

The Court of Justice of the European Communities

JUDGMENT OF THE COURT (Second Chamber)

16 July 2009

(Failure of a Member State to fulfil obligations – Assessment of the effects of projects on the environment – Directive 85/337/EEC – Access to justice – Directive 2003/35/EC)

In Case C-427/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 September 2007,

Commission of the European Communities, represented by D. Recchia, P. Oliver and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, K. Schiemann, J. Makarczyk (Rapporteur) and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2008,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that:

– by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337 as amended by Directive 97/11'), all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11 are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of that amended directive, and

– by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 3(1) and (3) to (7) and 4(1) to (6) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17) or, in any event, by failing to adequately notify such provisions to the

Commission, Ireland has failed to fulfil its obligations under Directive 85/337, as amended by Directive 97/11, and Article 6 of Directive 2003/35.

Legal context

Community legislation

Directive 2003/35

2 Article 1 of Directive 2003/35 provides:

'The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention [on access to information, public participation in decision-making and access to justice in environmental matters], in particular by:

(a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

(b) improving the public participation and providing for provisions on access to justice within Council Directive 85/337... and 96/61/EC.'

3 Article 6 of Directive 2003/35 states:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 June 2005 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.'

Directive 85/337

4 In accordance with Article 1(2) of Directive 85/337, as amended by Article 3(1) of Directive 2003/35, for the purposes of that directive:

'...

"the public" means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

"the public concerned" means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

5 Article 2(1) and (3) of Directive 85/337, as amended by Article 3(3) of Directive 2003/35, states:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

...

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

In this event, the Member States shall:

- (a) consider whether another form of assessment would be appropriate;
- (b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it;

...'

6 Article 4 of Directive 85/337 as amended by Directive 97/11 provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

7 Article 5 of Directive 85/337 as amended by Directive 97/11 provides:

'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 IV 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.

...

3. 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,
- an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,

– a non-technical summary of the information mentioned in the previous indents.

...'

8 Article 6(2) to (6) of Directive 85/337, as amended by Article 3(4) of Directive 2003/35, states as follows:

'2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information ..., information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.'

9 Article 7 of Directive 85/337, as amended by Article 3(5) of Directive 2003/35, provides:

'1. 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 send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

- (a) a description of the project, together with any available information on its possible transboundary impact;
- (b) information on the nature of the decision which may be taken,

and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to Article 6(3)(a) and (b).

...

5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.'

10 Article 9 of Directive 85/337, as amended by Article 3(6) of Directive 2003/35, provides:

'1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

- the content of the decision and any conditions attached thereto,
- having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,
- a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.'

11 Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, states as follows:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

- (a) having a sufficient interest, or alternatively
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

12 Annex II to Directive 85/337 as amended by Directive 97/11 lists the projects subject to Article 4(2) of that amended directive. Under the heading 'Infrastructure projects', point 10(e) of that annex covers the construction of roads, harbours and port installations, including fishing harbours (projects not included in Annex I).

Directive 96/61/EC

13 In accordance with Article 2(13) and (14) of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), as amended by Article 4(1) of Directive 2003/35:

'13. "the public" shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

14. "the public concerned" shall mean the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

14 Article 15(1) and (5) of Directive 96/61, as amended by Article 4(3) of Directive 2003/35, states as follows:

'1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for:

- issuing a permit for new installations,
- issuing a permit for any substantial change in the operation of an installation,
- updating of a permit or permit conditions for an installation in accordance with Article 13, paragraph 2, first indent.

The procedure set out in Annex V shall apply for the purposes of such participation.

...

5. When a decision has been taken, the competent authority shall inform the public in accordance with the appropriate procedures and shall make available to the public the following information:

- (a) the content of the decision, including a copy of the permit and of any conditions and any subsequent updates; and
- (b) having examined the concerns and opinions expressed by the public concerned, the reasons and considerations on which the decision is based, including information on the public participation process.'

15 Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, provides:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

- (a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

National legislation

16 According to the combined provisions of section 176 of the Planning and Development Act 2000 (No 30/2000), as amended by the Planning and Development (Strategic Infrastructure) Act 2006 (No 27/2006, S.I. No 525/2006) ('the PDA'), and Schedule 5 to the Planning and Development Regulations 2001 (S.I. No 600/2001), an environmental impact statement and an environmental impact assessment are mandatory in respect of certain projects where the thresholds specified are exceeded, but private roads development is not identified as a discrete category of project.

17 Judicial review is governed by Order 84 of the Rules of the Superior Courts. Those courts have jurisdiction to review, subject to certain conditions, the decisions of lower courts and administrative bodies.

18 Both public-law and private-law remedies are available in judicial review proceedings. The traditional public law remedies relate to review of whether those lower courts or bodies have acted in excess or abuse of jurisdiction and to supervision of the exercise of their jurisdiction.

19 Judicial review is a two-stage process. An application for leave to bring judicial review proceedings must be made to the court, accompanied by a statement of grounds identifying the relief sought and an affidavit setting out the facts relied on. If leave is granted, the applicant can bring judicial review proceedings.

20 A specific statutory procedure applies to applications for judicial review of decisions of the competent planning authorities, which is governed by sections 50 and 50A of the PDA.

21 Section 50A(3) of the PDA states:

'The Court shall not grant section 50 leave unless it is satisfied that –

(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a substantial interest in the matter which is the subject of the application, or

(ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176, for the time being in force, as being development which may have significant effects on the environment, the applicant —

(I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) satisfies such requirements (if any) as a body or organisation, if it were to make an appeal under section 37(4)(c), would have to satisfy by virtue of section 37(4)(d)(iii) (and, for this purpose, any requirement prescribed under section 37(4)(e)(iv) shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls were a reference to the class of matter into which the decision or act, the subject of the application for section 50 leave, falls).'

22 Section 50A(4) of the PDA specifies that the substantial interest required is not limited to an interest in land or other financial interest.

23 Section 50A(10) and (11)(b) of the PDA require the court, in determining applications, to act as expeditiously as possible consistent with the administration of justice. Section 50A(12) of the PDA allows for additional rules to be adopted to expedite the procedure.

The pre-litigation procedure

24 The Commission has combined, in the present action, complaints raised in two pre-litigation procedures.

25 First, in 2001 the Commission registered a complaint against Ireland concerning damage to a coastal wetland at Commogue Marsh, Kinsale, County Cork caused by a private road project. On 18 October 2002, the Commission sent a letter of formal notice to Ireland, indicating that it appeared that no consent for the project in question had been granted and that no prior environmental impact assessment had been carried out despite the sensitivity of the site, contrary to the requirements of Directive 85/337 as amended by Directive 97/11.

26 Ireland replied to that letter of formal notice on 5 March 2003, pointing out that the project at issue was a part of a development for which consent had been given.

27 As the Commission was not satisfied with that reply, it issued a reasoned opinion on 11 July 2003, calling on Ireland to take the necessary measures to comply with Directive 85/337 as amended by Directive 97/11 within two months of receipt of that opinion.

28 By letter of 9 September 2003, Ireland requested an extension of the two-month time-limit for reply to the reasoned opinion. Ireland replied to the reasoned opinion by letter of 10 November 2003.

29 Secondly, the Commission sent a letter of formal notice to Ireland on 28 July 2005 concerning the transposition of Directive 2003/35, inviting Ireland to submit its observations within two months of receipt of that letter.

30 Ireland replied by letter of 7 September 2005, in which it admitted that it had only partially transposed Directive 2003/35.

31 The Commission issued a reasoned opinion on 19 December 2005, calling on Ireland to take the necessary measures to comply with that directive within two months of receipt of that opinion.

32 By letter of 14 February 2006, Ireland indicated that transposition measures were in preparation.

33 On 18 October 2006, the Commission issued an additional reasoned opinion calling on Ireland to adopt the necessary measures to comply with that opinion within two months of receipt. Ireland replied on 27 February 2007, outside the time-limit prescribed by the Commission.

34 As it was not satisfied with Ireland's replies in the course of those two pre-litigation procedures, the Commission brought the present action pursuant to the second paragraph of Article 226 EC.

The action

35 The Commission's action is based on two complaints.

The first complaint

Arguments of the parties

36 The Commission considers that the construction of a private road constitutes an infrastructure project that falls within point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11 and that, as a consequence, the Irish authorities are bound, in accordance with Article 2 of that amended directive, to ensure that, before consent is given, such projects are made subject to an assessment with regard to their effects on the environment if it is considered that they are likely to have significant effects on the environment.

37 In limiting the need to carry out an environmental impact assessment to public road projects proposed by public authorities, the Irish legislation thus fails to take account of Community requirements.

38 Ireland contends that private road construction development which, it does not dispute, falls within point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11, almost invariably forms an integral part of other developments which, for their part, are subject to the requirement of an environmental impact assessment under the combined provisions of Article 176 of the PDA and Schedule 5 to the Planning and Development Regulations 2001 if they are likely to have significant effects on the environment.

39 Ireland accepts, moreover, that Directive 85/337 as amended by Directive 97/11 makes no distinction between public and private road projects, and it indicates its intention to amend its legislation so as to include road development as a stand-alone category subject to an environmental impact assessment if the road development is likely to have significant effects on the environment.

Findings of the Court

40 Pursuant to Article 4(2) of Directive 85/337 as amended by Directive 97/11, the Member States are to determine, for projects in the classes listed in Annex II to that amended directive, through a case-by-case examination, or thresholds or criteria, whether those projects are to be made subject to an environmental impact assessment in accordance with Articles 5 to 10 of that directive. According to that same provision, the Member States may also decide to apply both procedures.

41 Although the Member States have thus been allowed a measure of discretion in specifying certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) of Directive 85/337 as amended by Directive 97/11 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 (see Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50; Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paragraph 37; and Case C-75/08 *Mellor* [2009] ECR I-0000, paragraph 50).

42 In that regard, the Court has already held that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects 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 that amended directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see *Kraaijeveld and Others*, paragraph 53, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 38).

43 Among the projects subject to Article 4(2) of Directive 85/337 as amended by Directive 97/11, point 10(e) of Annex II to that amended directive refers to 'construction of roads'.

44 In that regard, by subjecting private road construction development to an environmental impact assessment only if that development formed part of other developments coming within the scope of Directive 85/337 as amended by Directive 97/11 and themselves subject to the assessment obligation, the Irish legislation, as applicable when the time-limit set in the reasoned opinion expired, meant that any private road construction development carried out in isolation could avoid an environmental impact assessment, even if the development was likely to have significant effects on the environment.

45 It should also be pointed out that a criterion relating to the private or public nature of the road is irrelevant as regards the applicability of point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11.

46 Therefore, the first complaint is well founded.

The second complaint

47 It is apparent from the most recent of the Commission's written pleadings that, in its view, and having regard to the withdrawal of the complaints concerning Article 4(1), (5) and (6) of Directive 2003/35, Ireland's transposition of Article 3(1) and (3) to (7) and Article 4(2) to (4) of that directive remains incomplete, as a result of which there is a failure to fulfil obligations under Article 6 of that directive.

48 In addition, the Commission takes the view that, in any event, Ireland did not communicate within the prescribed time-limit the provisions which were deemed to implement the aforementioned articles, contrary to the requirements of Article 6.

49 The second complaint, considered in its various parts, as pleaded in essence by the Commission, thus relates exclusively – as the Commission, moreover, confirmed at the hearing – to the failure to transpose certain provisions of Directive 2003/35, without any criticism of the quality of transposition, and, consequently, no such criticism may properly be raised by the Commission in the context of this case.

50 Moreover, it should be noted that the provisions of the PDA referred to in the present action are those which result from amendments introduced by the amending Act of 2006, mentioned in paragraph 16 of this judgment. Those provisions, as the Advocate General noted in point 53 of her Opinion, entered into force on 17 October 2006, that is to say, before the expiry of the time-limit laid down in the additional reasoned opinion.

The requirement to transpose the provisions of Article 3(1) of Directive 2003/35

– Arguments of the parties

51 As regards Article 3(1) of Directive 2003/35, the Commission claims that the Irish authorities must adopt measures to ensure that domestic legislation does not treat the concepts of 'the public' and 'the public concerned' more narrowly than Directive 2003/35. It points out, in particular, that the rights conferred on non-governmental organisations are not sufficiently guaranteed, as is apparent from the case-law, although that directive confers on such non-governmental organisations certain rights as being among the public concerned.

52 Ireland counters that, in the light of the general obligation to interpret national law in accordance with the provisions of Community law which applies, in particular, to the courts, it is not necessary to introduce legislative definitions of 'the public' and 'the public concerned' in order to give full effect to those definitions. It adds that the newly-created rights are already guaranteed to all of the public and that it is not, therefore, necessary to give a specific definition of 'the public concerned'.

53 Ireland also contends that, pursuant to section 50A(3)(b)(ii) of the PDA, non-governmental organisations promoting the environment are exempted from the requirement to demonstrate that they have a substantial interest.

– Findings of the Court

54 It should be recalled that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, inter alia, Case C-214/98 *Commission v Greece* [2000] ECR I-9601, paragraph 49; Case C-38/99 *Commission v France* [2000] ECR I-10941, paragraph 53; and Case C-32/05 *Commission v Luxembourg* [2006] ECR I-11323, paragraph 34).

55 It follows from an equally consistent line of case-law that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, inter alia, Case C-197/96 *Commission v France* [1997] ECR I-1489, paragraph 15; Case C-207/96 *Commission v Italy* [1997] ECR I-6869, paragraph 26; and *Commission v Luxembourg*, paragraph 34).

56 In the light of the purpose of Article 3(1) of Directive 2003/35, which is to add definitions to those appearing in Article 1(2) of Directive 85/337, and in particular to indicate, for the purposes of the latter directive, what is to be meant by 'the public concerned' and, whereas, at the same time, Directive 2003/35 accords new rights to that public, it cannot be concluded from Ireland's failure to reproduce those definitions in its legislation expressly that Ireland has not fulfilled its obligation to transpose the provisions in question.

57 The scope of the new definition of 'the public concerned' thus introduced by Directive 2003/35 can be assessed, as the Advocate General stated in points 36 and 37 of her Opinion, only with regard to all of the rights which that directive accords to 'the public concerned', since those two aspects are indissociable.

58 In that regard, the Commission does not establish to what extent 'the public concerned', understood as the public affected or likely to be affected by, or having an interest in, environmental decision-making procedures, does not have the rights which it is deemed to enjoy under the amendments introduced by Directive 2003/35.

59 Lastly, it should be pointed out that the Commission's arguments relating to the construal, in the case-law, of the role of non-governmental organisations promoting the environment as belonging to 'the public concerned' deal, primarily, with possible defects in the effective implementation of the rights which those organisations may rely on, in particular in judicial review proceedings, and are, consequently, outside the scope of the complaint before the Court alleging, solely, a failure to transpose.

60 It follows from the foregoing that the second complaint, in so far as it concerns the transposition of Article 3(1) of Directive 2003/35, is unfounded.

The requirement to transpose Articles 3(3) to (6), and 4(2) and (3), of Directive 2003/35

– Arguments of the parties

61 According to the Commission, Article 3(3) to (6), and Article 4(2) and (3), have not been fully transposed.

62 As regards those provisions, Ireland contends that there has been transposition in so far as the planning consent system is concerned, but it accepts that it was still necessary, when the time-limit prescribed in the additional reasoned opinion elapsed, to transpose those provisions by adopting legislative measures in relation to other consent procedures.

63 As regards Article 4(2) and (3) of that directive, Ireland recognises that it still had to adopt and notify certain measures in relation to full transposition of those provisions when the time-limit prescribed in that reasoned opinion elapsed.

– Findings of the Court

64 It must be borne in mind that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-173/01 *Commission v Greece* [2002] ECR I-6129, paragraph 7, and Case C-114/02 *Commission v France* [2003] ECR I-3783, paragraph 9).

65 It is not in dispute that, by the end of the period laid down in the additional reasoned opinion, Ireland had not adopted the laws, regulations and administrative provisions necessary to ensure full transposition of Article 3(3) to (6), and Article 4(2) and (3), of Directive 2003/35. Furthermore, and in accordance with settled case-law, any subsequent changes once the action for failure to fulfil obligations has been lodged cannot be taken into consideration by the Court (see, inter alia, Case C-211/02 *Commission v Luxembourg* [2003] ECR I-2429, paragraph 6).

66 In so far as it concerns the failure to transpose Article 3(3) to (6) and Article 4(2) and (3) of Directive 2003/35, the second complaint is therefore well founded.

The requirement to transpose Articles 3(7) and 4(4) of Directive 2003/35

– Arguments of the parties

67 The Commission claims that Ireland did not transpose the requirements arising out of Articles 3(7) and 4(4) of Directive 2003/35, those provisions having inserted, respectively, Article 10a into Directive 85/337 and Article 15a into Directive 96/61. The Commission puts forward five arguments in support of this part of the second complaint.

68 By its first argument, which concerns the concept of sufficient interest in Article 3(7) and Article 4(4) of Directive 2003/35, the Commission asserts that the criterion that a 'substantial interest' must be established in the context of the specific statutory procedure for applying for judicial review of decisions of competent planning authorities laid down in Section 50 of the PDA does not correspond to the 'sufficient interest' criterion in Directive 2003/35.

69 The setting of such a criterion – stricter than that used in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, – amounts, according to the Commission, to non transposition of the requirements laid down in Directive 2003/35.

70 Lastly, the Commission points out that two judgments of the Irish High Court handed down in the *Friends of the Curragh Environment Ltd* case on 14 July 2006 and 8 December 2006 show that the system of judicial review in force in Ireland cannot be regarded as implementing Directive 2003/35, since the High Court stated, in the second of those judgments, in relation to the assessment of 'substantial interest', that that directive had not yet been implemented in Irish law.

71 Ireland contests the relevance of those High Court judgments, inasmuch as they were dealing, primarily, with the issue of the direct effect of Directive 2003/35.

72 It adds that the judgment handed down by the High Court on 26 April 2007 in the *Sweetman* case established, on the contrary, that the abovementioned provisions of that directive are implemented by the judicial review procedure, supplemented by specific procedural rules laid down in certain legislation, in particular section 50 of the PDA, since the criterion of substantial interest was held by the judge to be flexible and not inconsistent with Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35.

73 By its second argument, the Commission claims that Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, have not been transposed, on the ground that, contrary to the first paragraph in each of those articles, the requirement that an applicant must be able to challenge the substantive legality of decisions, acts or omissions subject to the public participation provisions in each of the directives has not been transposed into Irish law.

74 Ireland contends, in that regard, that those articles do not require provision to be made for an exhaustive review of the merits of a decision, but merely require that it be possible to contest the substantive legality of a decision. Such a form of review is provided for under Irish law.

75 Ireland also asserts that the requirements laid down in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, are fully implemented into Irish law by reason of the existence of the judicial review procedure available before Irish courts. The purpose of judicial review is to provide a form of review of decisions made and actions taken by courts and administrative bodies, to ensure that the functions conferred on such authorities have been carried out correctly and legally.

76 In addition, according to Ireland, a specific statutory judicial review procedure applies to challenges to decisions of the competent planning authorities, which is governed by sections 50 and 50A of the PDA.

77 The Commission claims, in its third argument, that no measure has been taken by Ireland to ensure transposition of the requirement of timeliness, laid down in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in Article 15a of Directive 96/61, inserted by Article 4(4) Directive 2003/35.

78 In its fourth argument, the Commission raises the same failure to transpose as regards the requirement that any such procedure must not be prohibitively expensive, pointing out that, in relation to costs, there is no applicable ceiling as regards the amount that an unsuccessful applicant will have to pay, as there is no legal provision which refers to the fact that the procedure will not be prohibitively expensive.

79 According to Ireland, the existing procedures are fair, equitable and not prohibitively expensive. They enable, furthermore, the decisions referred to in Directives 83/337 and 96/61, as amended by Directive 2003/35, to be reviewed in a timely manner.

80 Lastly, by its fifth argument, the Commission criticises Ireland for not having made available to the public practical information on access to administrative and judicial review procedures, as required by the sixth paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35.

81 Ireland takes the view that it has fulfilled that obligation, since Order 84 of the Rules of the Superior Courts, referred to in paragraph 17 of this judgment, is a statutory provision and there is, in addition, a website for the Courts Service of Ireland which describes the different courts and the limits of their jurisdiction, and allows for access to High Court judgments.

– Findings of the Court

82 As regards the first argument relating to sufficient interest, it is clear from paragraphs (a) and (b) of the first paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and from paragraphs (a) and (b) of the first paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the Member States must ensure that, in accordance with the relevant national legal system, members of the public concerned having a sufficient interest, or alternatively, maintaining the impairment of a right, where the administrative procedural law of a Member State requires this as a precondition, have access to a review procedure under the conditions specified in those provisions, and must determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice.

83 It is not in dispute that, by enabling applicants who are members of 'the public concerned' and who can claim an interest meeting the conditions laid down in section 50A(3) of the PDA to challenge certain planning measures, Ireland has adopted provisions under which the right of access to justice in that particular area depends directly on those applicants' interest, as the Advocate General points out in point 57 of her Opinion.

84 In that regard, inasmuch as, as has been stated in paragraph 49 of this judgment, the Commission disputes only the failure to transpose certain provisions – having moreover expressly stated that it did not mean to allege incorrect or incomplete transposition – there is no need to ascertain whether the criterion of substantial interest as applied and interpreted by the Irish courts corresponds to the sufficient interest referred to in Directive 2003/35, as that would lead to calling into question the quality of the transposition having regard, in particular, to the competence of the Member States recognised by that directive to determine what constitutes a sufficient interest consistently with the objective which that directive pursues.

85 Furthermore, the second judgment of the High Court in *Friends of the Curragh Environment Ltd*, to which the Commission principally refers, was handed down under the legislation applicable prior to the amendments made to the PDA in 2006 and it is not, in any event, enough to prove the alleged failure to transpose.

86 The first argument is therefore unfounded.

87 In relation to the second argument, it is common ground that in Irish law, apart from the specific statutory procedure applicable pursuant to sections 50 and 50A of the PDA, there is judicial review governed by Order 84 of the Rules of the Superior Courts. In those review procedures applicants can ask for decisions or acts to be quashed in the context of supervision in relation to decisions and actions taken by lower courts and administrative bodies to ensure that the functions conferred on those authorities are carried out legally.

88 The various procedures thus established for judicial review are applicable to decisions, acts or omissions subject to the public participation provisions in Directives 85/337 and 96/61 as amended by Directive 2003/35, inter alia, in the specific area of planning, and may therefore be considered to constitute transposition of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, inasmuch as they require that the applicant be able to challenge the substantive or procedural legality of such acts, decisions or omissions.

89 Since the Court does not have before it a complaint alleging incorrect transposition of those provisions, it cannot examine the arguments submitted by the Commission relating to the extent of the review actually carried out in the context of judicial review, as shown, in particular, by the case-law of the High Court.

90 The second argument is therefore unfounded.

91 As regards the third argument relating to the failure to transpose Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, in so far as they require that the procedures should be timely, having regard to what was stated in paragraph 49 of this judgment and inasmuch as it follows from sections 50A(10) and (11)(b) of the PDA that the courts having jurisdiction must determine applications as expeditiously as possible consistent with the administration of justice, that argument is therefore unfounded.

92 As regards the fourth argument concerning the costs of proceedings, it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement.

93 Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.

94 That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment, cannot be regarded as valid implementation of the obligations arising from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35.

95 The fourth argument is thus well founded.

96 As regards the fifth argument, it must be borne in mind that one of the underlying principles of Directive 2003/35 is to promote access to justice in environmental matters, along the lines of the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

97 In that regard, the obligation to make available to the public practical information on access to administrative and judicial review procedures laid down in the sixth paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, amounts to an obligation to obtain a precise result which the Member States must ensure is achieved.

98 In the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.

99 The fifth argument must thus be upheld.

100 It follows from the foregoing that the second complaint, in so far as it concerns the requirement to transpose Articles 3(7) and 4(4) of Directive 2003/35 is, in its fourth and fifth arguments, well founded.

Failure to comply with the first paragraph of Article 6 of Directive 2003/35, inasmuch as the obligation to inform the Commission was not fulfilled

– Arguments of the parties

101 The Commission claims that the information provided to it by Ireland in relation to the transposition of the provisions of Directive 2003/35 which introduced Article 10a of Directive 85/337 and Article 15a of Directive 96/61 is not sufficient.

102 It argues, in that regard, that Ireland did not draw to its attention the case-law establishing access for the public concerned to judicial review, or the precise legislative texts that show that the rights and obligations laid down in those provisions have been transposed, in particular as regards the requirement for a fair, equitable, timely and not prohibitively expensive judicial review procedure.

103 It adds that it was not informed of the relevant national case-law regarding, specifically, the use of review procedures in relation to Directive 2003/35, and in particular, that Ireland itself did not send it the judgments handed down by the High Court in the *Friends of the Curragh Environment Ltd* case, which were provided to the Commission by a separate source.

104 Ireland accepts that it has not fully complied with the obligation to inform the Commission laid down in Article 6 of Directive 2003/35. It nevertheless points out that, in so far as Articles 3(7) and 4(4) of that directive were already transposed by existing statutory provisions, it was not obliged to notify those provisions.

– Findings of the Court

105 It should be recalled that, while, in proceedings under Article 226 EC for failure to fulfil obligations, it is incumbent upon the Commission to prove the allegation and to place before the Court the information needed to enable the Court to establish that an obligation has not been fulfilled, in doing which the Commission may not rely on any presumption, it is also for the Member States, under Article 10 EC, to facilitate the achievement of the

Commission's tasks, which consist in particular, pursuant to Article 211 EC, in ensuring that the provisions of the EC Treaty and the measures taken by the institutions pursuant thereto are applied (see, inter alia, Case C-408/97 *Commission v Netherlands* [2000] ECR I-6417, paragraphs 15 and 16, and Case C-456/03 *Commission v Italy* [2005] ECR I-5335, paragraph 26).

106 For the purposes set out in that case-law, Article 6 of Directive 2003/35, like other directives, imposes upon the Member States an obligation to provide information.

107 The information which the Member States are thus obliged to supply to the Commission must be clear and precise. It must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive completely. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 226 EC in order to establish the failure to fulfil the obligation (see Case C-456/03 *Commission v Italy*, paragraph 27).

108 Moreover, although the transposition of a directive may be carried out by means of domestic legal rules already in force, the Member States are not, in that event, absolved from the formal obligation to inform the Commission of the existence of those rules so that it can be in a position to assess whether the rules comply with the directive (see, to that effect, Case C-456/03 *Commission v Italy*, paragraph 30).

109 In the present case, in so far as the law already in force was deemed to ensure, by itself, the implementation of the provisions of Directive 2003/35 relating to access to justice in environmental matters, it was for Ireland to inform the Commission of the laws or regulations in question, and it cannot properly argue that it had previously notified the Commission of those domestic legal rules in the context of the transposition of Directives 85/337 and 96/61 as applicable before the amendments introduced by Directive 2003/35.

110 Since it claimed that transposition had been confirmed by the case-law of its national courts, in particular, that of the High Court, it was also for Ireland to communicate to the Commission a precise summary of that case-law, thus enabling the Commission to ascertain whether Ireland had indeed implemented Directive 2003/35 solely by virtue of applying national law as it existed before that directive entered into force, and to carry out its task of supervision under the Treaty.

111 Consequently, the second complaint is well founded in so far as it concerns infringement of the obligation to inform the Commission.

112 Therefore, having regard to all of the foregoing considerations, it must be held that

- by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337 as amended by Directive 97/11, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11 are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of that amended directive, and
- by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 3(3) to (7) and 4(2) to (4) of Directive 2003/35, and by failing to adequately notify such provisions to the Commission,

Ireland has failed to fulfil its obligations under Directive 85/337, as amended by Directive 97/11, and Article 6 of Directive 2003/35.

113 The remainder of the action is dismissed.

Costs

114 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. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

115 In the present dispute, while the Commission has requested that Ireland be ordered to pay the costs, account must be taken of the fact that a substantial number of the applicant's complaints were unsuccessful. Therefore, each of the parties will be ordered to bear its own costs.

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

1. Declares that

– **by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category, covered by point 10(e) of Annex II to Directive 85/337, as amended by Directive 97/11, are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of that directive, and**

– **by failing to adopt the laws, regulations and administrative provisions necessary to comply with Article 3(3) to (7) and Article 4(2) to (4) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, and by failing to adequately notify such provisions to the Commission of the European Communities,**

Ireland has failed to fulfil its obligations under Directive 85/337, as amended by Directive 97/11, and Article 6 of Directive 2003/35;

2. Dismisses the action as to the remainder;

3. Orders the Commission of the European Communities and Ireland to bear their own costs.

[Signatures]