

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 22 June 2006¹**I — Introduction**

1. By the present action for failure to fulfil obligations, the Commission seeks a declaration that, by making the full and effective participation of the public in certain environmental impact assessments subject to prior payment of participation fees,² Ireland has failed to comply with its obligations under Articles 6 and 8 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,³ as amended by Council Directive 97/11/EC of 3 March 1997⁴ ('the EIA Directive').

process when environmental impact assessments are carried out. Although the failure to fulfil obligations that is pleaded in the present proceedings is to be examined with specific regard to the EIA Directive, the more general question is also raised of the extent to which the Member States are allowed to levy administrative fees in a domestic administrative procedure which is carried out on the basis or in implementation of Community provisions.

II — Legal context

2. The EIA Directive contains no express provision relating to administrative fees as levied, in the present case, in Ireland for public participation in the consultation

A — The EIA Directive

1 — Original language: German.

2 — This is the — somewhat imprecise — term used by the Commission in its application, but technically administrative charges/fees are at issue.

3 — OJ 1985 L 175, p. 40.

4 — Directive amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73, p. 5).

3. The EIA Directive provides that, before the execution of certain works or other interventions in the natural surroundings, an environmental impact assessment is to be carried out.

4. Article 6 of the EIA Directive reads as follows:

— specify the places where the information can be consulted,

‘1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To this end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.

— specify the way in which the public may be informed, for example by bill-posting within a certain radius, publication in local newspapers, organisation of exhibitions with plans, drawings, tables, graphs, models,

— determine the manner in which the public is to be consulted, for example, by written submissions, by public enquiry,

2. Member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.

— fix appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.’

3. The detailed arrangements for such information and consultation shall be determined by the Member States, which may in particular, depending on the particular characteristics of the projects or sites concerned:

5. Article 8 provides:

— determine the public concerned,

‘The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.’

B — The national provisions relating to the administrative charges at issue

6. Under Irish planning law, members of the public may be charged administrative fees for making submissions or observations on planning applications and on appeals, that is to say both in the procedure before the local planning authority and in proceedings before An Bord Pleanála (the Planning Appeals Board; ‘Bord Pleanála’). These administrative fees relate to all planning procedures, including procedures involving an environmental impact assessment. Their amount does not depend on the scale of the project or the extent of the submissions or observations. Also, the fee is to be levied only once, so that no further charge becomes payable for additional submissions or observations in the same procedure.

7. The statutory basis for levying the administrative fees is the Planning and Development Act 2000.

8. Section 33 of the Act empowers the Minister for the Environment *inter alia* to prescribe by regulation an administrative fee payable by members of the public for making submissions or observations on planning

applications before local planning authorities. At the material time, the administrative fee prescribed by the Minister for the Environment amounted to EUR 20.

9. Section 144 of the Act empowers Bord Pleanála, subject to the approval of the Minister, to determine a fee for the making of submissions or observations on planning appeals. According to the Commission, this administrative charge amounted to EUR 45 at the material time.

10. The Act exempts various State bodies and certain organisations from the administrative fees payable at both stages. This exemption covers, in addition to regional and State authorities, bodies which represent particular interests in connection with planning proposals, such as Fáilte Ireland, An Taisce and the Environmental Protection Agency.

III — Facts and procedure

11. Acting on the basis of two complaints received by it in 2000, the Commission called

on the Irish authorities by letter of 29 August 2000 to comment on certain aspects of the Planning and Development Act 2000, which was not yet in force, in particular on the provisions under which interested members of the public would have to pay an administrative fee in order to participate in the planning process.

12. Following an initial letter in response from the Irish authorities, on 23 October 2001 the Commission sent Ireland a letter of formal notice calling on it to comment on the fact that, under Irish planning law, rights pursuant to the EIA Directive would be exercisable only upon payment of a participation fee.

13. By letter of 7 March 2002, the Irish authorities responded that in their view the EIA Directive did not preclude the levying of administrative fees of the kind prescribed on the basis of the Planning and Development Act 2000. They stated in particular that under the Directive it is for the Member States to determine the detailed arrangements for consultation of the public and that the public would not be discouraged by the fees at issue from participating in the consultation process.

14. The Commission responded by sending a reasoned opinion to Ireland on 23 January

2003, in which it reaffirmed the complaint that, by levying the administrative fees at issue, Ireland was infringing Articles 6 and 8 of the EIA Directive.

15. In their reply of 16 May 2003, the Irish authorities again disputed that it was contrary to the EIA Directive to levy fees, stating in particular that the charges were proportionate and necessary in order to absorb the costs of the enhanced rights of public consultation under Irish planning law.

16. However, the Commission adhered to its view and therefore, by application dated 29 April 2005, registered at the Court on 17 May 2005, it brought the present action against Ireland pursuant to Article 226 EC.

IV — Consideration of the action

A — *Key arguments of the parties*

17. The *Commission* submits that the Irish legislation under which administrative fees

are payable for participation by interested members of the public in the consultation process required by the EIA Directive is incompatible with Article 6 of the EIA Directive essentially for four reasons.

assess a project's environmental effects appropriately.

18. The Commission contends, first, that no provision of the Directive expressly permits such fees. By contrast, it is expressly provided, for example, in Article 5 of Directive 90/313/EEC on the freedom of access to information on the environment⁵ that Member States may make a charge for supplying information. To levy a charge such as that at issue would be justified under the EIA Directive only if to do so were objectively necessary and proportionate. Furthermore, no other Member State requires payment of an administrative fee for participation in the consultation process.

20. Third, the wording of Article 6 of the Directive does not admit the broad interpretation put forward by Ireland. The imposition of fees is not to be regarded as one of the 'detailed arrangements for consultation' under Article 6(3) of the Directive which is to be determined by the Member States, because that legislative power covers only what is necessary to give practical effect to consultation under Article 6(2). The 'polluter pays' principle laid down in Article 174(2) EC also militates in favour of this interpretation, since otherwise costs attributable to applicants for development proposals which have environmental impacts are passed instead to the public or to those who may be affected by those impacts.

19. The Commission submits, second, that levying the administrative fees is contrary to the scheme and purpose of the EIA Directive, under which environmental impact assessments are to be carried out on the basis of appropriate information from a number of sources, including the public. The charge makes it less likely that the public will participate, through the consultation procedure, in the decision-making process and that the authorities will thus

21. Fourth, the Commission states that the levying of the fees at issue impedes, or potentially impedes, exercise of the rights conferred on the public by Article 6(2). The fees have a deterrent effect on social welfare recipients in particular, especially as the aggregate fees of EUR 65 for the procedure before the local planning authority and the appeal proceedings before Bord Pleanála represent 50% of the weekly income of this category of persons.

5 — Council Directive of 7 June 1990 (OJ 1990 L 158, p. 56).

22. The Commission then submits that the breach of Article 8 of the Directive that is pleaded follows from the infringement of Article 6, as Ireland fails thereby to ensure that opinions of members of the public who do not pay the administrative fees are taken into account in the development consent procedure.

23. *Ireland* opposes each of the Commission's arguments.

24. In its submission, it cannot be concluded from the fact that administrative fees of the kind at issue are not expressly envisaged in the Directive that the Member States are prohibited from introducing such fees. This follows also from the principle of subsidiarity, from the discretion which the Member States generally have under Article 249 EC with regard to the transposition of directives and from the legislative power of the Member States pursuant to Article 6(3) of the Directive. The fact that other Member States do not impose a fee does not mean that this is incompatible with the Directive.

25. There is no basis whatsoever in the Directive for the 'justification test' which the Commission has proposed. The question whether administrative fees erode the right under Article 6(2) of the Directive to be

consulted is to be answered solely in relation to the administrative fees actually levied in Ireland. So far as concerns the amount of the fees, Ireland considers that the income of social welfare recipients is not the right yardstick. Instead, the average monthly income in Ireland should be taken as a basis. In any event, the administrative fees at issue are not high, but reasonable and not a deterrent. They are intended to contribute in some small way towards defraying the considerable costs which arise because the Planning and Development Act 2000 has enhanced the rights of members of the public.

26. In Ireland's submission, no conclusions are in any event to be drawn for the EIA Directive from Directive 90/313. The contested provisions comply with both the principle of effectiveness and the principle of equivalence.

B — *Appraisal*

27. First of all, issue must, in my view, be taken with the Commission in so far as it submits that a Member State would be allowed to levy an administrative fee only if this were expressly provided for in the Directive.

28. That approach ultimately implies that a Member State might act only in so far as there is permission under Community law to do so. It is more correct, however, to proceed as a matter of principle on the basis that anything not prohibited by Community law remains, generally speaking, open to a Member State, or that Member States have legislative power or freedom to act in so far as Member State action does not conflict with the requirements of Community law. This also corresponds to the principle, enshrined in Article 5 EC, of conferred powers, under which the Community is attributed no general or exclusive power to legislate, but acts within the framework of, and in accordance with, the respective powers laid down by the Treaty and binds the Member States to that extent.

29. In that connection, as Ireland has stated, it can in any event not be inferred automatically from the EIA Directive's silence as to administrative fees in connection with public consultation pursuant to Article 6(2) that the Member States are prohibited from levying such fees.

30. Rather, it is to be remembered that according to the general principles on which the Community is based and which govern relations between the Community and the Member States, it is for the latter, under Article 10 EC, to ensure that Community rules are implemented within their terri-

tories. In implementing those rules, the national authorities are to act in accordance with the procedural and substantive rules of their own national law so far as Community law, including its general principles, does not include common rules to that end.⁶

31. Recourse to rules such as the rules of Irish planning law at issue under which administrative fees are levied for public participation in the consultation process is thus possible in so far as, or only in so far as, the application of those rules of national law does not jeopardise the scope and effectiveness of Community law, including its general principles.⁷

32. The present case concerns primarily the compatibility of national rules with the EIA Directive. As Ireland has pointed out, under Article 249 EC the Member States are left free to choose the ways and means of implementing a directive, but that freedom does not affect the obligation on each of the

6 — See, inter alia, Joined Cases C-480/00, C-481/00, C-482/00, C-484/00, C-489/00, C-490/00, C-491/00, C-497/00, C-498/00 and C-499/00 *Azienda Agricola Ettore Ribaldi and Others* [2004] ECR I-2943, paragraph 42; Case C-285/93 *Dominikanerinnen-Kloster Altenhohenau* [1995] ECR I-4069, paragraph 26; and Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 27.

7 — Cf., inter alia, Joined Cases C-80/99, C-81/99 and C-82/99 *Flemmer and Others* [2001] ECR I-7211, paragraph 55; Joined Cases 146/81, 192/81 and 193/81 *Bay Wa and Others* [1982] ECR 1503, paragraph 29; and Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraphs 17 and 22.

Member States to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues.⁸

33. It must therefore be examined below whether the levying of administrative fees for public participation in the consultation process when an environmental impact assessment is carried out is contrary to the requirements resulting from the Directive — in accordance with its wording, its context and its objective⁹ — and to its practical effectiveness.

34. As regards, first, the Commission's reference to Directive 90/313, the fact that under another directive it is expressly permitted to levy fees cannot in my view found a general presumption that the Community legislature has wished to allow fees only when the legislation expressly so provides. In any event, that mention of fees does not mean that it can safely be concluded a contrario that such fees are intended to be prohibited under the EIA Directive.

35. So far as concerns, next, the 'justification test' put forward by the Commission, according to which the levying of a fee should be objectively required, for example on grounds of good administration, and be proportionate, it is to be noted, as Ireland has pointed out, that neither the Directive itself nor Article 249 EC — in contrast to, for example, the Treaty provisions on the fundamental freedoms — contain such a qualification.

36. The Commission has also submitted that the levying of administrative fees is contrary to the aim and purpose of Article 6(2) of the Directive of enabling the public to participate in the consultation process when an environmental impact assessment is carried out and the competent authorities to assess the environmental effects properly, and erodes the practical effectiveness of this provision.

37. Under Article 5(3) of the Directive in conjunction with the sixth recital in its preamble, where development consent is sought for a project, the assessment of its environmental effects must be conducted primarily on the basis of the appropriate information supplied by the developer. According to that recital, this information may be supplemented by the authorities and by the public.

8 — Inter alia, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, and Case C-478/99 *Commission v Sweden* [2002] ECR I-4147, paragraph 15.

9 — Cf., inter alia, Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, paragraph 28.

38. Under Article 6(2) of the Directive, the Member States are correspondingly to ensure that any request for development consent and any information gathered are made available to the public within a reasonable time 'in order to give the public concerned the opportunity to express an opinion before the development consent is granted'.

39. In my view, that cannot be taken to mean that there is an *unrestricted* right for *everybody* to be consulted. As Ireland has submitted, this is so in particular because the Member States are expressly empowered under Article 6(3) of the Directive to determine the detailed arrangements for consultation of the public in such a way that the scope of the resulting consultation is restricted.

40. The Member States can, in accordance with the non-exhaustive list of possibilities in Article 6(3), determine both the public concerned and how the consultation is carried out; the consultation may, for example, even be in the form of public enquiry. In addition, the consultation stage can be limited in time.

41. Viewed in this light, the levying of administrative fees as a condition for public

participation in the consultation process, which in the relevant Member State takes place by way of written submissions, does impose a condition on or restrict consultation of the public, but that restriction is not in itself incompatible with the Directive.

42. Of course, the discretion of the Member States with regard to implementation of the Directive is limited in addition by the general principles of Community law,¹⁰ which include, in particular, the principles of effectiveness and equivalence. Under these principles, which the Court has applied not only to national judicial proceedings but also in connection with administrative procedures,¹¹ the detailed procedural and substantive rules laid down in national law must not render it virtually impossible or excessively difficult to implement the Community rules, and national law must be applied in a manner which is not discriminatory as compared to corresponding proceedings or procedures which concern purely domestic law.¹²

10 — See above, point 30.

11 — See, by way of example, for the application of those principles to an administrative procedure for the settling of disputes concerning the levying of a domestic tax, Case C-228/98 *Downias* [2000] ECR I-577, paragraphs 62 to 67; with regard to the collection of Community revenues and of agricultural levies in accordance with the detailed rules and conditions laid down in Member States' domestic law, see Joined Cases 66/79, 127/79 and 128/79 *Salumi and Others* [1980] ECR 1237, paragraphs 17 to 20; see also, on the provisions to be applied with regard to recovery by the national authorities of unduly paid aid, *Deutsche Milchkontor and Others*, cited in footnote 7, paragraph 15 et seq.

12 — *Inter alia*, *Deutsche Milchkontor and Others*, cited in footnote 7, paragraph 19; Case C-298/96 *Ölmühle Hamburg and Schmidt Söhne* [1998] ECR I-4767, paragraph 24; Case C-255/00 *Gründig Italiana* [2002] ECR I-8003, paragraph 33; and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 70.

43. First, therefore, it is to be asked, in accordance with the principle of effectiveness, whether participation of the public in the consultation process forming part of the environmental impact assessment procedure is rendered excessively difficult or even virtually impossible by the administrative fees at issue. The answer to this question can naturally not be given in the abstract, but depends on the actual amount of the administrative fees in question.

44. In the present case, the fee for making observations in the procedure before a local planning authority amounts to EUR 20 and the fee in proceedings before Bord Pleanála is EUR 45. Both parties have correctly proceeded on the basis that the significance or the (deterrent) effect of these fees for persons wishing to participate in the consultation process depends in principle on whether, in view of the means available to them, that is to say, above all their incomes, the fees appear easily, or less easily, affordable. The parties do not agree, however, on the criterion of assessment to be applied.

45. The weekly income of the category of persons constituted by social welfare recipients, the yardstick used by the Commission, is as extreme a yardstick as, for example, the average annual income of people in the highest income brackets would be. An assessment having regard to average monthly income in Ireland appears to me more sensible, even though no clear conclusions

can be drawn from this either. On the whole, however, Ireland's view that EUR 20 and EUR 45 are, generally, affordable sums is probably to be accepted as correct. Furthermore, as is apparent from the case-file and Ireland's submissions, the amount of these fees falls perfectly within the normal range for various fees and charges in connection with administrative procedures in Ireland.

46. Finally, regard must be had to the fact that, as I have already stated, the Directive does not oblige the Member States to guarantee the unconditional and unrestricted consultation of everybody but to grant the 'public', which is not more precisely defined, an effective opportunity to be consulted.

47. For those reasons I am of the view that the actual amount of the administrative fees at issue does not render realisation of the public consultation virtually impossible or excessively difficult.

48. With regard to the second principle, that is to say the principle of equivalence, as

Ireland has stated and the Commission has not disputed, the administrative fees at issue are levied generally for observations of the public in the Irish planning process and therefore are not applicable just to environmental impact assessment procedures in accordance with the EIA Directive. The provisions of Irish planning law governing public consultation pursuant to Article 6(2) of the Directive are not, in this regard, less favourable than those relating to comparable, purely national, procedures and thus the consultation complies with the principle of equivalence too.

49. Finally, in its application the Commission has not only contended that the administrative fees at issue are incompatible with Community law, first, generally and, secondly, because of their respective actual amounts, but has also complained, thirdly, that the Planning and Development Act 2000 authorises the competent minister or Bord Pleanála to prescribe the fees without limiting that power or defining it more precisely.

50. This criticism clearly relates to the principle of legal certainty, which the Member States are also to observe when transposing directives. According to the case-law on

this principle, the Member States must implement their obligations under Community law with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the requirements flowing from that principle.¹³

51. As is also apparent from the case-law, legislative action is not necessarily required for this. The principle of legal certainty can also be satisfied by a general legal framework provided that the full application of the directive by the national authorities is actually ensured and that, where the relevant provision of the directive seeks to create rights for individuals, the legal situation arising from the general legal framework is sufficiently precise and clear and that the persons concerned are put in a position to know the full extent of their rights.¹⁴

52. In particular, in accordance with settled case-law, to which the Commission clearly alludes, mere administrative practices for example, which by their nature are alterable

13 — Inter alia, Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraphs 46 and 47, and Case C-159/99 *Commission v Italy* [2001] ECR I-4007, paragraph 32.

14 — See, in this regard, in particular Case C-233/00 *Commission v France* [2003] ECR I-6625, paragraph 76, and the case-law cited.

at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under Community law, since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights in an area governed by Community law.¹⁵

54. Accordingly, the Irish administrative fees at issue have been prescribed pursuant to the Planning and Development Act 2000 with sufficient binding force and precision to satisfy the principle of legal certainty.

55. In light of all the foregoing, I reach the conclusion that the complaint alleging infringement of Article 6 of the EIA Directive and an associated breach of Article 8 is unfounded.

53. I do not think, however, that the way in which the administrative fees at issue are laid down in Irish law, namely by regulations of the competent minister or by Bord Pleanála with approval of the minister, can be equated to a 'mere administrative practice' within the meaning of this case-law. The Court has also already found to this effect, stating that the mere fact that a national legislative instrument has delegated to an authority of a Member State, such as a minister, authority to adopt measures prescribed by Community law is not in itself of such a nature as to infringe the principle of legal certainty, since the adoption of a measure following such a procedure does not necessarily mean that that measure is not binding or does not satisfy the requirement of that principle that it be specific, precise and clear.¹⁶

56. The Commission's action is therefore to be dismissed.

V — Costs

57. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission is unsuccessful, it must bear the costs as applied for by Ireland.

15 — See, to this effect, Case C-80/92 *Commission v Belgium* [1994] ECR I-1019, paragraph 20, and Case C-151/94 *Commission v Luxembourg* [1995] ECR I-3685, paragraph 18.

16 — See *Mulligan and Others*, cited in footnote 13, paragraph 50.

VI — Conclusion

58. I accordingly propose that the Court should:

- dismiss the action;
- order the Commission of the European Communities to pay the costs.