessary in order to establish that it has failed to fulfil its obligations.

57 The Commission replies that it is the use of absolute thresholds which constitutes the infringement and that all it had to do was put forward a body of evidence demonstrating that use of such thresholds could mean that projects likely to have significant effects on the environment escaped an impact assessment because they did not reach the threshold prescribed by law. It also maintains that it would be contrary to the objective of prevention pursued by the Directive if it were necessary to establish serious and grave environmental harm in order to prove inadequate transposition in Treaty infringement proceedings. Finally, it points out its difficulty in producing concrete evidence in the case of projects below the thresholds.

58 In that regard, it must be observed that the infringement alleged by the Commission is Ireland's incorrect transposition of Article 4(2) of the Directive through the use of thresholds which have the effect that all the characteristics of a project are not taken into consideration when it comes to determining whether the project is to be subject to an impact assessment. Certain projects likely to have significant effects on the environment may thus escape the assessment requirement because they do not reach the thresholds set.

59 So, the alleged infringement has to do with the way in which the Directive has been transposed into Irish law and not with the actual result of the application of the transposing legislation.

60 In order to prove that the transposition of a directive is insufficient or inadequate, it is not necessary to establish the actual effects of the legislation transposing it into national law: it is the wording of the legislation itself which harbours the insufficiencies or defects of transposition.

61 There is, therefore, nothing to prevent the Commission from demonstrating that transposition is defective or insufficient without waiting for the application of the transposing legislation to produce harmful effects.

62 Since the Directive forms part of Community environmental policy, which, as pointed out in the first recital in the preamble to the Directive, consists in preventing the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects, the opposite conclusion would be even more unjustified in this case.

63 It does not therefore matter that the evidence adduced by the Commission in support of its action consists of mere complaints which have not yet been investigated.

64 As far as the objection to thresholds is concerned, although the second subparagraph of Article 4(2) of the Directive confers on Member States a measure of discretion to specify certain types of projects which are to be subject to an assessment or to establish the criteria or thresholds applicable, the limits of that discretion lie in the obligation set out in Article 2(1) 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 (*Kraaijeveld*, cited above, paragraph 50).

65 Thus, a Member State which established criteria or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

66 Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive,

such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.

67 Similarly, a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size.

68 In order to demonstrate that Ireland has failed to fulfil its obligations in this regard, the Commission has put forward several convincing examples of projects which, whilst considered solely in relation to their size, may none the less have significant effects on the environment by reason of their nature or location.

69 The most significant example is afforestation because, when carried out in areas of active blanket bog, it entails, by its nature and location, the destruction of the bog ecosystem and the irreversible loss of biotopes that are original, rare and of great scientific interest. In itself, it may also cause the acidification or eutrophication of waters.

70 It was however necessary, and possible, to take account of factors such as the nature or location of projects, for example by setting a number of thresholds corresponding to varying project sizes and applicable by reference to the nature or location of the project.

71 Ireland's explanation that other environmental protection legislation, such as the Habitats Regulations, made it unnecessary to assess afforestation, land reclamation or peat extraction projects carried out in environmentally sensitive locations must be dismissed. Nothing in the Directive excludes from its scope regions or

areas which are protected under other Community provisions from other aspects.

72 It follows that, by setting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive, thresholds which take account only of the size of projects, to the exclusion of their nature and location, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

73 As regards the cumulative effect of projects, it is to be remembered that the criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State (*Commission* v *Belgium*, cited above, paragraph 42, *Kraaijeveld*, cited above, paragraph 51, and Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135, paragraph 45).

74 The question whether, in laying down such criteria and/or thresholds, a Member State goes beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project, but depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State concerned (*Kraaijeveld*, paragraph 52).

75 So, a Member State which established criteria and/or thresholds 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 exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all the projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see, to that effect, *Kraaijeveld*, paragraph 53).

76 That would be the case where a Member State merely set a criterion of project size and did not also ensure that the objective of the legislation would not be circumvented by the splitting of projects. Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive.

77 In order to demonstrate that Ireland has failed to fulfil its obligations in this regard, the Commission has also provided various examples of the effects of the Irish legislation as drafted.

78 Ireland has not denied that no project for the extraction of peat, covered by point 2(a) of Annex II to the Directive, has been the subject of an impact assessment, although small-scale peat extraction has been mechanised, industrialised and considerably intensified, resulting in the unremitting loss of areas of bog of nature conservation importance.

79 As regards initial afforestation, covered by point 1(d) of Annex II to the Directive, such projects, encouraged by the grant of aid, may be implemented in proximity to one another without any impact assessment at all being carried out, if they are conducted by different developers who all keep within the threshold of 70 ha over three years.

80 The Commission has also cited the example of land reclamation projects, covered by point 1(d) of Annex II to the Directive, whose cumulative effect is not taken into account by the Irish legislation. Nor has it been disputed that much land clearance has taken place in the Burren without a single impact assessment being carried out, although it is an area of unquestionable interest. Limestone pavement, which is characteristic of the area, has been destroyed, as have vegetation and archaeological remains, giving way to pasture. Considered together, those interventions were likely to have significant environmental effects.

81 As regards sheep farming in particular, the Commission has proved that, again encouraged by the grant of aid, this has grown in an unrestrained fashion, which is a development which may have adverse environmental consequences. However, it has not demonstrated that sheep farming as practised in Ireland constitutes a project within the meaning of Article 1(2) of the Directive.

82 It follows from all of the foregoing that, by setting thresholds for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive without also ensuring that the objective of the legislation will not be circumvented by the splitting of projects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

83 Consequently, the objection relating to infringement of Article 4(2) of the Directive in respect of the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive is well founded.

Infringement of Article 2(3) of the Directive

84 The Commission explains that S.I. No 349 of 1989 provides for an exemption formula enabling the competent Minister to dispense with an impact assessment for a project where he considers this to be warranted by exceptional circumstances. It points out that this provision is inconsistent with the Directive inasmuch as, first, the Minister is not required to consider whether another form of assessment would be appropriate and whether the information collected should be made available to the public and, second, he is not required to inform the Commission.

85 Ireland stated at the hearing that amending legislation had just been adopted.

86 However, it is settled case-law that 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-123/94 *Commission* v *Greece* [1995] ECR I-1457, paragraph 7).

87 It must accordingly be held that the objection relating to the infringement of Article 2(3) of the Directive is well founded.

Infringement of Article 5 of the Directive

88 The Commission considers that the Irish legislation does not properly transpose Article 5 since it makes no provision for considering the relevance or reasonableness of asking a developer for the information specified in Annex III. Article 2(5) of S.I. No 349 of 1989 merely provides that an impact assessment may include that information.

89 Ireland indicated at the hearing that amending legislation had just been adopted.

90 For the reason referred to in paragraph 86 above, it must be held that the objection relating to the infringement of Article 5 of the Directive is well founded.

Infringement of Article 7 of the Directive

91 The Commission states that Article 17 of S.I. No 25 of 1990 appears to be the transposition of Article 7 in respect of projects requiring consent under the Irish Local Government (Planning and Development) Acts 1963-1983. Article 17 provides a mechanism whereby local authorities are to notify the Irish Minister for the Environment of any application likely to have significant effects on the environment of another Member State. The Minister may then ask the local authority to provide him with the information and documents which he considers necessary.

92 The Commission considers, however, that that provision does not properly transpose Article 7 of the Directive since the Minister is not expressly required to transmit the information to the other Member State. Nor does the Minister have the power to require information from local authorities when it is the other Member State which has asked to be consulted.

93 Ireland stated in the course of the written procedure that it intended to clarify its legislation and that the amending legislation was in the process of being drafted. It added at the hearing that the Northern Ireland Agreements would enable better communication with the United Kingdom in the future.

94 For the reason given in paragraph 86 above, it must be held that the objection relating to the infringement of Article 7 of the Directive is well founded.

95 It follows from all of the foregoing that, by not adopting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive, the measures necessary to transpose Article 4(2) of the Directive correctly, and by not transposing Articles 2(3), 5 and 7 of the Directive, Ireland has failed to fulfil its obligations under the Directive. The remainder of the action is to be dismissed.

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. The Commission has applied for an order of costs against Ireland. Since the latter has been essentially unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by not adopting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the measures necessary to transpose Article 4(2) of that directive correctly, and by not transposing Articles 2(3), 5 and 7 thereof, Ireland has failed to fulfil its obligations under that directive;**

2. **Dismisses the remainder of the application;**

3. **Orders Ireland to pay the costs.**

Puissochet Moitinho de Almeida Gulmann

Edward Sevón

Delivered in open court in Luxembourg on 21 September 1999.

R. Grass

Registrar

J.-P. Puissochet

President of the Fifth Chamber