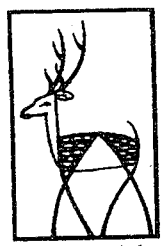
Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland

Áine Ryall



OXFORD AND PORTLAND, OREGON
2009

4

The ECJ and the EIA Directive

I. INTRODUCTION

THE ENVIRONMENTAL IMPACT Assessment (EIA) directive sets out the basic requirements for a system of environmental assessment and leaves the practical details to be completed by the Member States. The broad and general manner in which a number of provisions of the directive are drafted has led to considerable uncertainty in practice. The Commission has observed that

> whilst the 'framework' nature of the Directive has, from one perspective, made the task of implementation easier—by giving Member States more flexibility in adjusting their existing procedures—its broad nature has, perhaps inevitably, entailed some uncertainty over the precise interpretation to be placed upon the basic assessment principles and procedural requirements, which have to be satisfied.[1]

The European Court of Justice (ECJ) has been called upon to interpret a number of key provisions of the directive with a view to clarifying the scope and content of the obligations imposed on the Member States. Two particular strands of the Court's EIA jurisprudence are examined in this chapter: first, the Court's approach to the discretion left to Member States at a number of points in the directive; and secondly, the line of cases in which the Court has clarified the role and potential of the directive in judicial review proceedings before the national courts. This chapter explains the basic principles emerging from this jurisprudence and it traces how the ECJ has developed and refined these principles over time.[2]

II. THE ECJ'S GENERAL APPROACH TO THE EIA DIRECTIVE

The ECJ has taken a consistently rigorous and purposive approach when called upon to interpret the EIA directive. It is clear from the case law that the Court's primary concern is to ensure that the core objectives of the directive are not

[1] European Commission, Implementation of Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment COM (93) 28 final para 2.1

[2] See generally F Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18 *Journal of Environmental Law* 185.

undermined in practice. By virtue of Article 2(1), the basic substantive obligation is to ensure that projects likely to have significant effects on the environment are subjected to comprehensive assessment before development consent is granted.[3] According to the sixth recital to the original EIA directive, this assessment is to be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by 'the people who may be concerned by the project in question'. The ECJ has frequently invoked the core obligation articulated in Article 2(1), and the express reference to the role of the public in the sixth recital, when called upon to interpret the directive.

A. Transitional Arrangements

The ECJ rejected, categorically, early attempts by Member States to delay the implementation of the directive after the initial deadline for transposition had passed. Member States were required to transpose the original EIA directive into national law by 3 July 1988, but the directive made no provision for transitional arrangements. It is not surprising, therefore, to find that the Court was called upon to consider whether Member States were entitled to waive the requirements of the directive in cases where the development consent procedure had been initiated after 3 July 1988 but before the entry into force of national provisions purporting to transpose the directive. Member States sought to justify the introduction of transitional arrangements on the basis of legal certainty. The Court ruled that this course of action was unlawful in *Bund Naturschutz*.[4] This result was grounded on the firm reasoning that any other interpretation would run counter to the obligations imposed by the directive and would undermine its effectiveness.[5] In *Commission v Germany*,[6] the ECJ confirmed that the date on which the development consent procedure is initiated is determined by reference to the date on which the application for consent is lodged formally with the competent authority.[7] This criterion is consistent with 'the principle of legal certainty and is designed to safeguard the effectiveness of the directive'.[8] Directive

[3] Case C-287/98 *Luxembourg v Linster* [2000] ECR I-6971 para 52; Case C-227/01 *Commission v Spain* [2004] ECR I-8253 para 47; Case C-486/04 *Commission v Italy* [2006] ECR I-11025 para 36; Case C-142/07 *Ecologistas en Acción-CODA v Ayuntamiento de Madrid* [2008] ECR I-0000 para 33; and Case C-215/06 *Commission v Ireland* [2008] ECR I-0000 para 49.

[4] Case C-396/92 *Bund Naturschutz in Bayern eV v Freistaat Bayern* [1994] ECR I-3717.

[5] *Ibid*, para 19. See also Case C-81/96 *Burgemeester en Wethouders van Haarlemmerliede en Spaarnwoude v Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923 paras 22–3 and 27 (*Burgemeester*), and Case C-416/02 *Commission v Spain* [2005] ECR I-7487 para 80.

[6] Case C-431/92 *Commission v Germany* [1995] ECR I-2189.

[7] *Ibid*, para 32. See also Case C-201/02 *R (Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723 paras 42–3 (*Wells*).

[8] Case C-431/92 *Commission v Germany* [1995] ECR I-2189 para 32. See also Case C-209/04 *Commission v Austria* [2006] ECR I-2755 paras 56–7.

97/11/EC[9] (which introduced important amendments to the original EIA directive) and Directive 2001/42/EC[10] (the SEA directive) both contain specific provisions that explain the dates from which the obligations contained in those directives apply.[11] Directive 2003/35/EC (Article 3 of which contains the most recent set of amendments to the EIA directive) is silent on this point. It appears from the case law noted above, however, that the obligations created in Directive 2003/35/EC apply to projects in respect of which a request for development consent is submitted after the deadline for transposition has passed, in this case 25 June 2005.[12]

B. Project Categorisation

In *Abraham*,[13] the ECJ confirmed that the term 'project' in Article 1(2) refers to works or physical interventions.[14] An agreement between public authorities and a private undertaking was not a project within the meaning of the directive. It was for the national court to determine, however, whether the agreement constituted a 'development consent' for the purposes of the directive.[15] The Court has taken a robust approach to the categorisation of projects for the purpose of Article 4(1) and Annex I of the directive (the projects in respect of which EIA is mandatory). In *Commission v Germany*,[16] the ECJ rejected the argument that a proposed new block to the Grosskrotzenburg thermal power station should be categorised as a 'modification' to a project within the meaning of (original) Annex II, paragraph 12 and therefore not be subject to mandatory EIA. The Court observed that pursuant to (original) Annex I, paragraph 2, projects for thermal power stations with a heat output of 300 megawatts or more are subject to mandatory assessment. It followed, in the Court's view, that 'such projects must be assessed irrespective of whether they are separate constructions, are added to a pre-existing construction, or even have close functional links with a pre-existing construction'.[17] The proposed new block in this case, which was to form part of a thermal power station with a heat output of 500 megawatts, fell within the scope

[9] Dir 97/11/EC [1997] OJ L 73/5.

[10] Dir 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30.

[11] Dir 97/11/EC Art 3(2) and Dir 2001/42/EC Art 13(3).

[12] Dir 2003/35/EC Art 6.

[13] Case C-2/07 *Abraham v Région wallonne* [2008] ECR I-0000.

[14] *Ibid*, para 23

[15] *Ibid*, para 25.

[16] Case C-431/92 *Commission v Germany* [1995] ECR I-2189.

[17] *Ibid*, para 35.

of Article 4(1) and so assessment was mandatory. This strong decision illustrates the ECJ's determination to give wide-ranging effect to the provisions governing mandatory EIA.[18]

The ECJ adopted a similarly expansive approach to the concept of 'modifications to development projects' in *Kraaijeveld.*[19] On this occasion, the Court confirmed that 'the scope of the directive is wide and its purpose very broad'.[20] The purpose of the directive would be undermined if 'modifications to development projects' were construed so as to enable certain works to escape assessment even though such works were likely to have significant effects. Notwithstanding that the original directive did not refer expressly to modifications to Annex II projects, this did not mean that such projects did not fall within its scope.[21] Following this purposive analysis, the ECJ ruled that the expression 'canalization and flood-relief work' (original Annex II, paragraph 10(e)) was to be interpreted as including not only the construction of a new dyke, but also modifications to an existing dyke.[22] The Court was not prepared to allow the concept 'modifications to development projects' to be deployed in such a way that projects likely to have significant effects on the environment would escape assessment. This approach was confirmed in *Bozen.*[23] In *Commission v Spain,*[24] the ECJ refused to accept an argument mounted by the Spanish Government to the effect that (original) Annex I, paragraph 7 was only concerned with construction of a new railway line and did not apply to a project for improving an existing railway line. The project at issue (a section of the Valencia-Tarragona railway) had not been subjected to EIA. The Court confirmed that the directive is wide in scope and that its purpose is very broad.[25] Drawing on the 'fundamental objective' articulated in Articles 1(1) and 2(1), the ECJ held that the original Annex I, paragraph 7 must be understood to include the doubling of an existing railway track.[26] In the Court's view, such a project could indeed have a significant effect on the environment within the meaning of the directive (in particular in terms of likely permanent effects on flora and fauna, the composition of soil and the landscape

[18] See also Case C-133/94 *Commission v Belgium* [1996] ECR I-2323 paras 26–7, where the ECJ ruled that by adopting a narrow interpretation of the concept 'integrated chemical installation' (one of the classes of project listed in Annex I), Flemish legislation failed to adequately transpose Arts 2(1), 4(1) and Annex I, para 6 of the original EIA directive.

[19] Case C-72/95 *Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

[20] *Ibid,* para 39. See also Case C-227/01 *Commission v Spain* [2004] ECR I-8253 para 46; Case C-486/04 *Commission v Italy* [2006] ECR I-11025 para 37; Case C-2/07 *Abraham* [2008] ECR I-0000 para 32; and Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-0000 para 28.

[21] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403 para 40.

[22] *Ibid,* para 42.

[23] Case C-435/97 *World Wildlife Fund (WWF) v Autonome Provinz Bozen* [1999] ECR I-5613 paras 39–40.

[24] Case C-227/01 *Commission v Spain* [2004] ECR I-8253.

[25] *Ibid,* para 46.

[26] *Ibid,* paras 47–8.

and significant noise effects).[27] The objective of the directive would be undermined if the contested project could be excluded from the assessment obligation. It followed that the project at issue could not be regarded as a mere modification to an earlier project for the purposes of the original Annex II, paragraph 12. The contested project involved a new track route and was, by its nature, likely to have significant effects on the environment. The ECJ was also alert to the danger of developers dividing projects into two or more separate parts such that each individual part does not require EIA and therefore the project as a whole avoids assessment. In the words of the Court,

> [i]f the argument of the Spanish Government were upheld, the effectiveness of Directive 85/337 could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division.[28]

The ECJ's robust approach to mandatory EIA in this case demonstrates the importance that it attaches to EIA as a mechanism for delivering more environmentally aware decisions. At a more general level, this ruling highlights the ECJ's perception and understanding of the difficulties inherent in ensuring the effectiveness of Community law at national level.

In *Commission v Italy*,[29] the ECJ was required to consider the scope of the concept 'waste disposal' for the purpose of the EIA directive. The Commission maintained that the term 'disposal' deployed in Annex I paragraphs 9 and 10 and Annex II paragraph 11(b)—which concern certain waste disposal installations—embraced *both* disposal (in the strict sense) *and* recovery operations. The EIA directive does not provide a definition of waste disposal. Nor is there any general definition of waste disposal or recovery in the text of the waste directive (Directive 75/442/EEC).[30] Annexes II A and II B to that directive simply list various operations that fall within the scope of those concepts. Drawing on its previous case law, the ECJ noted that the essential characteristic of a waste recovery operation is to ensure that the waste can serve a useful purpose, thereby conserving natural resources.[31] That characteristic is extraneous to the environmental consequences that may flow from the recovery operation. The Court observed that the environmental consequences of waste recovery could be significant, and it noted, in particular, Article 4 of Directive 75/442/EEC, which requires Member States to ensure that waste is recovered or disposed of without endangering human health and without using processes that could harm the

[27] *Ibid*, paras 49 and 59.

[28] *Ibid*, para 53.

[29] Case C-486/04 *Commission v Italy* [2006] ECR I-11025. See also Case C-255/05 *Commission v Italy* [2007] ECR I-5767.

[30] Dir 75/442/EEC [1975] OJ L194/39.

[31] Case C-486/04 *Commission v Italy* [2006] ECR I-11025 para 41.

environment.[32] The ECJ insisted that if the Community legislature had intended to equate the concept of waste disposal for the purposes of both the EIA directive and the waste directive, then it would have done so expressly.[33] It concluded that the concept of waste disposal under the EIA directive is an independent one which must be given a meaning that fulfils the fundamental objectives of that particular directive. This purposive interpretation requires waste disposal to be construed 'in the wider sense' as including all operations leading either to waste disposal or to waste recovery.[34] In *Abraham*,[35] a purposive approach led the ECJ to conclude that Annex II, paragraph 12, of the original EIA directive, read in conjunction with Annex I, paragraph 7, included works to modify an existing airport.[36] Similarly, in *Ecologistas en Acción-CODA*,[37] the ECJ determined that it would be contrary to the very purpose of the directive (as amended by Directive 97/11/EC) to treat any urban road project as falling outside its scope on the sole basis that the directive does not expressly mention that particular category of road project among the Annex I and Annex II projects.[38] The ongoing uncertainty surrounding the scope of the EIA directive led the Commission to publish guidance notes in 2008 to help explain the meaning of certain project definitions listed in Annex I and Annex II.[39]

C. Prior Authorisation

In *Burgemeester*,[40] the ECJ was required to consider whether a Member State was entitled to waive the obligation to carry out an EIA in respect of an Annex I project in the following circumstances: a zoning plan (authorising the construction of a port and an industrial zone) had been approved by the relevant national authorities, without EIA, before 3 July 1988 (the date by which the original EIA directive was to have been transposed). As this approval was not acted upon, a fresh application for approval of the same plan was necessary. The new application was initiated after 3 July 1988. Under the relevant Dutch law, there was no obligation to carry out an EIA in respect of the new application. This dispensation was based on the fact that the plan at issue had been included in an earlier approved zoning plan. The Court adopted its characteristic purposive approach

[32] *Ibid*, para 42.
[33] *Ibid*, para 43.
[34] *Ibid*, para 44.
[35] Case C-2/07 *Abraham* [2008] ECR I-0000.
[36] *Ibid*, paras 32–3.
[37] Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-0000.
[38] *Ibid*, paras 28–37.
[39] European Commission, *Interpretation of Definitions of Certain Project Categories of Annex I and II of the EIA Directive* (2008), text available at: http://ec.europa.eu/environment/eia/pdf/interpretation_eia.pdf.
[40] Case C-81/96 *Burgemeester* [1998] ECR I-3923. See also Case C-227/01 *Commission v Spain* [2004] ECR I-8253 para 56 and paras 54–60 of the Opinion.

and ruled that where a fresh procedure is initiated formally post 3 July 1988, then that procedure is subject to the obligations imposed by the EIA directive. Any other interpretation would run counter to the basic principle articulated in Article 2 and would compromise the directive's effectiveness.[41] The ECJ was particularly concerned to ensure that an Annex I project did not escape assessment by virtue of the fact that it had been approved, without EIA, 'years or even decades previously' under the national development consent procedures applicable at that point in time.[42] This approach again confirms the ECJ's determination to scrutinise closely Member States' attempts to restrict the application of the directive. The Court noted, in passing, that national legal remedies were available in respect of the new development consent procedure.[43] While the Court did not expand on this point, it appears that it was acknowledging (albeit implicitly) the role of the public in ensuring that the requirements of the directive are observed in the course of the consent procedure.

D. Development Consent

'Development consent' is defined in Article 1(2) of the directive as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. *Wells*[44] is a valuable decision in terms of clarifying the scope of the concept of development consent and the stage of the development consent procedure at which the EIA should be undertaken. The facts, in brief, were as follows: pursuant to the relevant national planning rules, the developer in *Wells* was required to apply to register an old mining permission and to have planning conditions determined by the competent mineral planning authority (MPA).[45] Registration was granted in 1992 and the developer then applied to the MPA for the determination of new conditions. The MPA imposed stricter conditions than those submitted by the developer and this resulted in an appeal to the Secretary of State. In June 1997, the Secretary of State imposed 54 planning conditions and left certain matters to be determined by the MPA. Neither the Secretary of State nor the MPA considered whether it was necessary to carry out an EIA. In the course of a challenge to the Secretary of State's failure to remedy the absence of an EIA, the High Court (England and Wales) referred a series of questions to the ECJ pursuant to Article 234 EC. The ECJ was required to determine whether approval of a new set of conditions on an old mining permission, and the

[41] Case C-81/96 *Burgemeester* [1998] ECR I-3923 para 27.

[42] *Ibid*, para 25.

[43] *Ibid*, para 26.

[44] Case C-201/02 *Wells* [2004] ECR I-723. See also J Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford, Oxford University Press, 2004) 207–11 and R Harwood, 'EIA, Development Consent and Duties on the Member State' (2004) 16 *Journal of Environmental Law* 261.

[45] Planning and Compensation Act 1991, s 22. See paras 8–19 of the *Wells* judgment for a full account of the relevant national legislative framework.

subsequent approval of further matters reserved by the new conditions, constituted development consent within the meaning of Article 1(2) of the directive. The ECJ began by clarifying that this question involved the interpretation of Community law.[46] The United Kingdom (UK) maintained that the determination of new conditions involved the detailed regulation of activity for which the principal consent (in this case the old mining permission) had been granted long before the obligations created in the EIA directive came into force. As regards the subsequent approval of reserved matters, the UK argued that this aspect of the procedure merely concerned the approval of details which could not, in any event, extend beyond the parameters set by the initial determination of the scheme of planning conditions. The ECJ was unimpressed by these arguments. The Court recalled the core objective of the EIA directive set down in Article 2(1) and stressed that it was only in cases where development consent was granted before 3 July 1988, or in so-called 'pipeline cases',[47] that this obligation would not apply. On the facts here, the developer was obliged to apply to register the old mining permission and to have new planning conditions determined by the MPA in order to exploit the quarry lawfully. In the absence of fresh decisions from the MPA, the old permission would cease to have legal effect and the developer would no longer enjoy consent to work the quarry. The decisions of the competent authorities determining the new conditions and approving reserved matters (the effect of which was to authorise the resumption of mining activity), taken as a whole, comprised a development consent within the meaning of Article 1(2). In the words of the ECJ,

> [i]t would undermine the effectiveness of [the EIA] directive to regard as mere modification of an existing consent the adoption of decisions which, in circumstances such as those of the main proceedings, replace not only the terms but the very substance of a prior consent, such as the old mining permission.[48]

The now familiar reasoning applied here demonstrates, yet again, the seriousness the Court attaches to the assessment requirement and its determination to ensure that the effectiveness of the directive is not undermined in practice by attempts to categorise substantive planning decisions as mere modifications of old consents that pre-date the introduction of the Community EIA regime.[49]

[46] Case C-201/02 *Wells* [2004] ECR I-723 para 37.

[47] The expression 'pipeline cases' is used to describe situations where the development consent procedure was already in train before the date on which the relevant EIA obligations came into force. See Case C-431/92 *Commission v Germany* [1995] ECR I-2189 para 32 and Case C-81/96 *Burgemeester* [1998] ECR I-3923 para 23.

[48] Case C-201/02 *Wells* [2004] ECR I-723 para 46. The ECJ's ruling on the development consent point confirmed an earlier House of Lords decision in *R v North Yorkshire County Council ex p Brown* [1999] UKHL 7. See also Harwood, above n 44, at 270–71.

[49] The Court of Appeal (England and Wales) has held that a planning authority's failure to take enforcement action, or a decision not to take such action, does not constitute a development consent: *R (Prokopp) v London Underground Ltd and Strategic Rail Authority* [2003] EWCA Civ 961 paras 38–49 (Schiemann LJ) and paras 58–67 (Buxton LJ).

In *Barker*,[50] the ECJ confirmed that the concept of development consent, while modelled on certain elements of national law, 'remains a Community concept' and falls exclusively within Community law.[51] Classification of a decision as a development consent within the meaning of Article 1(2) of the directive 'must be carried out pursuant to national law in a manner consistent with Community law'.[52] The Court further observed that it is apparent from the scheme and the objectives of the directive that the concept of development consent 'refers to the decision (involving one or more stages) which allows the developer to commence the works for carrying out his project'.[53] It falls to the national court to verify whether each stage in a consent procedure, considered as a whole, constitutes a development consent for the purposes of the directive.[54] In *Abraham*,[55] the ECJ determined that it fell to the national court to examine, on the basis of national legislation, whether an agreement between public authorities and a private undertaking amounted to a development consent.[56]

E. Stage of Development Consent Procedure at which EIA Must be Carried Out

In *Wells*,[57] the ECJ was also required to consider the point at which an EIA must be carried out where a consent procedure comprises a number of distinct stages. Article 2(1) requires that the EIA must take place *before* consent is given. Added to this, the first recital to the original EIA directive indicates that environmental effects must be taken into account 'at the earliest possible stage in the decision-making process'. Following these strong indicators, the Court ruled that where national law provides that the consent procedure is to be carried out in several stages—with one stage involving 'the principal decision' and the other stage

[50] Case C-290/03 *R (Barker) v London Borough of Bromley* [2006] ECR I-3949 (*Barker*).

[51] *Ibid*, para 40. This case concerned the grant of planning permission to develop a leisure complex in Crystal Palace Park, London without prior EIA. The ECJ heard oral arguments in both *Barker* and Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969 on 22 June 2005. In Case C-508/03, the Commission raised concerns about the manner in which planning authorisation may be divided into two stages in the UK land-use planning system (ie outline stage and reserved matters stage). In particular, a large urban development project could escape assessment at the outline stage and no provision was made for EIA at the reserved matters stage under English planning law. The infringement proceedings in this case concerned two projects involving developments at White City and Crystal Palace Park, London. After hearing the Advocate General, the ECJ decided to proceed to judgment without an Opinion and both judgments were delivered on 4 May 2006.

[52] Case C-290/03 *Barker* [2006] ECR I-3949 para 41.

[53] *Ibid*, para 45.

[54] *Ibid*, para 46. See also Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969 paras 100–102 where the ECJ ruled that the two decisions provided for by the national rules under scrutiny in that case (ie outline planning permission and the decision approving reserved matters) taken as a whole constituted 'a (multi-stage) development consent'.

[55] Case C-2/07 *Abraham* [2008] ECR I-0000.

[56] *Ibid*, para 25.

[57] Case C-201/02 *Wells* [2004] ECR I-723.

involving 'an implementing decision'—then the likely environmental effects 'must be identified and assessed at the time of the procedure relating to the principal decision'.[58] The ECJ proceeded to clarify that it is only in circumstances where the likely environmental effects are not capable of being identified until the time of the procedure relating to 'the implementing decision' that the assessment should be carried out in the course of that later procedure.[59] The ECJ concluded by stating that where a consent procedure comprises several stages, then, in principle, the assessment must be carried out 'as soon as it is possible to identify and assess all the effects which the project may have on the environment'.[60] This is a sensible conclusion that has a firm basis in the text of the directive.

The ECJ elaborated on this aspect of the *Wells* ruling in *Barker*.[61] Under the scheme established in the Town and Country Planning Act 1990, planning permission may be granted in several forms, one of which is outline permission with a requirement for subsequent approval of reserved matters. This is, in effect, a multi-stage development consent involving both the outline stage and the reserved matters stage.[62] Under domestic law, EIA could be carried out at the initial outline stage only.[63] A large urban development project could therefore escape assessment at outline stage since there was no provision for EIA at the subsequent reserved matters stage. This rule did not sit comfortably with Community EIA law. Ms Barker challenged the approval of reserved matters without prior EIA, and the legal advice on which this approval was based, before the national courts. The challenge was dismissed at first instance and later by the Court of Appeal (England and Wales). On appeal to the House of Lords, that court inquired of the ECJ whether Article 2(1) and Article 4(2) of the original EIA directive was to be interpreted as requiring EIA where, following the grant of outline permission, it appears at the time of approval of the reserved matters that the project is likely to have significant effects on the environment?

Recalling *Wells*, the ECJ ruled that in the case of a development consent procedure comprising more than one stage, then, 'in some circumstances', the competent authority is obliged to carry out an EIA in respect of the project at issue even after outline planning permission has been granted.[64] It follows that an EIA is required as a matter of Community law where it becomes apparent in the course of the second stage of the consent procedure that the project is likely to

[58] *Ibid*, para 52. See also Case C-2/07 *Abraham* [2008] ECR I-0000 para 26

[59] *Ibid.* See also Case C-2/07 *Abraham* [2008] ECR I-0000 para 26.

[60] *Ibid*, para 53.

[61] Case C-290/03 *Barker* [2006] ECR I-3949. See also D Elvin and J Maurici, 'Extending the Reach of Environmental Impact Assessment' [2006] *Journal of Planning and Environment Law* 1128.

[62] For an overview of the town and country planning system see S Bell and D McGillivray, *Environmental Law*, 7th edn (Oxford, Oxford University Press, 2008) ch 12. It is not possible to make an application for outline permission for a project that is subject to EIA under Irish planning law: Planning and Development Regs 2001 (SI No 600 of 2001) Art 96.

[63] See generally Holder, above n 44, at 211–18.

[64] Case C-290/03 *Barker* [2006] ECR I-3949 para 48.

have significant effects on the environment.[65] In the words of the ECJ, this assessment 'must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment'.[66] This requirement demonstrates the Court's concern to ensure that the likely effects on the environment are examined in light of the project as a whole and not in relation to its separate parts. The ECJ's approach is also consistent with the preventative philosophy at the heart of EIA. It recognises the practical reality that in certain (presumably quite rare) cases, significant environmental effects may only become apparent at the final (approval of detail) stage or where further consideration of likely impact may be required due to a material change in circumstances.

In *Commission v Ireland*,[67] the ECJ was required to consider whether Irish rules governing retention planning permission were compatible with the EIA directive. The complaint was grounded on alleged inadequate transposition of Articles 2, 4, and 5 to 10 of the directive (in its original version or as amended by Directive 97/11/EC). The Commission alleged that Irish law undermined the preventative objectives of the EIA directive by providing that a developer could seek retention permission for unauthorised development.[68] It also maintained that the planning enforcement regime in Ireland did not ensure the effective application of the directive. The ECJ recalled the fundamental objective articulated in Article 2(1) that projects likely to have significant effects on the environment must be subject to a requirement for development consent and a prior EIA. Article 1(2) provides (unambiguously) that development consent is the decision of the competent authority which entitles the developer to proceed with the project. Thus, under the scheme established in the directive, the developer cannot commence works unless he has applied for and obtained development consent, and an EIA has been carried out before such consent is granted. The general position under Irish law is that planning permission must be obtained, and any necessary EIA must be undertaken, prior to the execution of works. A failure to comply with these basic requirements constitutes a breach of national law. It was not disputed, however, that Irish law also provides that a developer can apply for retention permission in respect of unauthorised development, including EIA development, even in cases where no exceptional circumstances are established. The net result of retention permission is that, as a matter of Irish law, the requirements of the EIA directive are considered to have been met. While Community law could not preclude national law from allowing, 'in certain cases' for the regularisation of operations or measures which are unlawful in light of Community law, the ECJ insisted that this possibility is subject to conditions: first, that it does not offer the persons concerned the opportunity to circumvent the relevant Community rules, or to

[65] See also Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969 paras 100–106.
[66] Case C-290/03 *Barker* [2006] ECR I-3949 para 48.
[67] Case C-215/06 *Commission v Ireland* [2008] ECR I-0000.
[68] Planning and Development Act 2000, s 34(12).

dispense with applying them; and secondly, that it should remain the exception.[69] In the ECJ's view, a 'system of regularisation' such as the Irish retention permission rules, could have the effect of encouraging developers to forgo inquiring whether proposed projects were likely to have significant effects and, consequently, to avoid identification of environmental effects and prior assessment. Ireland had pleaded the earlier *Wells* ruling as authority that a remedial EIA could be carried at a later stage by way of an exception to the general rule that the assessment must occur at the earliest possible stage in the decision-making process. This argument was roundly rejected by the ECJ: *Wells* was concerned with the Member State's obligation to remedy the unlawful consequences of a breach of Community law. *Wells* did not imply that a remedial assessment, undertaken to remedy the failure to carry out an EIA, was the equivalent of an EIA carried out prior to the grant of development consent as required by the directive. The ECJ concluded that in providing for retention permission in respect of projects for which EIA is required, where no exceptional circumstances are established, Ireland was in breach of Article 2(1) and Article 4(1) and (2) of the directive. This aspect of the ruling is not surprising: the possibility of retention planning permission for EIA development is plainly incompatible with the fundamental obligation articulated in Article 2(1) of the directive. Retention permission is a deeply engrained feature of the Irish planning system and this judgment creates significant challenges for the competent authorities.[70] There is an intriguing suggestion in paragraph 57 of the judgment that 'regularisation' of otherwise unlawful operations may still be permissible in certain exceptional circumstances. The ECJ chose not to elaborate on this aspect of its ruling in any real detail, however, and this point is likely to arise for consideration in future cases.

As regards the alleged inadequacy of Irish enforcement measures, the ECJ observed that under national law the absence of an EIA could be remedied by obtaining retention permission. The Court also noted, in passing, that under national planning law the competent authority's enforcement powers are discretionary. This resulted in a situation where it was possible that a competent authority would not initiate enforcement action in respect of EIA development which had been carried out with no regard to the requirements set down in the directive. The ECJ concluded that this enforcement system was inadequate as the existence of retention permission deprived it of any effectiveness.[71] The Court was satisfied that its conclusion on this point was not affected by Ireland's assertion that the enforcement regime had to take account of competing rights held by developers, landowners, the public and individuals directly affected by the development. The ECJ insisted that the need to weigh those interests could

[69] Case C-215/06 *Commission v Ireland* [2008] ECR I-0000 para 57.
[70] 'New law to tackle unauthorised developments', *Irish Times* 7 October 2008
[71] Case C-215/06 *Commission v Ireland* [2008] ECR I-0000 paras 74–6.

not, in itself, justify the ineffectiveness of an enforcement system.[72] The Court did not consider it necessary to examine the specific examples that the Commission had presented to demonstrate deficiencies in the practical application of Irish enforcement measures. In the ECJ's view, 'those deficiencies are the direct result of the inadequacies of the Irish legislation itself'.[73]

The ECJ's ruling provides strong authority that Member States are obliged to operate a system of planning enforcement and control that ensures the effective application of the directive—although it is unfortunate that this important aspect of the judgment is so brief. The Court appeared to accept, at paragraph 77, that the national enforcement system must weigh various competing rights (those of developers, landowners, the public and individuals directly affected by the development), thus indicating that the enforcement obligation is by no means absolute. It remains to be seen how this ground-breaking aspect of *Commission v Ireland* will be applied and developed at Community and national levels.[74]

III. THE ECJ'S APPROACH TO MEMBER STATE DISCRETION UNDER THE EIA DIRECTIVE

The ECJ has been called upon to examine the scope of Member State discretion pursuant to the following provisions of the EIA directive:

Article 1(4)	Exemption for projects serving national defence purposes;
Article 1(5)	Exemption for projects adopted by specific act of national legislation;
Article 2	Assessment procedure;
Article 4(2)	Determination of Annex II projects that require assessment;
Article 6(3)	Detailed arrangements governing public participation.

The case law to date, which is concerned principally with the original EIA directive, and more recently, the text as amended in 1997, provides strong evidence of the Court's determination to contain discretion with a view to ensuring that the directive operates as an effective tool for environmental protection.[75]

[72] *Ibid*, para 77.

[73] *Ibid*, para 78.

[74] See also Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003 where Advocate General Ruiz-Jarabo Colomer took the view that national legislation which granted local planning authorities a discretion as to whether or not to take enforcement action against unauthorised development created a situation where projects falling within the scope of the EIA directive could be carried out without prior EIA in breach of the obligations created in Arts 2(1) and 4 (paras 33–4 of the Opinion). The ECJ subsequently declared the infringement proceedings to be inadmissible.

[75] See generally H Somsen, 'Discretion in European Community Environmental Law: Analysis of ECJ Case Law' (2003) 40 *CML Rev* 1413.

A. Exemptions

Under the original Article 1(4), the directive did not apply to projects 'serving national defence purposes'.[76] The ECJ interpreted this provision restrictively on the basis that it introduced an exception to the general principle set down in Article 2(1). Accordingly, in *Bozen*,[77] the Court held that only projects that *mainly* served national defence purposes could be excluded from the assessment obligation.[78] The ECJ has also adopted a restrictive approach to the exemption set out in Article 1(5), which provides that the directive does not apply where a project is adopted by a specific act of national legislation. The rationale behind this exemption is that the objectives of the directive, including that of supplying information to the public, are to be achieved via the legislative process. The Court has drawn on the sixth recital to the original directive as an aid to interpreting the scope of the Article 1(5) exemption.[79] In *Bozen*, the ECJ ruled that in order to benefit from the exemption, the legislative act in question must include all the elements that may be relevant to the assessment of the effects of the project on the environment.[80] Any other interpretation would enable Member States to circumvent the directive. Subsequently, in *Linster*,[81] the ECJ emphasised that Article 1(5) must be interpreted restrictively, as it operates to limit the scope of the directive.[82] Drawing on Article 2(1) (which articulates the basic assessment obligation), and the sixth recital (which acknowledges the value of participation), the Court followed *Bozen* and ruled that

> it is only where the legislature has available to it information equivalent to that which would be submitted to the competent authority in an ordinary procedure for authorising a project that the objectives of the Directive may be regarded as having been achieved through the legislative process.[83]

The ECJ proceeded to provide guidance on the precise requirements of Article 1(5). Drawing on (original) Article 5(2) and Annex III, the Court observed that if the objectives of the directive are to be satisfied, the legislative act must include:

[76] A new Art 1(4) has been introduced pursuant to Art 3(2) of Dir 2003/35/EC [2003] OJ L156/17. This provision is more detailed and further restricts the (already limited) discretion available to Member States in this context. It reads as follows:
'Member States may decide on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on these purposes'.
The entitlement to invoke the exemption is now linked expressly to the fact that an EIA would have 'an adverse effect' on national defence.

[77] Case C-435/97 *Bozen* [1999] ECR I-5613.

[78] *Ibid*, para 65.

[79] *Ibid*, para 61.

[80] *Ibid*, para 59.

[81] Case C-287/98 *Linster* [2000] ECR I-6917.

[82] *Ibid*, para 49.

[83] *Ibid*, para 54.

> 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, and the data required to identify and assess the main effects which the project is likely to have on the environment.[84]

The wording of the legislative act must also demonstrate that the objectives of the directive have been achieved.[85] The strong rulings in *Bozen* and *Linster* set clear limits to the exercise of Member State discretion pursuant to Articles 1(4) and 1(5) and serve to underscore the importance that the ECJ attaches to participation rights in the course of the EIA process.

B. Assessment Procedure

The basic substantive obligation is set down in Article 2(1) of the EIA directive. It requires that projects likely to have significant effects on the environment must be assessed before the competent authority decides to grant development consent. Article 2(2) leaves it to the Member States to determine how the actual assessment is to be carried out, however. In *Bozen*,[86] the ECJ confirmed that Article 2(2) permits a Member State to use an assessment procedure other than that set down in the directive. Any alternative administrative procedure must satisfy the requirements of Article 3 and Articles 5 to 10 of the directive, however, including the participation obligations created in Article 6.[87] This decision confirms that Member State discretion under Article 2(2) is constrained by the core procedural requirements set down in the directive. The express reference to Article 6 in the ECJ's ruling serves to highlight, once more, the important role of participation rights in the EIA process. In *Commission v Belgium*,[88] the ECJ confirmed that a system providing for tacit authorisation (where authorisation is deemed to have been granted in the absence of a decision by the competent authority within the relevant time period) was incompatible with the provisions of the directive, in particular Article 2.[89] In *Commission v Spain* the ECJ reiterated that

> national provisions of a general or sectoral nature which require the assessment of the environmental impact of certain types of projects must satisfy the requirements set out in Article 3 of the Directive, as well as the procedural rules in Articles 5 to 9 of the Directive which concern, *inter alia* public information.[90]

[84] *Ibid*, para 55.
[85] *Ibid*, para 56.
[86] Case C-435/97 *Bozen* [1999] ECR I-5613.
[87] *Ibid*, para 54.
[88] Case C-230/00 *Commission v Belgium* [2001] ECR I-4591.
[89] *Ibid*, para 16.
[90] Case C-474/99 *Commission v Spain* [2002] ECR I-5293 para 32.

On this occasion, the Court yet again singled out the provisions of the directive governing public participation for special attention. In *Ecologistas en Acción-CODA*,[91] the referring court asked the ECJ to determine whether various studies and reports concerning the contested projects (which were part of a complex scheme to improve and refurbish the Madrid urban ring-road) satisfied the requirements for an EIA. The Court recalled the clear separation of functions between national courts and the ECJ mandated by Article 234 EC and explained that it was for the national court to carry out this factual inquiry.[92] The ECJ noted, for the benefit of the referring court, that 'a formal assessment may be replaced by equivalent measures' where the minimum requirements set out in Article 3 and Articles 5 to 10 of the directive are satisfied.[93]

C. Determining the Annex II Projects that Require Assessment

A substantial portion of the EIA jurisprudence concerns the limits of Member State discretion under (original) Article 4(2). Pursuant to this provision Member States enjoyed a measure of flexibility in determining the Annex II projects that required assessment. Article 4(2) permitted Member States to specify that certain Annex II projects were to undergo assessment, or to establish criteria or thresholds for this purpose. On first reading, Article 4(2) seemed to confer a broad discretion on the Member States. The ECJ interpreted this discretion restrictively from the very beginning, however. The Court's approach was grounded firmly on Article 2(1) of the directive and the 'unequivocal obligation' that Article imposes on Member States to ensure that projects falling within the scope of the directive undergo assessment.[94]

Article 4(2) was first considered in *Commission v Belgium*,[95] where Flemish legislation 'totally and definitively' excluded certain classes of projects listed in (original) Annex II from EIA. The issue before the ECJ was whether this automatic exclusion was permissible under the directive. Belgium argued that Article 4(2) allowed a Member State to determine generally and a priori that the characteristics of certain Annex II projects are such that an assessment is unnecessary. The ECJ responded by observing that the power to determine which Annex II projects require assessment is conferred *within* each of the classes of project listed in Annex II.[96] The Community legislature obviously considered that *all* of the classes of projects listed therein could have significant effects on the environment (depending on their particular characteristics).[97] The Court

[91] Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-0000.
[92] *Ibid*, paras 48–50.
[93] *Ibid*, para 50.
[94] Case C-431/92 *Commission v Germany* [1995] ECR I-2189 para 39.
[95] Case C-133/94 *Commission v Belgium* [1996] ECR I-2323.
[96] *Ibid*, para 41.
[97] *Ibid.*

emphasised that the criteria and thresholds mentioned in Article 4(2) were designed to facilitate the examination of the actual characteristics of a project in order to determine whether or not it should be assessed.[98] Article 4(2) did not entitle Member States to exempt in advance one or more of the classes listed in Annex II.[99] The ECJ left open the question whether Member States were entitled to determine which Annex II projects were to be subject to assessment by using thresholds or criteria without inquiring into the specific characteristics of each discrete project.[100]

The ECJ embarked on a more detailed examination of the scope of the Article 4(2) discretion in *Kraaijeveld*.[101] On this occasion, the relevant national implementing legislation set thresholds for river dyke projects at such a level that, in practice, all dyke reinforcement projects were excluded from assessment. The Commission argued that any specifications, criteria or thresholds established by Member States pursuant to Article 4(2) did not exempt Member States from undertaking an *individual* examination of the actual project at issue in order to determine whether it was likely to have significant effects on the environment. The ECJ rejected this interpretation.[102] The Court reasoned that if it was necessary to subject every Annex II project to an individual examination as to its likely effects, then the Member States would have no interest in fixing specifications, criteria or thresholds. Such an interpretation would deprive Article 4(2) of any value. The ECJ proceeded to examine the scope of the discretion left to the Member States pursuant to Article 4(2) and clarified that

> the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely to have significant effects on the environment, by virtue, *inter alia*, of their nature, size or location, are to be subject to an impact assessment.[103]

Kraaijeveld is clear authority that the seemingly wide discretion conferred by Article 4(2) must be exercised within the limits set by the basic obligation articulated in Article 2(1). The ECJ accepted that Member States were entitled to fix criteria relating to the size of dykes in order to determine which dyke projects required assessment.[104] Whether a Member State had exceeded the limits of its discretion in creating a system for screening Annex II projects could not be determined by reference to the characteristics of a single project, however.[105] Rather, it depended on 'an overall assessment of the characteristics of projects of

[98] *Ibid*, para 42.
[99] See also Case C-121/03 *Commission v Spain* [2005] ECR I-7569 para 87.
[100] Case C-133/94 *Commission v Belgium* [1996] ECR I-2323 para 44.
[101] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403. See also C Boch, 'The Enforcement of the Environmental Assessment Directive in the National Courts: A Breach in the 'Dyke'?' (1997) 9 *Journal of Environmental Law* 119.
[102] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403 para 49.
[103] *Ibid*, para 50.
[104] *Ibid*, para 52.
[105] *Ibid*.

that nature which could be envisaged in the Member State'.[106] Where a Member State established criteria or thresholds at such a level that, in practice, all projects related to dykes were exempted in advance from EIA, the Member State would exceed the limits of its discretion 'unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment'.[107] Although Member States are free to establish criteria or thresholds pursuant to Article 4(2), a national screening system cannot result in *any* project likely to have significant effects on the environment being excluded from the assessment requirement. The effect of this aspect of the *Kraaijeveld* ruling is to severely constrain Member State discretion to establish criteria or thresholds for Annex II projects. The ECJ had earlier observed in *Commission v Belgium*[108] that it was envisaged that all of the classes of project listed in Annex II could have significant environmental effects (depending on their nature, size or location). Contested thresholds and other screening mechanisms will therefore be subjected to close scrutiny by the ECJ.

In *Commission v Germany*,[109] the Court confirmed that Article 4(2) did not empower the Member States to generally and definitively exclude one or more of the classes of projects listed in (original) Annex II from EIA. Germany maintained that Article 4(2) permitted Member States to determine which of the specific projects listed under the 12 classes in Annex II should undergo assessment. The ECJ did not hesitate in rejecting this interpretation. The concept 'classes of project' was to be interpreted to refer to all of the projects listed in Annex II and not just to the 12 categories of project listed in therein. Confining the concept of 'classes of project' to the 12 general categories listed in Annex II would 'negate the effectiveness of the rule laid down in Article 2(1) ... and would leave Member States free to apply Annex II as they saw fit'.[110]

Subsequently, in *Bozen*,[111] the ECJ confirmed its earlier rulings on the scope of the discretion enjoyed by the Member States under (the original) Article 4(2). It observed that Article 4(2) did not prevent Member States from employing methods other than those expressly indicated in that Article (ie specification or establishing criteria and thresholds) when determining which Annex II projects require EIA. For example a Member State could choose to designate that a particular Annex II project was not required to undergo assessment.[112] At the same time, however, the ECJ was careful to emphasise the limits to Member State discretion when attempting to identify the Annex II projects that require assessment:

106 *Ibid.*
107 *Ibid*, para 53.
108 Case C-133/94 *Commission v Belgium* [1996] ECR I-2323 para 41.
109 Case C-301/95 *Commission v Germany* [1998] ECR I-6135.
110 *Ibid*, para 44. See also Case C-474/99 *Commission v Spain* [2002] ECR I-5293 para 30.
111 Case C-435/97 *Bozen* [1999] ECR I-5613.
112 *Ibid*, para 43.

> [W]hatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded, could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects.[113]

In line with the earlier *Kraaijeveld* ruling, this passage confirms that Member State discretion to exclude Annex II projects from the assessment requirement is indeed very tightly drawn.

The scope of Member State discretion under the original Article 4(2) surfaced again in *Commission v Ireland*.[114] On this occasion, the Commission argued that Ireland had incorrectly transposed Article 4(2) by setting absolute thresholds for certain classes of Annex II projects (use of uncultivated land or semi-natural areas for intensive agricultural purposes; initial afforestation and land reclamation; and peat extraction). The Commission maintained that the absolute nature of the Irish thresholds meant that, in practice, it was not possible to ensure that all projects likely to have significant effects on the environment would be assessed. The fact that a project was sub-threshold was sufficient to exempt it from the assessment requirement in Irish law, regardless of its other characteristics. The Commission argued that Article 4(2) required that *all* of the characteristics of a project, not just its size or capacity, had to be taken into account. This argument was based on Article 2(1), which refers to a project's *nature* and *location*, in addition to its *size*, as the basic criteria for assessing significance. One line of defence pursued by Ireland was that the Commission had failed to demonstrate that the thresholds had actually been misused in practice.[115] The ECJ noted that the alleged infringement on this occasion concerned *the manner* in which the directive had been transposed into Irish law and not *the actual result* of the application of the transposing legislation. It reasoned as follows:

> 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.
>
> 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.
>
> 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

[113] *Ibid*, para 45. See also Case C-87/02 *Commission v Italy* [2004] ECR I-5975 paras 40–44.
[114] Case C-392/96 *Commission v Ireland* [1999] ECR I-5901.
[115] *Ibid*, para 56.

> 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.
>
> 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.[116]

This pragmatic approach underscores the seriousness that the ECJ attaches to the preventive philosophy underlying the EIA directive. The central question for the Court was whether or not Ireland had exceeded its discretion under Article 4(2) in creating a screening system for Annex II projects. The ECJ ruled that where a Member State established criteria or thresholds exclusively by reference to the *size* of projects, without also taking their *nature* and *location* into consideration, then the State would exceed the limits of its discretion. In the words of the Court,

> 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.
>
> 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.[117]

These paragraphs provide useful guidance for competent authorities and the national courts on the difficult concept of 'significant' effects. As regards the contested thresholds set by the Irish authorities the Court observed:

> 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.[118]

[116] *Ibid*, paras 60–63. The ECJ's approach in Case C-150/97 *Commission v Portugal* [1999] ECR I-259 is also of interest in this context. On this occasion, the contested national legislation purported to waive the EIA requirement in respect of projects where the development consent procedure had been initiated after 3 July 1988 but before the national implementing measures came into force. In ruling that Portugal had failed to meet its obligations under the directive, the ECJ dismissed Portugal's argument that there had been no adverse effects as a result of its breach. Portugal had maintained that the number of applications for development consent submitted to the competent authorities during the transitional period was small and that an 'environmental impact report' had been prepared for all of the applications at issue. See also Case C-227/01 *Commission v Spain* [2004] ECR I-8253 para 59 (Commission not required to establish 'the concrete negative effects that a project in fact has on the environment'). But see Case C-117/02 *Commission v Portugal* [2004] ECR I-5517 para 85 (Commission required to furnish 'a minimum of proof' of the effects that a contested project is likely to have on the environment); Case C-494/01 *Commission v Ireland* [2005] ECR I-3331 para 41; and Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969 paras 77–80 and 90–93.

[117] Case C-392/96 *Commission v Ireland* [1999] ECR I-5901 paras 66–7. See also Case C-474/99 *Commission v Spain* [2002] ECR I-5293 paras 30–31 and Case C-121/03 *Commission v Spain* [2005] ECR I-7569 paras 87–8.

[118] Case C-392/96 *Commission v Ireland* [1999] ECR I-5901 para 70.

Following *Kraaijeveld*, the ECJ confirmed that where a Member State set criteria and thresholds at such a level that in practice all projects of a certain type would be exempted in advance from the EIA requirement, the State would exceed the limits of its discretion, unless all of the projects exempted could, when viewed as a whole, be regarded as not likely to have significant effects on the environment.[119] The Court then elaborated on *Kraaijeveld* by observing that a Member State which set a criterion of project size without ensuring that the objective of the legislation was not circumvented by the splitting of projects, would exceed the limits of its discretion.[120] By not taking account of 'the cumulative effect' of projects, it was possible that in practice all projects of a certain type could escape the obligation to carry out an assessment notwithstanding the fact that, when taken together, they were likely to have significant effects within the meaning of Article 2(1). Any criteria and thresholds set by the Member States must therefore take account of the cumulative effect of projects.

The decisions in *Kraaijeveld*, *Bozen* and *Commission v Ireland* provided clear evidence of a progressive tightening of the discretion left to Member States as regards the Annex II projects. While *Kraaijeveld* is strong authority for the view that the Member States are not required to examine (or screen) each proposed project *individually*, passages in that judgment where the Court stressed the strict nature of the Article 2(1) obligation, together with the further narrowing of the Article 4(2) discretion in *Bozen* and *Commission v Ireland*, suggest that it will be very difficult for Member States to demonstrate that contested criteria or thresholds meet the strict requirements set by the ECJ. In effect, therefore, the Court has come very close to requiring individual examination of each Annex II project.[121] The ECJ's strong ruling in *Commission v Italy*,[122] considered earlier in chapter two, provides further support for this view. Here, the ECJ determined that a Member State was not entitled to exclude an Annex II project from assessment unless, following 'a comprehensive screening', the project at issue could be regarded as unlikely to have significant environmental effects.[123]

In *Abraham*,[124] the ECJ reaffirmed that the objective of the directive cannot be circumvented by project-splitting and that the cumulative effect of several individual projects must be examined globally in order to determine whether or

[119] *Ibid*, para 75.

[120] *Ibid*, para 76. See also Case C-332/04 *Commission v Spain* [2006] ECR I-40* para 76 and Case C-486/04 *Commission v Italy* [2006] ECR I-11025 para 53.

[121] Consider also the analysis of the interrelationship between Art 2(1) and Art 4(2) presented in L Krämer, *Casebook on EU Environmental Law* (Oxford, Hart Publishing, 2002) 49–51. Krämer proposes that if Art 4(1) and (2) were set aside, a considerable amount of litigation could be avoided. In place of Art 4(1) and (2), Krämer suggests that there should be an irrebuttable presumption that the Annex I projects are likely to have a significant effect on the environment. In the case of the Annex II projects, the presumption would be rebuttable, but the onus would lie on the competent authority to justify to the public concerned why, in its view, EIA was not necessary.

[122] Case C-87/02 *Commission v Italy* [2004] ECR I-5975.

[123] *Ibid*, paras 40–44.

[124] Case C-2/07 *Abraham* [2008] ECR I-0000.

not EIA is required.[125] Drawing on Article 2(1), Article 3 and its earlier ruling in *Commission v Spain*,[126] the Court clarified that in determining whether an Annex II project requires assessment account must be taken not only of the direct effects of the works envisaged, but also of the environmental impact liable to result from the use and exploitation of the end product of those works (in this case the projected increase in activity at an airport).[127] The ECJ confirmed this strict approach to project screening in *Ecologistas en Acción-CODA*.[128]

Commission v Ireland[129] concerned a controversial wind farm project at Derrybrien in County Galway, which involved a number of phases of construction for which the developer had obtained various consents. While EIAs were completed for different elements of the development, the Commission asserted that the assessments were deficient—in particular because environmental risks had not been adequately assessed. The Commission also emphasised the Irish authorities' failure to require a fresh EIA before resumption of works at Derrybrien in the aftermath of a catastrophic landslide in October 2003. Although installations for the harnessing of wind power for energy production were not listed in either Annex I or II of the original EIA directive, the ECJ determined that the directive applied to the first two phases of construction. The Court based this conclusion on the fact that these two phases required a number of works which were listed in Annex II (including extraction of peat and of minerals other than metalliferous and energy-producing minerals). Recalling its rulings in *Kraaijeveld* and *Abraham*, the ECJ found that Ireland was obliged to subject these works to EIA if they were likely to have significant effects. The Irish competent authorities had determined, however, that Annex II did not apply to the ancillary works of peat extraction and road construction, on the basis that these works were merely minor aspects of the wind farm project. The ECJ explained that if projects falling under Annex II of the original directive are regarded as being of secondary importance (when considered in the context of the overall wind farm project), that fact alone did not determine the question of whether those projects were likely to have significant effects. The ECJ then proceeded to consider the likely effects of the projects at issue:

> The intended projects of peat and mineral extraction and road construction were not insignificant in terms of scale by comparison with the overall area of the wind farm project which covered 200 hectares of peat bog and which was the largest project of its kind in Ireland, and they were moreover essential both to the installation of the turbines and to the progress of the construction works as a whole. In addition, those works were carried out on the slopes of Cashlaundrumlahan Mountain, where there are layers of peat up to 5.5 metres in depth, largely covered by plantation forestry.

[125] *Ibid*, para 27.
[126] Case C-227/01 *Commission v Spain* [2004] ECR I-8253.
[127] Case C-2/07 *Abraham* [2008] ECR I-0000 paras 41–4.
[128] Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-0000 paras 39 and 42.
[129] Case C-215/06 *Commission v Ireland* [2008] ECR I-0000.

> It follows from those factors, which are not disputed by Ireland, that the location and size of the projects of peat and mineral extraction and road construction, and the proximity of the site to a river, all constitute specific characteristics which demonstrate that those projects, which were inseparable from the installation of 46 wind turbines, had to be regarded as likely to have significant effects on the environment and, accordingly, had to be subject to an assessment of their effects on the environment.[130]

The Court concluded definitively that the ancillary projects were indeed likely to have significant effects and should have been subjected to prior EIA. It also determined that the Environmental Impact Statements (EISs) supplied by the developer were deficient, in particular due to the failure to examine the critical issue of soil stability.[131]

As explained earlier in chapter two, Directive 97/11/EC introduced important amendments to the original EIA directive, including a substantially revised Article 4. Legislative intervention on this complex issue was prompted by the extensive and complex ECJ jurisprudence concerning the original Article 4(2) considered above. The revised Article 4(2), together with Article 4(3) and Annex III, further circumscribes the scope of Member State discretion as regards Annex II projects.[132] The ECJ considered the selection criteria set down in Annex III in *Commission v Ireland*[133] in the context of the development consent relating to the third phase of construction of the Derrybrien wind farm. The highly sensitive nature of the site, including the absorption capacity of the natural environment, were among the factors that led the Court to conclude that the projects at issue were likely to have significant effects and should therefore have been subjected to prior assessment.[134] In *Ecologistas en Acción-CODA*,[135] the ECJ reaffirmed the importance of the Annex III selection criteria when Member States are screening Annex II projects.[136] The Court also clarified that the fact that a project should have beneficial effects on the environment was not relevant when determining whether EIA was required.[137]

It is clear from the case law considered above that the ECJ's primary aim is to ensure that, in line with the unambiguous mandate articulated in Article 2(1), projects likely to have significant effects on the environment do not escape assessment. Where a national court is called upon to evaluate contested criteria and thresholds against the standard set in the directive, or to review a competent authority's decision on the significance or otherwise of a particular project's impact on the environment, the court will often be confronted with complex,

[130] *Ibid*, paras 102–3.
[131] *Ibid*, paras 104–5.
[132] See ch 2 pp 39–40.
[133] Case C-215/06 *Commission v Ireland* [2008] ECR I-0000.
[134] *Ibid*, paras 109–10.
[135] Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-0000.
[136] *Ibid*, para 40.
[137] *Ibid* para 41.

mixed issues of law and fact.[138] The EIA directive requires, as a matter of law, that all projects likely to have significant effects must be assessed. This is a mandatory obligation. Measuring significance involves an essentially fact-based inquiry, but it cannot be treated in isolation from the underlying legal obligation set down in the directive. In Ireland, judicial review involves the national court inquiring into the *legality* of the decision taken by a legislative or administrative authority, as opposed to the *merits* of the decision.[139] The national court will be reluctant to stray into a reassessment of the facts as determined by an expert public authority. At the same time, however, the national courts are obliged to ensure that the legal requirements set down in the EIA directive are applied and enforced in practice. An important issue therefore arises as to the appropriate degree of scrutiny to be applied by the national court in such cases. In other words, how closely is a national court required to examine a competent authority's decision on the critical issue of significance? The ECJ's *Upjohn*[140] ruling, considered in chapter three, provides a measure of guidance on the appropriate standard of review. *Upjohn* indicates that review of the merits of a competent authority's decision is not required in order to meet the principle of effectiveness, at least in cases where the authority is required to make complex assessments. *Upjohn* did not concern the EIA directive, however, and so further scrutiny of the EIA jurisprudence is required in order to determine the appropriate standard of review in EIA cases.[141]

D. Detailed Arrangements for Public Participation

The EIA directive, at Article 6, requires Member States to ensure that 'the public concerned' is given the opportunity to express its opinion on the proposed project before development consent is granted. The detailed arrangements for informing and consulting the public are left to be determined by the Member States. Article 8 mandates that the results of consultations and the information gathered during the EIA process must be taken into consideration in the development consent procedure. In *Commission v Ireland*,[142] the ECJ was required to consider whether or not a Member State was entitled to levy an administrative fee as a precondition to participation in the EIA process. The basic rules governing control of development in Irish law are set down in the Planning and Development Act 2000 (PDA) Part III as amended. Any person (or body) may make a written submission or observation to a planning authority concerning an application for planning permission. Both the applicant for permission, and any person who made a valid submission or observation in relation to the application, may appeal the decision of the planning authority to *An Bord*

138 See also Holder, above n 44, at 102–27.
139 See ch 3 pp 103–4.
140 Case C-120/97 *Upjohn Ltd v The Licensing Authority* [1999] ECR I-223.
141 See pp 167–71.
142 Case C-216/05 *Commission v Ireland* [2006] ECR I-10787.

Pleanála (the Planning Appeals Board). Appeal fees, which were first introduced in 1983, are determined by the Board, subject to the approval of the Minister for the Environment, Heritage and Local Government (the Minister). The PDA introduced a new administrative fee (€20), which applies where a person wishes to make a submission or an observation to a planning authority concerning an application for planning permission.[143] Previously, lodging an objection with a planning authority was free of charge. A limited number of specified bodies are exempt from the fee requirement, but no special provision is made for environmental non-governmental organisations (ENGOs).[144] The Article 226 EC infringement proceedings concerned both the €20 fee and the fee payable for making submissions and observations to the Board in the course of a planning appeal (€45 at the material time).[145] The Commission maintained that by making public participation in certain EIA cases subject to prior payment of an administrative fee, Irish planning law infringed Articles 6 and 8 of the EIA directive (as amended by Directive 97/11/EC). Directive 2003/35/EC, which introduced further amendments to the EIA directive designed inter alia to strengthen public participation, was not in force at the relevant time. The ECJ ruled that the Irish fees were not in breach of Article 6 or Article 8 of the directive.

This was the first occasion on which the ECJ was required to consider the scope of the Article 6(3) discretion. *Commission v Ireland* therefore presented the Court with a rare opportunity to delve more deeply into the value of participation and to fortify the right of members of the public to participate effectively in the EIA process. The ECJ did not avail itself of this opportunity, however, and its short judgment presents little more than a disappointing, narrow interpretation of Article 6(3).[146] Ireland invoked the principle of subsidiarity and maintained that prohibitions not expressly set down in the text of the directive could not be

[143] The legal basis for the fee is found in PDA s 33(1), s 33(2)(c) and Planning and Development Regs 2001 (SI No 600 of 2001) Art 168 and sch 10. The fee is only payable once—no additional charge is payable for any subsequent submission or observation in respect of the same application: 2001 Regs, Art 168(3). Note that the 2001 Regs were amended substantially by Planning and Development Regs 2006 (SI No 685 of 2006).

[144] Planning and Development Regs 2001, Art 168(2). These include: a local authority; a State authority (ie a Minister of the Government or the Commissioners of Public Works); a transboundary State and prescribed bodies (ie a body notified or entitled to be notified in accordance with Art 28 including eg An Taisce—National Trust for Ireland, Fáilte Ireland, Regional Fisheries Board, National Roads Authority, or Health Service Executive as appropriate). Note that the list of bodies prescribed in Art 28 has been updated pursuant to the 2006 Regs.

[145] The legality of the fee under Community law was also challenged before the national courts: *Friends of the Irish Environment Ltd and Lowes v Minister for the Environment, Heritage and Local Government* [2005] IEHC 123, [2007] 3 IR 459. The High Court acceded to the State's request for a stay on the proceedings pending the outcome of the Art 226 EC infringement proceedings. A request for a preliminary ruling under Art 234 EC was refused on the basis that such a reference would not achieve anything different or be more expedient than the Art 226 EC procedure initiated by the Commission.

[146] A number of arguments put forward by the Commission are not reflected at all in the ECJ's ruling. In particular, the Commission maintained that the contested fees breached the 'polluter pays' principle. The gist of this argument was that administrative costs were the result of a developer's

implied. Ireland submitted that rather than undermining the purpose of the directive, the contested fees actually facilitated enhanced participation by generating funds to support planning administration. Ireland stressed the Member State's discretion to set the relevant detailed arrangements. It fell to the Commission to demonstrate that the contested fees undermined the purpose of the directive. It was denied that the fees could constitute a barrier to participation for people on low incomes—the fees were levied for administrative purposes and were, according to the Irish authorities, reasonable in both principle and in amount.

The ECJ deployed Article 249(3) EC as its starting point: Member States are obliged to give full effect to directives, but they retain 'a broad discretion' as to the choice of methods of implementation.[147] This 'freedom of choice' trumped the Commission's argument that if the Community legislature had intended to allow administrative fees it would have made express provision to that effect (as is the case with the directives on access to environmental information).[148] The exercise of Member State discretion under Article 6(3) was not subject to any test of necessity. Although Article 6(3) listed a number of options that were available to Member States when arranging for public participation, it was clear from the wording of the text that this list was not exhaustive. It followed that the Community legislature did not wish to limit the Member States' powers in this regard—on the contrary, it intended to give them 'a wide discretion'.[149] This discretion is not unlimited, however. In the words of the ECJ,

> when determining the arrangements, the Member States are, in principle, free to impose a participation fee such as the one at issue, provided that it is not such as to constitute an obstacle to the exercise of the rights of participation conferred by Article 6 of [the EIA directive].[150]

The Commission submitted that the contested fees undermined the purpose of the directive by restricting the exercise of the right to participate in the EIA process. Citing Article 6(2), and drawing on the sixth recital to the original EIA directive, the ECJ noted that public participation was one of the aims of the directive.[151] At the same time, however, Article 6(3) allows Member States 'to place certain conditions on participation'.[152] For example, the Member State is empowered expressly to determine the scope of 'the public concerned' by the project at issue. Furthermore, it may specify how the public is to be informed and

application for planning permission. The polluter pays principle would imply that these costs should not be transferred to the public or to those who may be affected by the environmental impacts of the proposed development.

147 Case C-216/05 *Commission v Ireland* [2006] ECR I-10787 para 26.

148 Dir 90/313/EEC on access to environmental information [1990] OJ L158/56 now repealed and replaced by Dir 2003/4/EC [2003] OJ L 41/26.

149 Case C-216/05 *Commission v Ireland* [2006] ECR I-10787 para 32.

150 *Ibid*, para 33. See also paras 43–4.

151 *Ibid*, para 37.

152 *Ibid*, para 38.

consulted and may fix appropriate time limits for the various stages of the development consent procedure. As Advocate General Stix-Hackl put it bluntly in her Opinion, Article 6(2) does not mean that there is 'an *unrestricted* right for *everybody* to be consulted'.[153] The ECJ drew on the Community rules governing the right of access to environmental information to bolster this point. It noted that Article 5 of Directive 90/313/EEC, and now Directive 2003/4/EC, provides that Member States may levy a reasonable charge for the supply of information on the environment. This provision demonstrated that the Community legislature did not believe that a reasonable fee was incompatible with the guarantee of access to information. It followed by analogy that an administrative fee was not, in principle, incompatible with the EIA directive.[154] On the specific facts in this case, the Court concluded that the amount of the contested Irish fees (€20 and €45 respectively) could not be regarded as constituting an obstacle to participation.[155] The ECJ also appears to have been impressed by Ireland's submission that the fees were justified on the basis of the administrative costs involved in processing observations received from persons concerned.[156]

The Commission had also questioned the validity of the Irish fees on the basis that the PDA authorised the Minister and *An Bord Pleanála* to set the amount of the relevant fee without limiting that power or defining it precisely. The ECJ observed that any such delegation is, in principle, a matter of national law. The amounts prescribed in the exercise of the delegated power must, however, be exercised in a manner compatible with the directive. The Commission had also alleged a breach of Article 8 of the directive. In light of the Court finding that Article 6 had not been breached, it followed that there was no infringement of Article 8 either.[157]

While the Irish fees at issue in this case passed scrutiny, the ECJ failed to provide guidance on the criteria to be applied when measuring the impact of a contested fee on those who wish to participate. This point was addressed, in passing, by the Advocate General who suggested that an assessment based on average monthly income in Ireland was the most sensible approach.[158] The Commission had attempted to apply the weekly income of social welfare recipients as the appropriate yardstick. The ECJ did not address this issue however. It simply concluded that the small fees involved in this case did not have a deterrent effect. It would have been useful if the Court had at least clarified whether or not average monthly income is indeed the most appropriate standard. This is an important practical point, especially in light of the fact that the rules governing

[153] *Ibid*, para 39 of the Opinion.
[154] *Ibid*, paras 40–42.
[155] *Ibid*, para 45.
[156] *Ibid.*
[157] *Ibid*, para 50.
[158] *Ibid*, para 45 of the Opinion.

the Irish fees make no special provision for waiver of the fee or for any reduced fee to be applied in special circumstances.

The underlying purpose of Article 6(3) is to give Member States flexibility when determining the practical arrangements governing public participation at local level. Yet it was open to the ECJ to take a hard line on the fee issue while remaining faithful to the wording of the text. The ECJ could have deployed its well-established purposive approach to greater effect in this case. While Article 6(3) confers a wide discretion, it does not mention the possibility of a fee. The ECJ could have distinguished upfront participation fees, such as those at issue in this case, from other categories of fees that can arise in the course of the EIA process—for example, the fee payable to lodge an appeal with *An Bord Pleanála* and the charge levied for purchase of a copy of the EIS. This approach would have shored up the value of participation while, at the same time, leaving the Member States a broad discretion with regard to other detailed arrangements. An upfront fee as a precondition to the right to comment on a development proposal grates against the aim of promoting participation. It is surprising, therefore, that the ECJ chose a literal interpretation of Article 6(3) rather than engaging in more detail with the potential 'chilling effect' of participation fees.

As explained earlier in chapter two, Directive 2003/35/EC strengthened the public participation provisions with a view to aligning Community EIA law with the more demanding participation obligations set down in the Aarhus Convention. Article 6(2) and (3) were replaced by a series of new paragraphs (Article 6(2) to (6)). The new Article 6(4) provides expressly that 'the public concerned'[159] (which includes ENGOs that meet any requirements set under national law) must be given 'early and effective' opportunities to participate in the decision-making process. To that end, 'the public concerned' is entitled to express comments and opinions to the competent authority 'when all options are open' and before a decision is taken on the request for development consent. The express reference to 'early and effective' participation corresponds with the basic message coming from the ECJ's EIA jurisprudence—any rights conferred by the directive must be effective in practice. Article 6(5) recasts old Article 6(3), but the core elements remain unchanged. Article 6(5) as amended provides:

> 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.

Article 6(6) requires that Member States set reasonable time-frames for the different phases of the decision-making procedure, allowing sufficient time for informing the public and for the public concerned 'to prepare and participate effectively'. In similar vein to old Article 6(3), Article 6(5) and (6) confer a broad discretion on the Member States when determining the detailed arrangements

[159] Defined in EIA directive, Art 1(1).

governing participation. Article 6(5) is silent on the question of fees. Article 6(6) attempts to tighten discretion, to some extent, in the specific case of time-frames. It appears therefore that the outcome in *Commission v Ireland* would not have been any different if the ECJ had been called on to interpret the revised Article 6 provisions.

E. Summary

The case law examined in this section illustrates the ECJ's determination to set limits to the discretion left to the Member States at various points in the directive. Even though the Court sanctioned participation fees in *Commission v Ireland*, it was still careful to delimit Member State discretion by requiring that any fees must not create an obstacle to effective participation. The ECJ's robust approach to discretion has served to sharpen the effectiveness of the directive as a means of challenging contested planning decisions before the national courts. This interventionist attitude is also evident in the case law, discussed earlier in chapter two, where the ECJ has taken a strong line on the competent authorities' duty to provide information to support (or justify) the conclusions reached in screening determinations in the context of Annex II projects.[160] The following section traces how the ECJ has progressively clarified and strengthened the role of the EIA directive in judicial review proceedings at national level. Particular attention is devoted to the appropriate standard of review and the extent to which the Court has addressed this important practical issue in the EIA case law.

IV. ROLE OF THE EIA DIRECTIVE IN JUDICIAL REVIEW PROCEEDINGS AT NATIONAL LEVEL

A. Overview

Where certain conditions are satisfied, a directive may be invoked against the State in the absence of national implementing measures or where national measures fall short of what is required by the terms of the directive in question. The conditions set down by the ECJ require that the provision at issue (which could be the whole directive or one or more provisions thereof) is unconditional and sufficiently precise and, furthermore, that the period for implementation has elapsed.[161] A provision is unconditional where it sets down an obligation that

[160] Case C-87/02 *Commission v Italy* [2004] ECR I-5975.

[161] Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53 paras 22–5; Case C-118/94 *Associazione Italiana per il WWF v Regione Veneto* [1996] ECR I-1223 para 19; Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava and others v Regione Lombardia* [1994] ECR I-483 paras 8–10; Joined Cases C-397/01 to C-403/01 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband*

does not require any discretionary implementing measures on the part of the Member State. The 'sufficiently precise' requirement will be satisfied where the obligation at issue is cast in unequivocal terms and is capable of being applied by a national court. Directives (or particular provisions of directives) that meet these requirements may be enforced against the State and organs of the State.[162] The ECJ has interpreted this latter concept broadly with a view to promoting the effectiveness of directives within the national legal orders.[163] In *Costanzo*, the Court ruled that 'all organs of the administration, including decentralized authorities such as municipalities' are obliged to apply directly effective provisions of directives.[164] Subsequently, in *Foster*, the ECJ elaborated on the meaning of 'organ of the State' in the following terms:

> [A] body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.[165]

This passage confirms that the legal form that a particular body may take is immaterial in determining whether or not it is an organ of the State. Three basic conditions are prescribed. First, the body must be providing a public service; secondly, the public service must be under the control of the State; and, thirdly, the body must have 'special powers' for the purpose of its public service role.[166] The wording deployed by the ECJ in the passage cited above (note the reference to 'included') indicates that this formula is not intended to be exhaustive.[167] The

Waldshut eV [2004] ECR I-8835 para 103 (*Pfeiffer*) and Joined Cases C-152/07 to C-154/07 *Arcor AG & Co KG v Bundesrepublik Deutschland* [2008] ECR I-0000 para 40. In the specific context of environmental directives see J Holder, 'A Dead End for Direct Effect?: Prospects for Enforcement of European Community Environmental Law by Individuals' (1996) 8 *Journal of Environmental Law* 314 and J Alder, 'Environmental Impact Assessment—The Inadequacies of English Law' (1993) 5 *Journal of Environmental Law* 203, 208–11.

[162] Case 152/84 *Marshall v Southampton and South-West Hampshire AHA* [1986] ECR 723 para 49.

[163] Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839; Case C-188/89 *Foster v British Gas* [1990] ECR I-3313 para 20; Joined Cases C-253/96 to C-258/96 *Kampelmann v Landschaftsverband Westfalen-Lippe* [1997] ECR I-6907 para 46; Case C-343/98 *Collino v Telecom Italia SpA* [2000] ECR I-6659 paras 22–4; Case C-157/02 *Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [2004] ECR I-1477 paras 23–4 and Case C-356/05 *Farrell v Whitty* [2007] ECR I-3067 para 40.

[164] Case 103/88 *Costanzo* [1989] ECR 1839 para 31.

[165] Case C-188/89 *Foster v British Gas plc* [1990] ECR I-3313 para 20. See also Case C-157/02 *Rieser* [2004] ECR I-1477 para 24.

[166] In the UK, for example, it has been held that a privatised water company is an organ of the State: *Griffin v South West Water* [1995] IRLR 15. The dispute here revolved around the application of the second *Foster* condition. Blackburne J observed that it was the public service that must be under State control, not the public body itself.

[167] See the comprehensive analysis of the 'organ of the State' doctrine in *Farrell v Whitty* [2008] IEHC 124. Birmingham J of the High Court concluded that *Foster* provided 'a useful guide or illustration but no more than that'.

ECJ's failure to articulate a clear set of guiding principles, beyond the loose *Foster* criteria, creates considerable scope for ambiguity and confusion at local level.[168]

The early academic literature speculated on whether or not certain provisions of the original EIA directive had 'direct effect'. In other words, could individuals and environmental groups rely on unimplemented, or incorrectly implemented, provisions of the directive to challenge planning decisions before their national courts? As indicated in chapter two, the EIA directive is cast in the classic form of a framework directive. It envisages detailed national implementing measures and leaves considerable discretion to the Member States on the mechanics of implementation at local level. This state of affairs prompted extensive debate on whether or not particular provisions of the directive were unconditional and sufficiently precise within the meaning of the ECJ's traditional direct effect jurisprudence.[169] Early national jurisprudence revealed markedly conflicting opinions on whether or not the original Article 4(2) (which left the Member States considerable discretion as regards EIA for Annex II projects) was capable of direct effect.[170] A related issue is whether or not the EIA directive creates rights for individuals that the national courts must protect. The objective of the directive is the protection of the environment (a general or a public interest) and

[168] B Moriarty, 'Direct Effect, Indirect Effect and State Liability' (2007) 14 *Irish Journal of European Law* 97, 135–50 and J Gaffney, 'Pleading EC Law in Irish Litigation: A Case Study' (2005) 5 *Judicial Studies Institute Journal* 153.

[169] A number of early commentaries suggested that (original) Art 2 and Art 4(1) were indeed unconditional and sufficiently precise to have direct effect. See, eg, L Krämer, 'The Implementation of Community Environmental Directives Within Member States: Some Implications of the Direct Effect Doctrine' (1991) 3 *Journal of Environmental Law* 39, 41–2 and 47 and 'Direct Effect of EC Environmental Law' in H Somsen (ed), *Protecting the European Environment: Enforcing EC Environmental Law* (London Blackstone Press, 1995) 133.

[170] See, eg, the decision of Lord Coulsfield in *Kincardine and Deeside District Council v Forestry Commissioners* [1994] 2 CMLR 869. On this occasion, the (Scottish) Court of Session, Outer House ruled that Art 4(2) was not 'precise and unconditional' and so did not have direct effect (para 34). Note too the Court's obiter comment that 'a powerful argument' could be made that Art 4(1) had direct effect. Contrast *Twyford Parish Council v Secretary of State for the Environment* [1992] 1 CMLR 276 where McCullough J in the High Court (England and Wales) held that the provisions of the directive (generally) were 'unconditional and sufficiently precise' and that the applicants in the case at hand 'were amongst those whom the directive was intended to benefit' (para 56). McCullough J went on to rule, however, that 'there is no authority for the view ... that if the terms of a directive, which should have been implemented but had not, were breached, *an individual who had not thereby suffered could enforce it against the defaulting State*' (para 68, emphasis added). This ruling suggested that infringement of a private law right or interest is a precondition to invoking the directive before the national courts. See also *Wychavon DC v Secretary of State for the Environment* (1994) 6 *Journal of Environmental Law* 351, 355–6 where Tucker J in the High Court (England and Wales) took the view that the (original) EIA directive did not have direct effect. For an overview of the early UK EIA case law see A Ward, 'The Right to an Effective Remedy in European Community Law and Environmental Protection: A Case Study of United Kingdom Judicial Decisions Concerning the Environmental Assessment Directive' (1993) 5 *Journal of Environmental Law* 221. The Irish jurisprudence is examined in ch 5.

not the protection of individual rights or private interests as such.[171] In *Kraaijeveld*,[172] Advocate General Elmer expressed the view that the original Article 6(2) conferred procedural rights (including 'the right to be heard') on qualified members of the public and that those rights were enforceable before the national courts.[173] Advocate General Cosmas subsequently endorsed this view in *Greenpeace*.[174] In sharp contrast, however, the ECJ has not pursued a rights-based analysis when called upon to clarify the circumstances in which individuals may invoke the EIA directive before the national courts.[175] This approach is not really surprising. A careful reading of the ECJ's early jurisprudence on the doctrine of direct effect indicates that the grant of an individual right is not a precondition for direct effect. As Ruffert has observed, 'the Court does not consider individual rights as a *condition* of direct effect, but as its *consequence*. Direct effect only depends on the clear and unequivocal structure of a provision'.[176] Writing extra-judicially, Edward has also emphasised that 'there is no *necessary* connection between the obligations assumed by Member States and the rights of individuals or their manner of enforcement'.[177] Rather than pursuing a rights-based analysis, the ECJ has focused on the clear and unequivocal *obligation* that the EIA directive imposes on the Member States (including the competent authorities and the national courts) to achieve a particular result—in other

[171] For a close analysis of the nature of 'rights' and 'interests' in Community law, and how the ECJ deploys the concept of 'rights' in its case law see C Hilson and T Downes, 'Making Sense of Rights: Community Rights in EC Law' (1999) 24 *EL Rev* 121 and S Prechal, *Directives in EC Law*, 2nd edn (Oxford, Oxford University Press, 2005) ch 6.

[172] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

[173] *Ibid*, paras 64–74 of the Opinion. This argument was also advanced in L Krämer, 'The Implementation of Community Environmental Directives Within Member States: Some Implications of the Direct Effect Doctrine' (1991) 3 *Journal of Environmental Law* 39, 54 and in C Hilson, 'Community Rights in Environmental Law: Rhetoric or Reality' in J Holder (ed), *The Impact of EC Environmental Law in the United Kingdom* (Chichester, Wiley, 1997) 54 and 62.

[174] Case C-321/95 P *Stichting Greenpeace Council v Commission* [1998] ECR I-1651 para 58 of the Opinion.

[175] The ECJ referred, in passing, to 'the environmental rights arising under Directive 85/337 that the applicants seek to invoke' in Case C-321/95 P *Greenpeace* [1998] ECR I-1651 para 30. The Court did not elaborate on the nature and content of these 'environmental rights', however.

[176] M Ruffert, 'Rights and Remedies in European Community Law: A Comparative View' (1997) 34 *CML Rev* 307, 315. See also M Lenz, DS Tynes and L Young, 'Horizontal What? Back to Basics' (2000) 25 *EL Rev* 509, 510–12 and S Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *CML Rev* 1047, 1050. Prechal writes:
'The way in which the Community law provision at issue are deployed depends on the character and subject matter of the proceedings in the national court. Therefore, equating direct effect with the creation of rights does not do justice to the diversity of the effects which directly effective provisions may produce'.

[177] D Edward, 'Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations' in A Giuffrè (ed), *Scritti in Onore di Giuseppe Federico Mancini (Vol II)* (Seminario Giuridico della Università di Bologna CLXXIX, 1998) 439.

words, that projects likely to have significant effects on the environment must undergo assessment, in accordance with the terms of the directive, before development consent is granted.[178]

Beginning with the landmark *Kraaijeveld* ruling, the ECJ affirmed that qualified members of the public may call on the national courts to examine whether the national legislature, or the national administrative authorities, have remained within the limits of the discretion conferred by the EIA directive.[179] The fact that certain provisions of the directive reserve an element of discretion to the Member States does not preclude judicial review. The directive therefore serves as a standard against which the legality of Member State action may be scrutinised. This 'right to call for judicial review'[180] or the 'public law effect' of a directive[181] is grounded in the well-established Community law doctrine of *l'effet utile* and in the ECJ's determination to promote decentralised enforcement of Community norms.[182] Edward has emphasised that:

> [t]he role of the courts, including the national courts, is to determine what obligations have been undertaken, whether performance is immediately exigible and if so by whom, and, where appropriate, to enforce performance ... From *Van Gend en Loos* to *Kraaijeveld*, nearly all the cases on direct effect were referred to the Court of Justice by national judges whose concern was to establish the obligations of the state and the extent of the judicial power, in furtherance of the rule of law, to enforce them.[183]

The next section examines the ECJ jurisprudence on the justiciability of the directive at national level. The case law is presented chronologically with a view

[178] See also D Edward, 'Direct Effect: Myth, Mess or Mystery?' in JM Prinssen and A Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Groningen, Europa Law Publishing, 2002) especially at 11–13. Scott has suggested that the ECJ's apparent reluctance to analyse the original EIA directive in terms of traditional direct effect doctrine may stem from an unwillingness to acknowledge that the directive confers rights on individuals. The implication of such a finding would be to open up the possibility of *Francovich* actions: J Scott, *EC Environmental Law* (London, Longman, 1998) 123–4.

[179] Since the entry into force of the amendments to the EIA directive introduced in Dir 2003/35/EC, qualified members of the public are those who fall within the definition of the 'the public concerned' set down in Art 1(2) and who meet any standing requirements set down in national law (Art 10a).

[180] Edward, above n 177, at 442.

[181] Scott, above n 178, at 157.

[182] In the ground-breaking judgment in Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, the ECJ ruled 'the useful effect of [a directive] would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law' (para 12). This formula has been recited practically verbatim in a series of ECJ rulings on the EIA directive considered below. The strong ruling in Case C-237/07 *Janecek v Freistaat Bayern* [2008] ECR I-0000 paras 37–9, supports a broad approach to locus standi to invoke a directive at national level. On this occasion, the ECJ confirmed the right of 'persons directly concerned' to require the competent authorities to draw up an air quality action plan pursuant to Art 7 Dir 96/62/EC on ambient air quality assessment and management [1996] OJ L296/55 as amended.

[183] Edward, above n 177, at 443. See also Prechal, above n 171, at 237.

to illustrating how the Court has gradually, yet progressively, refined its approach to the role of the directive in judicial review proceedings before the national courts.

B. Justiciability of the EIA Directive before National Courts

In *Commission v Germany*,[184] the Commission instituted proceedings seeking a declaration that in granting development consent for the construction of a new block at the Grosskrotzenburg thermal power station (an Annex I project according to the ECJ) without undertaking a preliminary EIA, Germany had failed to comply with its obligations under Articles 2, 3 and 8 of the original directive. The competent authority had decided not to carry out an EIA, as the directive had not been transposed into German law at the relevant time. The ECJ categorically rejected Germany's argument that Articles 2, 3 and 8 could only have direct effect if they conferred rights on individuals.[185] This aspect of the ruling confirms that the grant of individual rights is not a precondition for direct effect or the right to invoke the directive in the national legal order. Germany also maintained that Articles 2, 3, and 8 were not sufficiently clear and precise to establish a specific, unequivocal obligation on the national authorities to implement those provisions of the directive in the context of an application for development consent. The ECJ disagreed and presented the following analysis of the nature of the obligation created by the directive:

> Article 2 of the directive lays down *an unequivocal obligation*, incumbent on the competent authority in each Member State for the approval of projects, to make certain projects subject to an assessment of their effects on the environment. Article 3 prescribes the content of the assessment, lists the factors which must be taken into account in it, and leaves the competent authority a certain discretion as to the appropriate way of carrying out the assessment in the light of each individual case. Article 8 furthermore requires the competent national authorities to take into consideration in the development consent procedure the information gathered in the course of the assessment.
>
> Regardless of their details, those provisions [Articles 2, 3, and 8] therefore unequivocally impose on the national authorities responsible for granting consent an obligation to carry out an assessment of the effects of certain projects on the environment.[186] (emphasis added)

[184] Case C-431/92 *Commission v Germany* [1995] ECR I-2189.

[185] *Ibid*, paras 24–6.

[186] *Ibid*, paras 39–40. See also Case C-474/99 *Commission v Spain* [2002] ECR I-5293 where the ECJ confirmed that:
'It is for the Member States to ensure that the implementation of their Community obligations [pursuant to the EIA directive] by the centralised and decentralised competent authorities is effective' (para 28).

This passage confirms that Articles 2, 3 and 8 are indeed sufficiently clear and precise to impose a mandatory obligation on the competent national authorities to ensure that certain projects undergo assessment.[187] While the project at issue was an Annex I project, the ECJ's ruling is broad enough to embrace any Annex II projects likely to have significant effects. As this ruling came about in the specific context of Article 226 EC infringement proceedings, the ECJ was not required to consider the question of whether, and if so, to what extent, the 'unequivocal obligation' identified in this case could be enforced by private individuals before their national courts.

This issue was addressed in a series of subsequent decisions beginning with *Kraaijeveld.*[188] On this occasion a challenge was mounted to a decision approving a zoning plan providing for the reinforcement of particular dykes. The works envisaged by the plan would have resulted in Kraaijeveld losing access to a navigable waterway. The contested plan had been approved without prior EIA because the relevant Dutch implementing measures had set thresholds for river dykes at such a level as to exclude all dyke reinforcement projects from assessment. Kraaijeveld brought judicial review proceedings seeking to have the decision to approve the plan annulled, and the national court referred a series of questions to the ECJ: (1) whether the obligation to carry out an EIA had 'direct effect' so that it could be invoked by an individual before the national court and, if so (2) whether the national court was under a duty to apply the directive even where the applicant for judicial review had not explicitly invoked the directive. The ECJ treated both questions together. It began by recalling the general obligation on Member States to take all appropriate measures to achieve the result prescribed by a directive and emphasised that this duty was binding on all Member State authorities, including the courts.[189] Recalling its earlier ruling in *Verbond,*[190] the ECJ approached the direct effect issue as follows:

> As regards the right of an individual to invoke a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect attributed to a directive by Article 189 [Article 249 EC] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national

[187] In Case C-321/95 P *Greenpeace* [1998] ECR I-1651, Advocate General Cosmas interpreted this ruling as having 'upheld the direct effect of Articles 2, 3 and 8' of the directive (para 58 of the Opinion). The ECJ did not employ the term 'direct effect' in its judgment, however.

[188] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

[189] *Ibid*, para 55.

[190] Case 51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113.

> legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive.[191]

Thus the Court affirmed the right of 'those concerned' to invoke the obligation that the directive imposes on the Member States before their national courts (once the deadline for implementation has passed). More significantly, the fact that Kraaijeveld had not raised the EIA point in the course of the proceedings did not relieve the national court of its duty to consider the potential application of the directive to the case at hand. There is nothing in the *Kraaijeveld* judgment to suggest that the right to invoke the EIA directive is dependent on satisfying the traditional criteria for direct effect (ie that the provision in question is unconditional and sufficiently precise).[192] Instead, the ECJ grounded the right to invoke the directive in the well-established doctrine of effectiveness and in the clear terms of Article 249 EC. The fact that Member States enjoyed a measure of discretion under Article 2(1) and Article 4(2) of the EIA directive did not preclude judicial review.[193]

Where a challenge is mounted to a national provision on the basis of alleged non-compliance with the directive, the national court is required to 'take account' of whether or not the Member State or the competent authority (as the case may be) acted beyond the limits of its discretion.[194] In *Kraaijeveld*, the ECJ proceeded to consider the appropriate remedy where the applicant for judicial review establishes that this discretion has indeed been exceeded. It ruled as follows:

> If [the discretion under Article 2(1) and Article 4(2) of the EIA directive] has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.[195]

It follows from this passage that the national court is obliged to set aside any national 'provisions' that conflict with the requirements of the directive (for example, where national legislation sets unlawful thresholds). Yet the ECJ did not

[191] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403 para 56.

[192] For an interesting critique of this feature of *Kraaijeveld* see D Wyatt, 'Litigating Community Environmental Law—Thoughts on the Direct Effect Doctrine' (1998) 10 *Journal of Environmental Law* 9, 18–19.

[193] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403 para 59.

[194] *Ibid*, para 60.

[195] *Ibid*, para 61. Note that the language deployed by the ECJ in this passage mirrors Art 10 EC, which provides:
'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks'.
See also J Temple Lang, 'The Duties of National Authorities under Community Constitutional Law' (1998) 23 *EL Rev* 109.

consider what steps a national court is required to take where a *specific* planning decision is taken in breach of the requirements of the directive.[196] Is the national court obliged to revoke an unlawful planning decision or, at the very least, obliged to suspend it pending EIA? The ECJ articulated the national court's obligation in broad terms—it must take 'all the general or particular measures necessary' to ensure that projects likely to have significant effects do not escape assessment. This loose formulation, which does not specify any particular remedy, provides an element of procedural flexibility for national courts and, perhaps fittingly, reflects the wide range of remedies and procedures available throughout the Member States. It falls to the national courts to determine the most appropriate course of action in the particular context of its governing planning and administrative law. At the same time, however, the end result that must be achieved by the national court is expressed in unequivocal terms by the ECJ. The obvious tensions that arise here—between national procedural autonomy on the one hand and the effectiveness of the EIA directive on the other—are not easily resolved. As indicated earlier in chapter one, national judges must prove willing to apply and give effect to EC environmental norms if the procedural requirements mandated by the EIA directive are to be integrated successfully into national planning and administrative law.

The justiciability of the directive in domestic judicial review proceedings, and the remedies that must be provided by the national court in the case of non-compliance, was considered in greater detail in *Bozen*[197] (which concerned a challenge to a decision approving an Annex II project involving the restructuring of Bolzano-St Jacob Airport). The contested project had been subject to what the national court described as 'simplified environmental assessment'. It was common case, however, that the procedure by which the project had been adopted did not comply with the requirements of the EIA directive. The applicants in the main proceedings before the national court argued that the project was likely to have significant effects on the environment and should have been subject to an assessment pursuant to (original) Article 2(1) and Article 4(2). The national court inquired of the ECJ:

[196] This aspect of *Kraaijeveld* is criticised in S Dillon, 'The Mirage of EC Environmental Federalism in a Reluctant Member State Jurisdiction' (1999) 8 *New York University Environmental Law Journal* 1, 29–30. According to Dillon,

'[t]he Court of Justice could have used clear language that would have indicated to national courts that they are required to consider individual challenges to permissions for development and to evaluate the exercise of decision-maker discretion in the light of the Article 2(1) obligation. . . . Even allowing for the disharmony between the traditional language of the common law and the leaner, more nuanced language of the Court of Justice, the court's coyness in identifying the precise nature of the review Member State courts are required to provide under a given environmental directive is puzzling' (footnote omitted).

[197] Case C-435/97 *Bozen* [1999] ECR I-5613.

> If the Directive has been incorrectly transposed, is Article 4(2) thereof, in conjunction with Article 2(1), vertically directly effective (self-executing) in the sense that the authorities of the Member State are required to subject the projects at issue to an environmental assessment?[198]

The ECJ (following *Kraaijeveld*) ruled that individuals could indeed invoke the obligation imposed by the directive before their national courts. The Court's response was rather more specific on this occasion however:

> It is for the national court to review whether, on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.[199]

This passage confirms that the directive may be relied upon to challenge the decision of the relevant competent authority to exclude a *specific* project from the assessment requirement. The *Bozen* ruling therefore clarifies the ambiguity on this important point that had emerged post-*Kraaijeveld*. On the question of remedies, the ECJ took the opportunity to elaborate on *Kraaijeveld* as follows:

> Articles 4(2) and 2(1) of the Directive are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment, and, if so, to ensure that they are subject to an impact assessment.[200]

This passage differs from the *Kraaijeveld* formulation in that it refers to the duty of the national court to set aside any of its 'national rules or measures' that have been deemed incompatible with Article 2(1) and Article 4(2). The word 'measures' is sufficiently open-ended to embrace specific administrative decisions taken in breach of the requirements of the directive, although it is unfortunate that the ECJ was not more explicit on this point.

Linster[201] (which involved a challenge to the legality of a compulsory purchase procedure in respect of lands required to facilitate the construction of a motorway) presented the ECJ with an opportunity to deliver further guidance on a range of issues concerning the role of the directive in judicial review proceedings.

[198] *Ibid*, para 27.
[199] *Ibid*, para 48.
[200] *Ibid*, para 71.
[201] Case C-287/98 *Linster* [2000] ECR I-6917. See also Á Ryall, 'Environmental Assessment Law: Luxembourg v Linster' (2001) 8 *Irish Planning and Environmental Law Journal* 17.

In brief, the Linsters sought to defend compulsory purchase proceedings with the argument that the contested motorway project had not been the subject of an EIA as required by the directive. The national court was uncertain as to whether it could assess whether the national legislature had kept within the limits of its discretion without first determining whether the directive had direct effect. It referred a question on this point to the ECJ.[202] Luxembourg maintained that the national court was only entitled to find that the substantive provisions of the directive had been infringed if the provision of the directive on which the Linsters sought to rely had direct effect and conferred rights on the applicants in the judicial review proceedings.[203] The Linsters argued that by virtue of the principle of supremacy, a national court is under a duty to disapply national legislation that is contrary to Community law, even in cases where the Community provision at issue lacks direct effect.[204] The ECJ did not engage with these specific arguments. Recalling its earlier rulings in *Verbond*, *Kraaijeveld* and *Bozen*, the Court confirmed that 'those concerned' could invoke the obligation imposed by the directive before the national courts.[205] The role of the national courts was set out in the following terms:

> [A] national court, called on to examine the legality of a procedure for the expropriation in the public interest, in connection with the construction of a motorway, of immovable property belonging to a private individual, may review whether the national legislature kept within the limits of the discretion set by the Directive, in particular where prior assessment of the environmental impact of the project has not been carried out, the information gathered in accordance with Article 5 has not been made available to the public and the members of the public concerned have not had an opportunity to express an opinion before the project is initiated, contrary to the requirements of Article 6(2) of the directive.[206]

The *Linster* ruling also provides welcome guidance on the role of the national court where a challenge is mounted to the adequacy of the EIS. It will be recalled that Article 5 of the directive requires Member States to adopt measures to ensure that the developer supplies specified information on the proposed project and its likely impacts. The ECJ noted that the original Article 6(2) requires Member States to ensure that the public has access to the application for development consent and to the information supplied by the developer and, furthermore, that the public is given the opportunity to express an opinion on the proposed project.[207] While acknowledging that the Member States enjoy an element of discretion when implementing the requirements of Article 5(1) at national level, the ECJ ruled that this discretion 'does not preclude judicial review of the

[202] The detailed questions referred by the national court are set out in para 24 of the judgment.
[203] Case C-287/98 *Linster* [2000] ECR I-6917 paras 26–7.
[204] *Ibid*, para 28.
[205] *Ibid*, paras 31–2.
[206] *Ibid*, para 39.
[207] *Ibid*, para 35.

question whether it has been exceeded by the national authorities'.[208] Thus, the Court confirmed that the decision of the relevant competent authority on the adequacy of the EIS is open to challenge pursuant to Article 5 of the directive.

The *Bozen* and *Linster* judgments also offer useful guidance on the level of detail that must be provided in the EIS in order to comply with the requirements of the directive. Although this particular point did not arise directly in either *Bozen* or *Linster*, the ECJ's analysis of the scope of the Article 1(5) exemption in both of these cases is instructive. Article 1(5) provides that the EIA directive does not apply where a project is adopted by a specific act of national legislation. The ECJ's account of the degree of precision required in a legislative act before the Article 1(5) exemption will come into play was considered earlier in this chapter. The Court was careful to stress that the act in question must include all of the elements necessary to assess the environmental impact of the proposed project.[209] Otherwise, the objectives of the directive would be undermined. This purposive approach can also be deployed at national level in order to gauge the adequacy of an EIS. Following this line of reasoning, the test for evaluating the EIS may be formulated in the following manner: Does the EIS set out the required information in sufficient detail to enable the competent authority to assess the impact of the proposed project in accordance with the requirements of the directive and in particular Article 3 thereof? Determining the adequacy or otherwise of the EIS in light of the standards set down in the directive involves complex mixed questions of law and fact. The intensity of the standard of review to be applied by a national court where a challenge is mounted to the adequacy of the EIS is considered below.

In *Wells*,[210] the ECJ confirmed that an individual is entitled to invoke Article 2(1), in conjunction with Article 4(2), in order to challenge the State's failure to require an EIA. Even more significantly, the Court held that it is open to an individual to rely on the EIA directive against a competent authority even where this course of action involves so-called 'adverse repercussions' or negative consequences for a private developer. Serious doubt had surrounded this important point prior to *Wells*, given the well-established prohibition on horizontal direct effect (that directives can be invoked against the State and organs of the State but not against private parties).[211] *Wells* also provided long overdue clarification on the appropriate remedy where a national court determines that the requirements of the EIA directive have not been met in a particular case. The ECJ began, characteristically, by recalling the Member State's duty to nullify the unlawful consequences of a breach of Community law—a duty owed by every organ of the

[208] *Ibid*, paras 36–7.

[209] Case C-435/97 *Bozen* [1999] ECR I-5613 para 59 and Case C-287/98 *Linster* [2000] ECR I-6917 para 57.

[210] Case C-201/02 *Wells* [2004] ECR I-723.

[211] Case 148/78 *Ratti* [1979] ECR 1629 para 22 and Case 152/84 *Marshall* [1986] ECR 723 para 48. See generally Prechal, above n 171, at 255–70.

State, including the courts.[212] The competent authorities are required to take 'all the general or particular measures necessary' in order to ensure that the requirements of the directive are observed.[213] On this occasion, however, the ECJ acknowledged explicitly that the particular measures envisaged here include 'the revocation or suspension' of a consent that has already been granted, subject, as ever, to the principle of national procedural autonomy.[214] A national court is not *required* to revoke or suspend an unlawful consent, but this remedy may be deployed if it is available under national administrative law—even where revocation or suspension entails adverse consequences for a private developer. The ECJ also rejected an argument mounted by the UK to the effect that the lengthy period of time between the decision determining the new conditions, and Mrs Wells's request that the situation be remedied, resulted in a situation where revocation of the contested decision would offend the principle of legal certainty. In *Wells*, revocation had been requested *before* the final stage of the development consent procedure was completed. It followed, in the Court's view, that in these circumstances revocation would not have been contrary to the principle of legal certainty.[215]

The ECJ's approach in *Wells* reflects, yet again, the difficult tension between the principle of national procedural autonomy and the effectiveness of Community law within the national legal order. While the ECJ does not go so far as to direct that an unlawful consent *must* be revoked or suspended, the Member State is required 'to make good any harm' caused by the failure to carry out an EIA.[216] The procedural rules governing challenges to development consents before the domestic courts are a matter for the national legal system, provided that the twin principles of equivalence and effectiveness are respected.[217] It falls to the national court to determine whether it is possible under national administrative law for an unlawful consent to be revoked or suspended in order to facilitate EIA.[218] If revocation or suspension is not possible, then the national court must consider, 'if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered'. This is the most intriguing aspect of the *Wells* ruling. The 'individual' referred to in this part of the judgment presumably refers to the applicant for judicial review whose challenge to the contested development consent has proven successful. The ECJ appears to suggest here that if the

[212] Case C-201/02 *Wells* [2004] ECR I-723 para 64.

[213] *Ibid*, para 65.

[214] *Ibid.*

[215] *Ibid*, para 60. See also Harwood, above n 44, at 275–6 and Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969 paras 66–9 where the ECJ noted that while the principle of legal certainty and the protection of legitimate expectations require revocation of an unlawful measure to occur within a reasonable time and regard must be had to how far the person concerned (ie the developer) might have been led to rely on the unlawful measure, revocation, is, in principle, permitted.

[216] Case C-201/02 *Wells* [2004] ECR I-723 paras 66–9.

[217] *Ibid*, para 67.

[218] *Ibid*, para 69.

individual concerned agrees (and this is cast as a firm pre-condition), then compensation is an acceptable alternative remedy to revocation or suspension of the unlawful consent. This raises the obvious question—what is a national court to do if the individual concerned does *not* agree to compensation as a remedy—bearing in mind that revocation or suspension of the unlawful consent may not be an option under domestic law? The manner in which the ECJ has formulated the 'alternative' remedy option in *Wells* is unsatisfactory and raises more questions than it solves. At no point in the judgment does the ECJ elaborate on what it means by the phrase 'harm' in this particular context. What is the 'harm' suffered by an individual objector (or ENGO) where a competent authority grants development consent without prior EIA in breach of the requirements of the directive? As explained in chapter two, the EIA directive is concerned with procedural matters as opposed to substantive environmental rights and obligations. Even in cases where an EIA is carried out in accordance with the directive, the competent authority is not obliged to take a decision that prioritises the environment over development. In the end, competing values and interests may outweigh environmental considerations. The best that can be said is that EIA increases awareness of environmental concerns among competent authorities, developers and the public. Where a competent authority fails to carry out an EIA, an individual objector is denied the right to participate in the decision-making procedure and the decision-maker is deprived of the individual's input. In the absence of EIA, the decision taken by the competent authority may be deficient from an environmental perspective—although there is an inevitable element of speculation here. It follows that whatever the 'harm' contemplated by the ECJ may be, it is extremely difficult to measure. How does one go about putting a monetary value on the loss of the procedural right to participate in the EIA process? This point is considered further below in the specific context of State liability for breach of Community law.[219]

Early doubts about the direct effect or justiciability of the EIA directive at national level have gradually been resolved by the ECJ and this point is now settled. The fact that various provisions of the directive confer a measure of discretion on the Member States does not preclude judicial review. In separating the right to invoke the directive before the national courts from the traditional requirements for direct effect (ie the unconditional and sufficiently precise criteria), the ECJ has succeeded in sharpening the effectiveness of the directive as a means of challenging planning decisions within the domestic legal order. At the same time, however, the ECJ's reluctance to apply traditional direct effect principles when considering the role of the EIA directive before the national courts, together with the recent emergence of a looser concept of 'invocability', has generated unnecessary complexity that has spilled over into the national

[219] See pp 179–90.

arena.[220] Edward has suggested that the *Kraaijeveld* ruling 'is not "direct effect" in the traditional sense and it would perhaps be as well to find another formula in order to avoid confusion'.[221] In similar vein, Prechal has observed that in addition to the confusion the concept of direct effect has generated, and continues to generate, there is a danger that 'it may serve as a pretext *not* to apply Community law provisions and it still underlines the "foreign origin" character of Community law, which should, at a certain stage, be overcome'.[222] The analysis of the Irish case law presented in chapter five confirms that the uncertainty produced by the obscure wording adopted by the ECJ in *Kraaijeveld* (when elaborating on the circumstances in which qualified members of the public may invoke the directive at national level) has indeed led to difficulties in practice. Notwithstanding the more explicit judgments from the ECJ post-*Kraaijeveld*, a number of important practical issues concerning the role of the directive in domestic judicial review proceedings remain unresolved.

C. Standard of Review to be Applied by National Courts

While the ECJ has confirmed that qualified individuals may invoke the EIA directive before the national courts, it has not elaborated on the standard of review to be applied by those courts in EIA cases. The Court's reluctance to articulate a specific standard of review lies in the well-established principle of national procedural autonomy and its desire to accommodate the diverse systems of administrative law operating throughout the Member States. Following the ECJ's *Upjohn*[223] ruling, it appears that national courts are not required to embark on a review of the *merits* of decisions taken by competent authorities in cases involving 'complex assessments'. This approach mirrors the position in Irish administrative law whereby judicial review is limited to an examination of the *legality* of the contested decision. Moreover, following the principles established in *O'Keeffe*,[224] a particularly weak form of review is applied where a challenge is mounted to the decision of an expert public authority. The courts will rarely, if ever, interfere with decisions of competent authorities on purely planning matters or on questions of planning judgement. This stance reflects the practical reality that the judiciary are not expert in planning and environmental matters.

The role of the courts in judicial review cases is to uphold the Rule of Law and to contain the exercise of discretion within the parameters set by the EIA

[220] J Jans and J Prinssen, 'Direct Effect: Convergence or Divergence? A Comparative Perspective' in JM Prinssen and A Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Groningen, Europa Law Publishing, 2002).

[221] In 'Foreword' to J Holder (ed), *The Impact of EC Environmental Law in the United Kingdom* (Chichester, Wiley, 1997) xiv, cited in Scott, above n 178, at 123. See also C Hilson and T Downes 'Making Sense of Rights: Community Rights in EC Law' (1999) 24 *EL Rev* 121, 135–7.

[222] Prechal, above n 176, at 1068.

[223] Case C-120/97 *Upjohn* [1999] ECR I-223.

[224] *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39.

directive. Fulfilling this role will often involve the national courts in complex mixed questions of law and fact (eg judging significance in the case of the Annex II projects and evaluating the adequacy of the EIS submitted by the developer against the benchmarks set in Article 5 of the directive). Notwithstanding the deference shown to local administrative law in *Upjohn*, the ECJ insisted that the national courts provide effective protection for the rights that individuals derive from Community law. This critical theme also permeates the EIA case law considered earlier in this chapter. Indeed, the ECJ's sharp focus on the national courts' obligation to ensure that the objectives of the EIA directive are not undermined in practice is one of the most striking features of the *Kraaijeveld* line of authority. The fundamental difficulty lies in translating the concept of 'effective' protection into a realistic and workable standard of review to be applied by the national courts in EIA cases. In *SIAC*[225] (considered earlier in chapter three), the Irish Supreme Court held that the 'manifest error' standard applies when a national court is called upon to review the legality of decisions involving the application of Community procurement rules by competent authorities.[226] Fennelly J observed that the *O'Keeffe* principles entailed the risk of not delivering effective judicial protection as required by the Remedies directive[227] (a view shared by the Advocate General in *SIAC*).[228] Following *SIAC*, it appears that the *O'Keeffe* principles need to be recalibrated in cases involving Community law in order to ensure a sufficient level of judicial scrutiny. Unfortunately, the Supreme Court did not consider how the 'manifest error' test connects with well-established principles of judicial review in Irish law. The result is continuing uncertainty within the national legal order as to the appropriate standard of review in cases where Community law rights are at issue.

The ruling in *Commission v United Kingdom*[229] sheds interesting light on the appropriate standard of review at national level (although it involved Article 226 EC infringement proceedings). On this occasion, the Commission maintained that Articles 2(1) and 4(2) of the (original) EIA directive had been breached because the competent authorities had not undertaken prior EIAs in respect of urban development projects at White City and Crystal Palace in London, even though—as the Commission alleged—both Annex II projects were likely to have significant effects. As regards the White City development (which concerned circa 58,000 sq meters of retail and leisure development, including a major new road junction, 4,500 parking spaces, and a link to the Underground network), the Commission was of the view that a project of that size raised a presumption that

[225] *SIAC Construction Ltd (SIAC) v Mayo County Council* [2002] IESC 39, [2002] 3 IR 148.

[226] *Ibid*, 174–6.

[227] Dir 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33.

[228] Case C-19/00 *SIAC Construction Ltd v Mayo County Council* [2001] ECR I-7725 paras 53–4 of the Opinion.

[229] Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969.

an EIA was necessary, unless this presumption was mitigated by other factors. In the case of the Crystal Palace development (which involved leisure and commercial use covering 52,000 sq metres, a roof-top car park with 950 spaces, and a car park at ground level), the Commission maintained that the scale and size of the project was such that it was likely to have significant effects and the competent authority had therefore exceeded its discretion. The UK submitted that, having considered the reports and studies in their possession and following consultation, the competent authorities were entitled to conclude that neither project was likely to have significant effects and therefore did not require EIA.

The ECJ began by recalling that the Commission is required to prove the allegation that a Member State has failed to fulfil its obligations.[230] It cannot rely on any presumptions in this regard and 'must furnish at least some evidence of the effects that the project in question is likely to have on the environment'.[231] The Court reiterated the Member States' duty to facilitate the achievement of the Commission's tasks, which include, in particular, ensuring that the provisions of the Treaty, and the measures taken by the institutions pursuant thereto, are applied.[232] Where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it falls to the State to challenge in substance and in detail the information produced by the Commission.[233] Although Article 4(2) of the EIA directive 'gives the competent authority a degree of freedom in appraising whether or not a particular project must be made subject to an assessment', it is clear from settled case law that the limits of this discretion are found in Article 2(1).[234] The Commission is required to prove that the defendant Member State failed to adopt all measures necessary to ensure that projects likely to have significant effects are subject to prior assessment.[235] The ECJ ruled that the Commission had failed to satisfy this burden of proof. It was not entitled to rely on mere presumptions that large-scale projects are automatically likely to have significant effects 'without establishing, on the basis of at least some specific evidence, that the competent authorities made a manifest error of assessment'.[236] The ECJ criticised the Commission for failing to support its assertions with 'an analytical presentation of tangible and specific evidence which might have enabled the Court to assess whether the competent authorities did in fact exceed the limits of their discretion'.[237] This aspect of the ruling is very significant. It demonstrates that the ECJ is prepared to revisit a competent authority's judgement of the significance of an Annex II project. The focus of the inquiry is on whether or not the competent authority made 'a manifest error of

[230] *Ibid*, para 77.
[231] *Ibid*, paras 77–8.
[232] *Ibid*, para 79.
[233] *Ibid*, para 80.
[234] *Ibid*, paras 88–9.
[235] *Ibid*, para 90.
[236] *Ibid*, para 92.
[237] *Ibid*, para 93. See also Case C-117/02 *Commission v Portugal* [2004] ECR I-5517 para 87.

assessment' when determining significance. The Court's approach here is consistent with its earlier ruling in *Upjohn* concerning the scope of judicial review proceedings at national level where Community law rights are involved. The ruling in *Commission v United Kingdom* provides a strong indication that the 'manifest error' standard should also be applied in judicial review proceedings at national level where it is alleged that the competent authority has exceeded the discretion conferred by the EIA directive. In the absence of a more explicit ruling from the ECJ, it falls to the national courts to examine how national judicial review law and practice intersect with the Community law obligation to deliver effective judicial protection. The express reference to the 'manifest error' test provides a useful point of reference for the national courts as they embark on the task of moulding national judicial review principles to fit the requirements of Community EIA law.

The most recent series of rulings from the ECJ confirm the crucial role of the national courts in reviewing the exercise of discretion in EIA matters. In *Abraham*,[238] the ECJ concluded that the contested project (works to modify the infrastructure of an existing airport runway) came within the scope of Annex II of the original directive.[239] It was for the national courts, however, to establish that the competent authorities had correctly assessed whether the project was likely to have significant effects.[240] In *Commission v Ireland*,[241] the national competent authorities determined that Annex II did not apply to ancillary works which were considered to be minor aspects of a wind farm project. The ECJ disagreed and it embarked on a careful examination of the projects in question (which involved peat and mineral extraction and road construction). Taking particular account of the highly sensitive nature of the location, the Court determined that the proposed projects were likely to have significant effects and should have been subject to prior assessment. It also determined that the EISs submitted by the developer were deficient due to a failure to consider soil stability. The ECJ reached similar conclusions in connection with another set of development consents relating to different elements of the wind farm project. *Commission v Ireland* provides a strong example of the ECJ's willingness to investigate the exercise of discretion by national competent authorities. It is regrettable, however, that the Court did not refer to the 'manifest error' test in this context, and that the judgment does not elaborate further on the appropriate standard of review. In *Ecologistas en Acción-CODA*,[242] the ECJ reaffirmed that it

[238] Case C-2/07 *Abraham* [2008] ECR I-0000.
[239] *Ibid*, paras 32–3.
[240] *Ibid*, para 39.
[241] Case C-215/06 *Commission v Ireland* [2008] ECR I-0000.
[242] Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-0000.

was the role of the national court to assess whether the reports and studies concerning the projects at issue in that case satisfied the requirements set down in the EIA directive.[243]

In sum, the national courts are obliged to ensure that the effectiveness of the EIA directive is not undermined in practice. To this end, decisions taken by competent authorities on the following matters should be subject to robust review:

1. Whether or not a particular Annex II project is likely to have significant effects on the environment;
2. The adequacy or otherwise of the EIS submitted by the developer;
3. The adequacy or otherwise of the assessment (EIA) undertaken by the competent authority;
4. Whether the various procedural steps required by the directive (including public participation) were observed;
5. Whether the requirements of Article 8 have been fulfilled. More specifically, were the results of consultations and the information gathered pursuant to Articles 5 and 6 taken into consideration by the competent authority?;
6. Whether the decision published by the competent authority complies with the requirements of Article 9.

D. Substantial Compliance

The early decision in *Commission v Germany*[244] suggested that it was sufficient if the procedure applied to assess the impacts of a contested project meets the basic requirements articulated in the directive—even if this procedure is not formally based on the scheme set out in the directive.[245] This decision concerned Article 226 EC infringement proceedings and so it must be treated with some caution in the context of the role of the national courts in judicial review proceedings. There is no *express* reference to the concept of substantial compliance in the *Kraaijeveld* line of authority. In *Bozen*,[246] the ECJ acknowledged that a Member State could adopt an alternative assessment procedure to that set down in the directive. Any such procedure must satisfy the requirements of Article 3 and Articles 5 to 10, however. This aspect of *Bozen* indicates that (depending on the particular circumstances), it is open to a competent authority to seek to defend judicial review proceedings with the 'substantial compliance' argument. In *Ecologistas en Acción-CODA*,[247] the referring court inquired of the ECJ whether studies undertaken and reports compiled by the national authorities concerning the contested

[243] *Ibid*, paras 48–50.
[244] Case C-431/92 *Commission v Germany* [1995] ECR I-2189.
[245] *Ibid*, paras 41–5. The ECJ was influenced by the fact that the procedure adopted by the German authorities in this case met the requirements of Arts 3, 5 and 8 of the (original) directive.
[246] Case C-435/97 *Bozen* [1999] ECR I-5613.
[247] Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-0000.

urban road projects constituted an EIA for the purposes of the directive. The ECJ confirmed that 'a formal assessment may be replaced by equivalent measures where they satisfy the minimum requirements set out in Article 3 and Articles 5 to10'.[248]

The substantial compliance issue was considered by the House of Lords in *Berkeley v Secretary of State for the Environment*,[249] where the applicant for judicial review challenged the Secretary of State's decision to grant planning permission for the redevelopment of the Fulham Football Club ground.[250] The planning application, which was not accompanied by an EIS, attracted a large number of representations from local residents. One of the most controversial aspects of the proposed development was its potential impact on the ecology of the River Thames. The local authority's planning department compiled 'a lengthy and impressive document' that summarised the various views expressed during the consultation process and weighed the advantages and disadvantages of the proposed project. The Secretary of State decided to call in the planning application for his own determination, but he did not require the Club to submit an EIS.[251] Following a public inquiry lasting eight days, the planning inspector recommended that permission be granted subject to comprehensive conditions. The Secretary of State accepted that recommendation and granted permission subject to conditions.

By the time the case reached the House of Lords, the parties had agreed that the decision to grant permission was ultra vires because of the failure to consider whether an EIA was required.[252] It was also agreed that the decision could not be defended on the basis that the outcome would have been the same even if an EIA had been undertaken. The crucial question before the Law Lords was whether there had been substantial compliance with the requirements of the directive and, if so, whether the Secretary of State's decision could be upheld on that basis. The ECJ's ruling in *Commission v Germany*[253] was deployed to support the substantial compliance argument. Lord Hoffmann, who delivered the main judgment, drew on the Opinion delivered by Advocate General Elmer in that case and concluded that 'an EIA by any other name will do as well' as long as the

[248] *Ibid*, para 50.

[249] *Berkeley v Secretary of State for the Environment* [2000] UKHL 36. See also Á Ryall, 'Environmental Assessment Law: *Berkeley v Secretary of State for the Environment*' (2001) 8 *Irish Planning and Environmental Law Journal* 70.

[250] The proposed development involved building a new stadium (which would incorporate and improve a number of listed buildings) together with a residential development (comprising 142 flats) overlooking the Thames.

[251] For an overview of the Secretary's power to call in a planning application for determination pursuant to s 77 of the Town and County Planning Act 1990 see Bell and McGillivray, above n 62, at 403.

[252] If the Secretary had considered the point, it was likely that he would have concluded that the contested project was an urban development project (within the meaning of Annex II) that was likely to have significant effects on the environment.

[253] Case C-431/92 *Commission v Germany* [1995] ECR I-2189.

procedure followed is an EIA 'in substance'.[254] Notwithstanding the fact that Article 6(3) of the directive conferred an element of discretion on the Member States as to the detailed arrangements for making the information specified in Article 5 available to the public, this discretion did not permit a Member State

> to treat a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the Annex III information which should have been provided by the developer.[255]

Lord Hoffmann accepted that where there was a failure to observe what he described as 'some procedural step which was clearly superfluous' to the requirements of the directive, then the national court could exercise its discretion not to quash the unlawful planning permission without acting in breach of its obligations under Community law.[256] *Berkeley* was not such a case, however.[257] It falls to the national court to examine whether the fundamental objectives of the directive have been complied with in the course of the actual assessment procedure adopted by the competent authority.

E. Horizontal Effect or Consequential Adverse Impact?

It is a well-established principle of Community law that a directive may be enforced against the State, or an organ of the State, but not against a private individual or body.[258] The obligation to implement Community law falls squarely

[254] *Berkeley v Secretary of State for the Environment* [2000] UKHL 36 para 9.

[255] *Ibid.*

[256] *Ibid.* See also *R (Prokopp) v London Underground Ltd and Strategic Rail Authority* [2003] EWCA Civ 961 paras 70–78 (Buxton LJ, obiter); *Younger Homes (Northern) Limited v First Secretary of State* [2004] EWCA Civ 1060 paras 46–8 (Laws LJ) and *Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment and Belize Electric Company Ltd* [2004] UKPC 6 paras 69–73 (Lord Hoffmann) and paras 117–20 (Lord Walker, dissenting).

[257] Note that in subsequent decisions the Court of Appeal (England and Wales) has been careful to highlight the narrow basis on which *Berkeley* was argued before the House of Lords—in particular, the fact that the developer was not represented and that there was no reference to any evidence of actual prejudice to the developer's interest or indeed any other interest. See, eg, *Bown v Secretary of State for Transport* [2003] EWCA Civ 1170 paras 46–7 (Carnwath LJ); *R (Jones) v Mansfield DC* [2003] EWCA Civ 1408 paras 58–60 (Carnwath LJ) and *R (Richardson) v North Yorkshire County Council* [2003] EWCA Civ 1860 paras 40–44 (Simon Brown LJ). In *R (Edwards) v Environment Agency* [2008] UKHL 22, Lord Hoffmann confirmed that the speeches delivered in *Berkeley* needed to be read in the particular context of that case.

[258] Case 152/84 *Marshall* [1986] ECR 723; Case C-91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325 and Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835 para 109. Consider, however, the line of cases in which the ECJ accepted that, depending on the circumstances, an unimplemented directive may have an impact in disputes between two private parties. This particular line of authority, which includes the decisions in Case C-194/94 CIA *Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-2201 and Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7535, is considered by Prechal, above n 171, at 266–9.

on the State and not on private individuals.[259] Where the EIA directive is invoked in the course of a challenge to development consent for a private project, and a national court subsequently annuls that consent, there are serious implications (particularly in terms of additional costs and delay) for the private developer.[260] In other words, invoking the directive successfully against a competent authority 'may have indirect adverse effect for individuals'.[261] This result does not sit comfortably with the prohibition on horizontal enforcement. Wyatt maintains that detrimental impact of this nature on developers is not due to horizontal effect in the strict sense but instead an inevitable consequence of permitting an individual or body to invoke the directive against the relevant competent authority.[262] The projects at issue in *Kraaijeveld* and *Linster* were both public projects, so this issue did not arise. *Bozen*, on the other hand, concerned a development project promoted by a private developer. The horizontal effect issue was not addressed at all in the ECJ's decision—yet the Court was adamant in directing that the relevant national authorities, including the courts, are obliged to set aside 'the national rules or measures' that are found to be incompatible with Article 2(1) and Article 4(2).[263] The national authorities were also required to take

> all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment, and, if so, to ensure that they are subject to an impact assessment.[264]

Fulfilling this obligation may necessitate the revocation or suspension of an unlawful consent in appropriate cases—with potentially serious incidental consequences for third parties, including private developers.

The horizontal effect problem was considered in detail by Sedley and Brooke LJJ in the Court of Appeal (England and Wales) in *R v Durham County Council, ex parte Huddleston*.[265] The developer in this case applied to the local mineral planning authority (MPA) to register a dormant mining permission with a view to having it revived, subject to conditions. The application was not accompanied by an EIS. The statutory period for determination of the application having expired, the developer sought to rely on a provision in the relevant national legislation that facilitated a 'deemed approval'. In the meantime, the House of Lords had ruled (in *R v North Yorkshire County Council, ex parte Brown*)[266] that

[259] Case C-91/92 *Faccini Dori* [1994] ECR I-3325 para 22.

[260] Y Scannell, 'Environmental Assessment: *Browne v An Bord Pleanála*' (1990) 2 *Journal of Environmental Law* 209, 222.

[261] D Wyatt, 'Litigating Community Environmental Law—Thoughts on the Direct Effect Doctrine' (1998) 10 *Journal of Environmental Law* 9, 15.

[262] *Ibid*, 15–16.

[263] Case C-435/97 *Bozen* [1999] ECR I-5613 para 71.

[264] *Ibid.*

[265] *R v Durham County Council ex p Huddleston* [1999] EWCA Civ 792. See also D Elvin and J Robinson, 'Environmental Impact Assessment' [2000] *Journal of Planning and Environment Law* 876, 887–93.

[266] *R v North Yorkshire County Council ex p Brown* [1999] UKHL 7.

the determination of conditions in the context of an application to register an old mining permission constituted an application for 'development consent' for the purposes of the EIA directive. The registration process therefore required an EIA. Relying on *Brown*, the MPA insisted that the developer provide an EIS and threatened enforcement action if quarrying commenced. After taking legal advice, however, the authority was forced to accept that it could not treat the deeming provision as ineffective, as this would amount to enforcing the directive against a private party. The planning authority was hamstrung by the prohibition on horizontal enforcement.

Mr Huddleston, who lived near the mining site, stepped into the enforcement gap and brought judicial review proceedings challenging the planning authority's decision not to require an EIS. It was common ground that the EIA directive had direct effect but the planning authority, as an organ of the State, could not enforce the directive against a private developer. The applicant claimed

> [a] right to the valuable benefits accorded to him by the [EIA] Directive, which were denied to him when [the MPA] was deemed to have granted 'development consent' to [the developer] without first according him his right to take an informed part in the consultation process[267] ... By reason of the State's failure, [to set up the machinery required by Articles 5–9 of the EIA directive] Mr. Huddleston was deprived, as a member of the public concerned, of the valuable benefit which should have been conferred on him by Article 6(2) [of the directive]. That provision had the effect of requiring the State to make available to the public any information gathered pursuant to Article 5, so that the public concerned (including Mr. Huddleston) might have the opportunity to express a properly informed opinion to [the authority] before consent was given or withheld.[268]

The Court of Appeal ruled that Mr Huddleston was entitled to rely on the directive against the planning authority. Sedley LJ, who delivered the leading judgment, recalled the *Bozen* ruling wherein the ECJ confirmed that an individual could call on the State to account for non-implementation of the EIA directive in a case where a developer was 'directly and adversely affected by the intervention'. Sedley LJ reasoned that such an outcome 'simply could not have been reached by the Court if it had been perceived as involving horizontal direct effect'.[269] Sedley LJ also drew on *Costanzo*,[270] where the ECJ had ruled that an individual could rely on the provisions of the public procurement directive notwithstanding any incidental detriment to the other parties to the tendering process (such as the successful bidder who finds himself displaced). The fact that a directive had to be applied against somebody (the developer in *Bozen* and the successful bidder in *Costanzo*) did not mean that it was being applied as between two private individuals. Rather 'the issue throughout remains one of *lawful*

[267] *Huddleston* [1999] EWCA Civ 792 para 35.
[268] *Ibid*, para 38.
[269] *Ibid*, para 16.
[270] Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839.

government' (emphasis added).[271] Sedley LJ concluded that 'enforcement of a directive by an individual against the State is not rendered inadmissible solely by its consequential effect on other individuals'.[272] *Huddleston* (following *Bozen*) confirms that individuals may invoke the directive against an organ of the State even where the result entails adverse consequences for a private individual or body.

The ECJ was called upon to address the thorny question of potential horizontal effect head-on in *Wells*.[273] Simply put, the core issue in *Wells* was whether permitting an individual to invoke the EIA directive in order to challenge a planning decision amounted to horizontal effect because it results in an innocent third party (the developer) being deprived of the benefit of the planning permission? Recalling its earlier rulings in *Costanzo* and *Bozen*, the Court confirmed that 'mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned'.[274] In the ECJ's view, there was no *direct link* between the competent authority's obligation to ensure an EIA was carried out in respect of the project at issue and the performance of any other obligation falling on the developer under the directive.[275] In the words of the Court,

> [t]he fact that mining operations must be halted to await the results of the assessment is admittedly the consequence of the belated performance of [the] State's obligations. Such a consequence cannot, however, as the United Kingdom claims, be described as inverse direct effect of the provisions of [the EIA] directive in relation to the quarry owners.[276]

Thus the ECJ confirmed that an individual may invoke the EIA directive against a planning authority even where there may be so-called 'adverse repercussions' or consequences for the rights of innocent third party developers.[277] This aspect of *Wells* is consistent with the Court's ground-breaking *Costanzo*[278] ruling and is therefore not particularly surprising. The real practical issue is what remedy, if any, is available to a third party developer who suffers loss or damage as a result of a Member State's failure to implement the EIA directive correctly? Simons has suggested an interesting solution in the context of Irish planning law: rather than quashing an unlawful planning permission, the High Court 'might order the

[271] *Huddleston* [1999] EWCA Civ 792 para 17.
[272] *Ibid*, para 18.
[273] Case C-201/02 *Wells* [2004] ECR I-723.
[274] *Ibid*, para 57. See also Joined Cases C-152/07 to C-154/07 *Arcor* [2008] ECR I-0000 para 36.
[275] *Ibid*, para 58.
[276] *Ibid*.
[277] See also K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *EL Rev* 287, 300 and M Stallworthy, 'Once More Unto the Breach: English Law Rationales and Environmental Assessment' [2004] *Journal of Planning and Environment Law* 1472, 1474–6.
[278] Case 103/88 *Costanzo* [1989] ECR 1839.

relevant planning authority to exercise its statutory power to revoke the planning permission, which would then attract the payment of statutory compensation'.[279] The question of compensation for damage suffered as a result of breach of Community law is considered further below in the context of State liability.

F. Consistent Interpretation

The general preoccupation with the direct effect or 'invocability' of the EIA directive, both in the case law and in the literature, has tended to overshadow the importance of consistent interpretation (or 'indirect effect') as a mechanism for promoting effective local enforcement of the procedural requirements set down in the directive.[280] It is a well-established principle of Community law that national courts are under an obligation to interpret national law in conformity with the provisions of directives, at least in so far as this is possible.[281] The rationale behind the development of the doctrine of consistent interpretation is to ensure *l'effet utile* of directives within the national legal order, notwithstanding a failure to implement or inadequate implementation.[282] The ECJ has confirmed, of late, that the doctrine is 'inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it'.[283]

Where the provisions of a directive are not sufficiently precise and unconditional to be invoked directly before the national courts, a directive may still have an impact in the domestic legal system via consistent interpretation. The 'sympathetic' interpretation requirement has been held to apply even where the relevant national provisions predate the directive in question.[284] The ECJ summarised the essential features of the doctrine of consistent interpretation in *Centrosteel* as follows:

> The national court is bound, when applying provisions of domestic law predating or postdating the said Directive [in this case Directive 86/653/EEC on self-employed

[279] G Simons, *Planning and Development Law*, 2nd edn (Dublin, Thomson Round Hall, 2007) para 13.285.

[280] See generally Prechal, above n 171, ch 8; S Drake, 'Twenty Years After *Von Colson*: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30 *EL Rev* 329: and G Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty' (2002) 22 *Oxford Journal of Legal Studies* 397.

[281] Case 14/83 *Von Colson* [1984] ECR 1891 para 26; Case C-62/00 *Marks and Spencer plc v Commissioners of Customs & Excise* [2002] ECR I-6325 para 24; Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835 paras 113–16; Case C-212/04 *Adeneler v Ellinikos Organismos Galaktos* [2006] ECR I-6057 para 108 (*Adeneler*) and Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-0000 para 99.

[282] Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835 para 111.

[283] *Ibid*, para 114; Case C-212/04 *Adeneler* [2006] ECR I-6057 para 109 and Case C-268/06 *Impact* [2008] ECR I-0000 para 98.

[284] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 para 8 (*Marleasing*).

> commercial agents], to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive, so that those provisions are applied in a manner consistent with the result pursued by the Directive.[285]

In *Pfeiffer*, the ECJ added:

> Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.[286]

It is clear from this passage that the obligation of consistent interpretation is not limited to the national provisions intended to implement the directive in question. Rather the national court is bound 'to consider national law as whole' in order to assess the extent to which it may be applied to deliver a result that is not contrary to the requirements of the directive at issue.[287] In *Adeneler*, the ECJ confirmed that where a directive is transposed belatedly, the interpretative obligation only arises once the relevant period for transposition of the directive in question has expired.[288] The Court also clarified, however, that once a directive has entered into force, the national courts must refrain as far as possible from interpreting national law in a manner which might seriously compromise the attainment of the objective pursued by the directive.[289]

The general principles of Community law, in particular the principles of legal certainty and non-retroactivity, create important constraints on the interpretative obligation.[290] While the consistent interpretation obligation does not require a *contra legem* interpretation of domestic law, the ECJ has insisted that national courts are required

> to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law,

[285] Case C-456/98 *Centrosteel v Adipol* [2000] ECR I-6007 para 19.

[286] Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835 para 115. See also Case C-212/04 *Adeneler* [2006] ECR I-6057 para 111; and Case C-268/06 *Impact* [2008] ECR I-0000 para 101.

[287] Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835 paras 115–16. See also Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission* [2003] ECR I-5197 paras 39–42; Case C-350/03 *Schulte v Deutsche Bausparkasse Badenia AG* [2005] ECR-9215 paras 69–71 and Case C-212/04 *Adeneler* [2006] ECR I-6057 para 111.

[288] Case C-212/04 *Adeneler* [2006] ECR I-6057 paras 113–15. See also M Klamert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots' (2006) 43 *CML Rev* 1251.

[289] Case C-212/04 *Adeneler* [2006] ECR I-6057 para 123.

[290] Case 80/86 *Kolpinghuis Nijmegen BV* [1987] ECR 3969 para 13; Case C-212/04 *Adeneler* [2006] ECR I-6057 para 110 and Case C-268/06 *Impact* [2008] ECR I-0000 para 100.

> with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.[291]

The State may not invoke a directive (either directly or indirectly) to determine or aggravate an individual's criminal liability.[292] The ECJ has ruled that the doctrine of consistent interpretation also applies in cases involving disputes between private parties.[293] The true limits of the doctrine of consistent interpretation remain hazy, however, especially the extent to which a national law, when interpreted and applied in light of a directive, can impose obligations on private parties without running into serious conflict with the prohibition on horizontal direct effect.[294] The enduring complexity of the case law in this field reflects the tension between the ECJ's drive to ensure that directives take 'full effect' within the national legal orders and the plain terms of Article 249(3) EC which vests responsibility for implementation of directives in the Member States and not private parties. The most striking feature of the recent case law is the vigour and insistence with which the ECJ has pursued the interpretation obligations, notwithstanding the often very serious consequences for private parties. The duty of consistent interpretation has become a powerful mechanism to close the implementation gap that would otherwise result from the prohibition on horizontal effect.

G. State Liability

In the ground-breaking *Francovich*[295] case, the ECJ ruled that an individual could recover against the State for loss or damage suffered as a result of the State's failure to transpose a directive.[296] The conditions to be satisfied before such liability would arise were expressed as follows:

[291] Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835 para 118; Case C-212/04 *Adeneler* [2006] ECR I-6057 para 111 and Case C-268/06 *Impact* [2008] ECR I-0000 para 101.

[292] Case 80/86 *Kolpinghuis Nijmegen BV* [1987] ECR 3969; Case C-168/95 *Arcaro* [1996] ECR I-4705 and Joined Cases C-387/02, 391/02 and 403/02 *Berlusconi* [2005] ECR I-3565 para 74. See also, by analogy, Case C-105/03 *Pupino* [2005] ECR I-5285 para 45.

[293] Case C-106/89 *Marleasing* [1990] ECR I-4135.

[294] Prechal, above n 171, at 210–15 and Editorial, 'Horizontal Direct Effect—A Law of Diminishing Coherence?' (2006) 43 *CML Rev* 1.

[295] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

[296] For analysis of the *Francovich* doctrine see inter alia: P Wennerås, *The Enforcement of EC Environmental Law* (Oxford, Oxford University Press, 2007) 149–67; Prechal, above n 171, ch 10; A Ward, *Judicial Review and the Rights of Private Parties in EC Law*, 2nd edn (Oxford, Oxford University Press, 2007) ch 5; M Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford, Hart Publishing, 2004) 233–67; T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, Oxford University Press, 2006) ch 11; W Van Gerven, 'Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie' (1996) 45 *ICLQ* 507 and C Harlow, 'Francovich and the Problem of the Disobedient State' (1996) 2 *European Law Journal* 199.

> [First] the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between breach of the State's obligation and the loss and damage suffered by the injured parties.[297]

There is no requirement that the directive in question satisfy the criteria for direct effect (ie be sufficiently precise and unconditional) in order for liability to arise. The *Francovich* criteria apply where a Member State has failed to take *any* measures to transpose a directive. The ECJ subsequently elaborated on the criteria for liability in non-*Francovich* situations (ie cases involving a breach other than non-transposition). In *Brasserie du Pêcheur*,[298] the following three conditions were held to apply where a Member State acts in a legislative context in which it enjoys a wide discretion:

> [T]he rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[299]

The main difference between the *Francovich* and *Brasserie* criteria is the requirement of a 'sufficiently serious' breach in the latter. In *Dillenkofer*,[300] the ECJ folded the *Francovich* conditions into the (previously separate) *Brasserie* conditions. The Court stressed that even though the requirement of a sufficiently serious breach was not expressly mentioned in *Francovich*, this precondition 'was nevertheless evident from the circumstances of that case'.[301] The ECJ proceeded to clarify that where a Member State fails (as in *Francovich*) to take *any* of the measures necessary to achieve the result prescribed by a directive within the stipulated period, then that failure *in itself* constitutes a sufficiently serious breach.[302] In *British Telecommunications*,[303] the ECJ confirmed that the conditions for liability articulated in *Brasserie du Pêcheur* also apply where a Member

[297] Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357 para 40.

[298] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport, ex p Factortame Ltd and Others* [1996] ECR I-1029.

[299] *Ibid*, para 51. In Case C-5/94 *R v Minister for Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553 (*Hedley Lomas*), the ECJ emphasised that the mere infringement of Community law may in itself amount to a sufficiently serious breach where 'at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no discretion' (para 28). See also Case C-150/99 *Svenska Staten v Stockholm Lindöpark AB* [2001] ECR I-493 para 40.

[300] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others v Germany* [1996] ECR I-4845.

[301] *Ibid*, para 23.

[302] *Ibid*, para 29.

[303] Case C-392/93 *R v HM Treasury, ex p British Telecommunications plc* [1996] ECR I-1631 para 40.

State incorrectly transposes a directive into national law.[304] The requirement of a sufficiently serious breach as a precondition to liability is designed to ensure that State liability for breach of Community law is based on the same criteria as apply in the context of the non-contractual liability of the Community pursuant to Article 288 EC.[305] In order to determine whether a breach is sufficiently serious, the test applied is whether the Member State 'manifestly and gravely disregarded the limits on its discretion'.[306] The ECJ has supplied a list of factors that the national courts may take into account when assessing the seriousness of the breach. These factors include:

> [T]he clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.[307]

A breach will be 'sufficiently serious' where it persists notwithstanding an ECJ ruling establishing the infringement, or where it is clear from a preliminary ruling or settled case law that the conduct in question constitutes an infringement.[308] Further guidance on the difficult concept of a 'sufficiently serious' breach has been provided in a series of decisions.[309] Apart from the sufficiently serious breach requirement, reparation for loss or damage cannot be made conditional on proving fault (in the sense of intention or negligence).[310] Nor is the right to reparation dependent on a prior finding by the ECJ that the State in

[304] See also Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit International BV and Others v Bundesamt für Finanzen* [1996] ECR I-5063 para 48 (*Denkavit*).

[305] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 paras 40–47.

[306] *Ibid*, para 55.

[307] *Ibid*, para 56.

[308] *Ibid*, para 57.

[309] Case C-392/93 *British Telecommunications* [1996] ECR I-1631 paras 42–5; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553 para 28; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit* [1996] ECR I-5063 paras 50–53; Case C-319/96 *Brinkmann Tabakfabriken GmbH v Skatteministeriet* [1998] ECR I-5255 paras 30–32 (*Brinkmann*); Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493 paras 38–41; Case C-118/00 *Gervais Larsy v Institut national d'assurances sociales pour travailleurs indépendants (Inasti)* [2001] ECR I-5063 para 44 (*Larsy*); and Case C-278/05 *Robins and Others v Secretary of State for Work and Pensions* [2007] ECR I-1053 paras 70–82.

[310] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 para 80. The ECJ acknowledged, however, that 'certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious' (para 78). Compare the stricter position on liability for misfeasance in public office and breach of statutory duty in Irish law with the conditions set down in *Brasserie du Pêcheur*: see *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 23; *Glencar Explorations plc v Mayo County Council* [2001] IESC 64, [2002] 1 IR 84 and *Beatty v Rent Tribunal* [2005] IESC 66, [2006] 2 IR 191. On State liability in tort under Irish law see B McMahon and W Binchy, *Law of Torts*, 3rd edn (Dublin, Butterworths, 2000) ch 38 and J Healy, *Principles of Irish Torts* (Dublin, Clarus Press, 2006) paras 9.01–9.11. On the specific question of the liability of public authorities see D Ryan, 'The Position in Tort of Public Authorities after *Beatty v The Rent Tribunal*' (2005–06) 1 *Quarterly Review of Tort Law* 12.

question has infringed Community law.[311] As regards the third condition for liability, it is for the national courts to determine whether or not there is a direct causal link between the State's breach and the damage sustained by the injured party.[312]

The Member State may be held liable regardless of which organ of the State was responsible for the breach.[313] In *Köbler*,[314] the ECJ ruled that the principle of State liability also applied where the alleged infringement of Community law stemmed from a decision of a national court adjudicating at last instance. The three conditions noted above also govern State liability in this specific context.[315] The second condition—that the breach must be sufficiently serious—plays a special role however. The ECJ emphasised that regard must be had to 'the specific nature of the judicial function and to the legitimate requirements of legal certainty'.[316] In the case of an alleged breach of Community law by a national court adjudicating at last instance, State liability can only arise 'in the exceptional case where the court has manifestly infringed the applicable law'.[317] In determining whether that condition is satisfied, the national court charged with considering an action for damages in this context must take account of the factors which characterise the situation before it, in particular: the degree of clarity and precision of the rule infringed; whether the infringement was intentional; whether the error of law was excusable or inexcusable; the position taken by a Community institution (where applicable); and non-compliance by the national court with its obligation to make a reference to the ECJ pursuant to Article 234(3) EC.[318] An infringement of Community law will be sufficiently serious where the decision of the national court was made 'in manifest breach' of the relevant ECJ case law.[319] In *Traghetti del Mediterraneo*,[320] the ECJ ruled that

[311] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 paras 94–6 and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* [1996] ECR I-4845 para 28.

[312] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 para 65 and Case C-127/95 *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* [1998] ECR I-1531 para 110.

[313] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 para 32; Case C-302/97 *Konle v Austria* [1999] ECR I-3099 para 62 and Case C-118/00 *Larsy* [2001] ECR I-5063 para 35. See also R Davis, 'Liability in Damages for a Breach of Community Law: Some Reflections on the Question of Who to Sue and the Concept of "the State"' (2006) 31 *EL Rev* 69.

[314] Case C-224/01 *Köbler v Republik Österreich* [2003] ECR I-10239. See also PJ Wattel, 'Köbler, CILFIT and Welthgrove: We Can't Go On Meeting Like This' (2004) 41 *CML Rev* 177; S Drake, 'State Liability for Judicial Error: A False Dawn?' (2004) 11 *Irish Journal of European Law* 34; J Buttimore, 'State Liability for Judicial Error: A Bridge Too Far?' (2004) 11 *Irish Journal of European Law* 446; and P Wennerås, 'State Liability for Decisions of Courts of Last Instance in Environmental Cases' (2004) 16 *Journal of Environmental Law* 329.

[315] Case C-224/01 *Köbler* [2003] ECR I-10239 para 52.

[316] *Ibid*, para 53.

[317] *Ibid*, para 53.

[318] *Ibid*, paras 54–5.

[319] *Ibid*, para 56.

[320] Case C-173/03 *Traghetti del Mediterraneo Spa v Repubblica italiana* [2006] ECR I-5177.

liability may arise where the manifest infringement of Community law results from an interpretation of provisions of law or an assessment of facts or evidence carried out by a court adjudicating at last instance.[321] Notwithstanding that it is possible for national law to define the criteria leading to the nature or degree of the infringement which must be satisfied before State liability can arise, 'under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law'.[322] Community law therefore precludes national legislation which limits liability solely to cases of intentional fault and serious misconduct on the part of the court if such a limitation could lead to exclusion of liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed.[323] In *Cooper v HM Attorney General*,[324] Plender J of the High Court (England and Wales) determined that

> [a]ny contention that a court adjudicating at last instance can be said to have made a manifest error of Community law when its judgment is in some respect inconsistent with a later judgment of the ECJ is as misconceived as it is inconsistent with the judgment in *Köbler*.[325]

The High Court stressed that because Community law 'is a system in the process of constant development' inconsistencies between national courts' decisions and subsequent rulings of the ECJ can be expected.[326] As regards the extent of reparation, the ECJ has ruled that damages 'must be commensurate with the loss or damage sustained'.[327] Although the right to reparation is founded directly on Community law, the criteria for assessing the extent of reparation are to be determined by national law, subject to the principles of effectiveness and equivalence.[328] While a Member State may require a plaintiff to mitigate his loss,[329] certain heads of damage, such as loss of profit, may not be excluded definitively.[330] Recovery of damages under Community law is not confined to consequential loss. This contrasts sharply with the position under certain national tort law regimes where there are limitations on the recovery of damages for pure economic loss (by which is meant, loss which cannot be regarded either as

[321] *Ibid*, paras 32–46.
[322] *Ibid*, para 44.
[323] *Ibid.*
[324] *Cooper v HM Attorney General* [2008] EWHC 2178 (QB).
[325] *Ibid*, para 91.
[326] *Ibid.*
[327] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 para 82. See also the strong decision in Case C-410/98 *Metallgesellschaft & Hoechst v Inland Revenue* [2001] ECR I-4727 para 94 (*Metallgesellschaft*).
[328] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 para 83.
[329] *Ibid*, para 84.
[330] *Ibid*, para 87 and Case C-410/98 *Metallgesellschaft* [2001] ECR I-4727 para 91.

property damage suffered by the plaintiff, or as consequential on such damage).[331] Aggravated or exemplary damages must be available for breach of Community law where such damages could be awarded pursuant to a similar claim based on national law.[332]

The question arises as to the potential scope of the doctrine of State liability where an individual suffers damage as a result of breach of the EIA directive by an organ of the State. The three (now well-established) conditions that must be met before a right to obtain redress against the State will arise present a number of practical difficulties in the specific context of the EIA directive. First, as indicated above, the early case law from the ECJ was somewhat ambivalent on whether or not the original EIA directive conferred rights on individuals. Two Advocates General expressed the view that (original) Article 6(2) embraced 'a right to be heard'[333] and in *Greenpeace* the ECJ referred, in passing, to the objectors' 'environmental rights' under the directive but it chose not to elaborate further on this point.[334] The ECJ preferred to focus on the *obligation* that the EIA directive imposes on the national legislative and administrative authorities, rather than inquiring as to whether or not the directive confers rights. The amendments to the EIA directive introduced in 1997,[335] and more recently in 2003,[336] have amplified the Member States' obligation to deliver early and effective opportunities for participation and to ensure effective access to justice in EIA cases. In *Commission v Ireland*,[337] the ECJ referred to the sixth recital to the original EIA directive and noted that it was apparent from Article 6(2) (as amended by Directive 97/11/EC) that public participation is one of the aims of the directive.[338] At a later point in the judgment the ECJ made a direct reference to 'the rights of participation' conferred by Article 6 of the EIA directive.[339]

[331] It is a well-established principle of the law of negligence in England and Wales that there is no general duty of care to prevent pure economic loss: *Spartan Steel & Alloys Ltd v Martin & Co* [1973] 2 QB 27 and *Murphy v Brentwood DC* [1991] 1 AC 398. An important exception arises where the situation falls within the principles established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. The position in Ireland is somewhat different following the decision of the Supreme Court in *Ward v McMaster* [1988] 1 IR 337. Unfortunately, however, the principles applicable to claims for pure economic loss in Ireland are far from settled. In *Glencar Explorations plc v Mayo County Council* [2001] IESC 64, [2002] 1 IR 84 Keane CJ expressly reserved the question as to whether economic loss is recoverable in actions for negligence other than actions for negligent misstatement and those falling within the categories identified in *Siney v Dublin Corporation* [1980] IR 400 and *Ward v McMaster* [1988] IR 337. The Supreme Court also sidestepped the pure economic loss issue in *Beatty v Rent Tribunal* [2005] IESC 66, [2006] 2 IR 191. See also Ryan, above n 310, at 14–15.

[332] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 para 89.

[333] Advocate General Elmer in Case C-72/95 *Kraaijeveld* [1996] ECR I-5403 and Advocate General Cosmas in Case C-321/95 P *Greenpeace* [1998] ECR I-1651.

[334] Case C-321/95 P *Greenpeace* [1998] ECR I-1651 para 30.

[335] Dir 97/11/EC [1997] OJ L73/5.

[336] Dir 2003/35/EC [2003] OJ L156/17.

[337] Case C-216/05 *Commission v Ireland* [2006] ECR I-10787.

[338] *Ibid*, para 37.

[339] *Ibid*, para 44.

The 2003 amendments, which were introduced pursuant to Article 3 of Directive 2003/35/EC, are inspired by the Aarhus Convention which champions three core (procedural) environmental rights: the right to information; the right to participate in decision-making; and the right of access to justice.[340] The 11th recital to Directive 2003/35/EC explains that the EIA directive should be amended to ensure that it is fully compatible with the Convention, in particular the public participation and access to justice provisions thereof. Although the term 'right' is not deployed at any point in the amended text, it is clear that the directive is intended to confer procedural rights on the public, including the right to specified information; the right to participate in the decision-making procedure; and access to a review procedure where it is alleged that these rights have been infringed. Article 6(4), in particular, expressly recognises the entitlement of the public to participate in the EIA process. Following the ruling in *Commission v Ireland*,[341] and the amendments introduced in 2003, it is now beyond doubt that the EIA directive confers a right to participate. The directive therefore meets the first condition for liability on the part of the State under the *Francovich* doctrine.[342] Further support for this conclusion is found in *Wells* where the ECJ indicated that, subject to the principle of national procedural autonomy, an individual may claim compensation for the harm suffered as a result of breach of the EIA directive by the competent authorities.[343]

As regards the second condition, the ECJ has provided general guidance for national courts when called upon to determine whether or not a breach is 'sufficiently serious'. A prior finding of an infringement on the part of the State will obviously be enough to meet this condition. Other factors that may be considered in assessing the seriousness of the breach include: whether guidance on the correct interpretation of the provision at issue was available to the State at the time the infringement was committed; the clarity and precision of the rule breached; and the measure of discretion left to the Member State under the rule at issue. Although the EIA directive leaves it to the Member States to determine the most appropriate method of implementation at national level, the jurisprudence examined earlier in this chapter demonstrates the ECJ's willingness to contain that discretion within tight boundaries. The ECJ has yet to rule on the scope of Member State discretion under a number of important provisions of the directive, however (for example, Article 3 on the mechanics of the actual assessment, including the difficult inter-relationship between planning control

[340] United Nations Economic Commission for Europe (UN ECE), Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) adopted at the Fourth Ministerial Conference 'Environment for Europe' at Aarhus, Denmark, June 1998.

[341] Case C-216/05 *Commission v Ireland* [2006] ECR I-10787.

[342] See also Wennerås, above n 314, at 332 who argues that 'state liability is in principle available in all instances of infringements of Community rules that individuals could have invoked and relied on in national courts' and Stallworthy, above n 277, at 1476–81.

[343] Case C-201/02 *Wells* [2004] ECR I-723 para 69.

and pollution control at national level). The framework nature of the directive, and the broad and general scope of a number of its core provisions, means that it will be difficult to demonstrate a sufficiently serious breach in practice. In the context of other directives, the ECJ has found that a breach is not sufficiently serious in cases where the rules at issue were reasonably capable of bearing a number of different meanings and the defaulting Member State did not have the benefit of guidance from the ECJ at the time of the breach.[344]

The third condition requires the party seeking damages to demonstrate a causal link between the alleged breach of the State's obligation and the harm suffered. The main point to consider here is the nature of the harm suffered where rights under the EIA directive are undermined as a result of the State's breach. Consider the following scenario: a competent authority decides that EIA is not required for an Annex II project and proceeds to authorise the development without EIA. A challenge to this decision before the national courts is unsuccessful and the national court subsequently rules that the applicant is liable for the legal costs incurred by both the competent authority and the developer in defending the proceedings. Following a complaint by the applicant, the Commission institutes Article 226 EC infringement proceedings against the State and the ECJ subsequently rules that the project should have been subject to an assessment. This result confirms that the objector was denied the right to participate in the decision-making process under the terms set down in the directive. This is the harm occasioned to the plaintiff and there is a direct causal link between this harm and the unlawful action of the competent authority. Once a sufficiently serious breach can be established (and this will depend very much on the particular factual matrix), the costs incurred as a result of the (failed) national judicial review proceedings should be recoverable, together with interest.

Are there other potential heads of damage apart from the costs involved in pursuing a challenge to the contested decision? In the first scenario, the project is likely to be nearing completion, or completed, by the time the ECJ delivers a ruling. If the applicant is a property owner living in close proximity to the contested project, he may seek to recover damages for any negative impact on the value of his property or any reduction in the quality of the local environment. This line of argument is problematic, however. The directive confers procedural rights, not substantive rights, on 'the public concerned' by the project at issue. The overarching objective is to protect the environment in general terms and not to protect individual property rights and interests. It is therefore difficult to identify a causal link between breach of the EIA directive and alleged loss or damage in the form of reduced property values or a reduction in amenity or local environmental quality. The position is even more obscure where the individual (or group) whose rights under the EIA directive have been breached claims to

[344] Consider, eg, Case C-392/93 *British Telecommunications* [1996] ECR I-1631 paras 43–5; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit* [1996] ECR I-5063 paras 51–3; and Case C-319/96 *Brinkmann* [1998] ECR I-5255 para 31.

have acted in the public interest and cannot point to a particular property interest or other economic interest of its own that is affected by the unlawful decision.

The critical question becomes: What measure of damages (if any) should be recoverable for breach of the right to participate (apart from the direct costs and expenses incurred in mounting a challenge to the unlawful development consent)? This question has not been addressed directly by the ECJ. The *Wells* ruling (considered earlier in this chapter) provides a measure of guidance, however. It will be recalled that in *Wells* the ECJ was required to address the scope of the obligation to remedy a failure to carry out an EIA. The Court drew on the well-established principle of 'cooperation in good faith' articulated in Article 10 EC, which requires Member States 'to nullify the unlawful consequences of a breach of Community law'. It stressed the Member State's obligation 'to make good any harm' caused as a result of a breach of the directive. The competent authorities are obliged 'to take all general or particular measures' to remedy the failure to carry out an assessment. It falls to the national court to determine whether, subject to the principle of national procedural autonomy, it is possible as a matter of domestic law to revoke or to suspend the unlawful development consent. Where revocation or suspension is not an option, the ECJ posited an alternative course of action—the national court can determine whether it is possible for the individual concerned (on the facts of *Wells* this is the individual who challenged the unlawful development consent) to claim 'compensation for the harm suffered'.[345] Although *Francovich* is not mentioned at this point in the judgment, it is implicit in the language deployed by the Court that the principle of State liability for breach of Community law is of direct relevance here. The ECJ chose not to wade any further into this difficult and uncharted territory. As ever, it is left to the national courts to tease out the practical implications of any such claims for compensation in the domestic legal order. At the very minimum, however, *Wells* confirms that, in principle, and depending on the particular legal and factual matrix, an individual may claim compensation for loss or damage suffered as a result of a breach of the EIA directive.

At national level, the usual remedy where mandatory procedural requirements are found to have been breached is an order of the relevant national court quashing the unlawful decision, with costs usually awarded to the successful challenger. In *Glencar Explorations Ltd v Mayo County Council*[346] Keane CJ in the Irish Supreme Court confirmed that

> [t]he remedy available to persons affected by the commission of an *ultra vires* act by a public authority is an order of *certiorari* or equivalent relief setting aside the impugned decision and not an action for damages, to allow which, in the case of public officials,

[345] Case C-201/02 *Wells* [2004] ECR I-723 para 69.
[346] *Glencar Exploration plc v Mayo County Council* [2001] IESC 64, [2002] 1 IR 84.

> would be contrary to public policy for the reasons set out by Finlay CJ in [the leading Supreme Court decision *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 23].[347]

The Chief Justice proceeded to acknowledge obiter that, following *Francovich*, the position would be otherwise where it was claimed that a public authority had acted in breach of Community law and (financial) damage had been sustained as a result.[348] It follows from this remark that the Irish courts are alert to the possibility of a *Francovich* action where a planning authority is found to have breached Community law.

Before leaving this point, it is instructive to consider how the Ombudsman has dealt with complaints from individuals alleging that they have been denied their statutory right to object to a planning application, or to appeal to *An Bord Pleanála*, as a result of alleged 'maladministration' on the part of a planning authority. Where such complaints have been judged to be well-founded, the Ombudsman has recommended that the planning authority pay financial compensation for the loss of the opportunity to object, or to lodge an appeal, and for the time and effort incurred in pursuing the complaint with the authority.[349] The Ombudsman has categorised the loss of the opportunity to object or to appeal as 'serious maladministration'.[350] In addition to compensation for loss of opportunity, the Ombudsman generally recommends that the planning authority pay the complainant the costs incurred in pursuing the matter with the authority, or, in the alternative, 'a contribution towards some community works or planting in the area in which the complainant lives'.[351] The Ombudsman has acknowledged consistently that '[f]inancial compensation cannot adequately compensate where the opportunity to object to a proposed development—which is a fundamental aspect of our planning system—has been lost'.[352] Apart from financial compensation, the Ombudsman also requires the defaulting planning authority to review procedures 'for logging objections against planning applications and notifying objectors of decisions'.[353] In the Annual Report for 2001, the Ombudsman stated:

> I have not yet encountered a case where there was *prima facie* evidence that a planning permission might not have succeeded at the Bord Pleanála stage or may have been

[347] *Ibid*, 128.

[348] *Ibid*, 129.

[349] *Annual Report of the Ombudsman 1998*, 19–20 (IR£500 compensation); *Annual Report of the Ombudsman 1999*, 31 (IR£200 compensation); *Annual Report of the Ombudsman 2004*, 16–17 (€200 offered by the local authority on a without prejudice basis as a gesture of goodwill); *Annual Report of the Ombudsman 2006*, 26–7 (local authority agreed to pay €1,000 to the complainant and each of her neighbours in recognition of the loss of their statutory right to appeal and agreed to refund fees incurred in seeking leave to appeal to *An Bord Pleanála*) and *Annual Report of the Ombudsman 2007*, 12–13 (local authority offered €200 compensation to an objector for its failure to provide notification that an appeal had been lodged). Ombudsman Annual Reports available at: www.ombusdman.ie.

[350] *Annual Report of the Ombudsman 2001*, 19.

[351] *Ibid.*

[352] *Annual Report of the Ombudsman 1999*, 31 and *Annual Report of the Ombudsman 2001*, 19.

[353] *Annual Report of the Ombudsman 2001*, 19.

> subject to particular conditions if an objection had been lodged by a person adversely affected by the permission. Obviously, this would raise more complicated questions in relation to appropriate redress.[354]

It therefore remains to be seen what recommendation the Ombudsman would make in such a case. There is nothing in the Ombudsman's case reports to suggest that any of the complaints documented to date related to EIA-type development. Such cases would raise further complex issues concerning the appropriate method of redress where it is found that a complainant's Community law rights have been breached.

The cases where the Ombudsman has recommended financial compensation for the loss of opportunity to object or to appeal illustrate the vital role played by the Ombudsman in ensuring that procedural rights are respected by planning authorities. More significantly for present purposes, the Ombudsman's case law establishes a firm precedent for compensation for loss of the opportunity to exercise procedural rights under the planning code. The Ombudsman's approach could be applied by the Irish courts in the event of a *Francovich* type claim for breach of procedural rights conferred by the EIA directive. There is further authority for financial compensation for breach of procedural rights under the European Convention on Human Rights (ECHR) system. Woolley has observed that in *Guerra v Italy*[355] the European Court of Human Rights awarded damages for non-pecuniary loss in circumstances where the State was found to have breached the applicants' right to respect for private and family life (pursuant to Article 8 ECHR) by reason of its failure to provide the applicants with information on the risks posed by a local fertiliser plant.[356] In *Giacomelli v Italy*[357] the Strasbourg Court found that the Italian authorities had failed to comply with domestic environmental legislation and had refused to enforce judicial decisions in which the operations of a controversial waste treatment plant were declared unlawful. The State's inaction had thus rendered the various procedural safeguards available to the applicant 'inoperative' and had breached the rule of law. The relevant procedural safeguards included: the obligation to conduct an EIA prior to authorisation of any project with potentially harmful environmental consequences; the possibility for citizen participation in the licensing procedure; and recourse to the national courts. The Court held unanimously that there had been a violation of Article 8 and awarded the applicant €12,000 for 'substantial' non-pecuniary damage. In the context of the damages award, the Court noted the stress and anxiety suffered by the applicant as result of watching the local

[354] *Ibid.*

[355] *Guerra v Italy* (1998) 26 EHRR 357.

[356] D Woolley, J Pugh-Smith, R Langham and W Upton (eds), *Environmental Law* (Oxford, Oxford University Press, 2000) para 4.39.

[357] *Giacomelli v Italy* (2007) 45 EHRR 38.

situation persist for years and, furthermore, the fact that she was compelled to institute several sets of judicial proceedings challenging the unlawful decisions authorising the plant's operations.

V. CLOSING OBSERVATIONS

The framework character of the EIA directive, and the general manner in which a number of important provisions are drafted, means that it falls to the ECJ to interpret vague and often ambivalent rules with a view to ensuring that those rules are applied correctly and uniformly by competent authorities across the Member States. The screening procedure established in Article 4(3) and Annex III (introduced via the 1997 amendments to the directive) clarifies the scope of the general assessment obligation articulated in Article 2(1) and aims to ensure that any Annex II project likely to have significant effects will be subject to assessment. Detailed guidance on screening published by the Commission in 2001 is now well-established and has, in turn, inspired national guidance documents aimed at competent authorities.[358] The evolving jurisprudence provides a measure of guidance for competent authorities when determining whether or not an Annex II project is likely to have significant effects within the meaning of the directive. Notwithstanding the ECJ's vigilance in policing the boundaries of Member State discretion as regards the Annex II projects, problems persist at local level in setting criteria and thresholds for these projects and in the practical application of such criteria and thresholds. There is a danger that where competent authorities apply thresholds mechanically, sub-threshold projects likely to have significant effects may elude assessment. This issue underscores the importance of carefully drafted guidance notes and regular training for competent authorities on project screening.

A robust and purposive approach to the obligations imposed on Member States under the EIA directive is a steady feature of the ECJ case law examined in this chapter. The Court's main concern is to ensure that the procedural requirements mandated by the directive, including public participation, are not undermined in practice. To this end, the ECJ has interpreted the discretion left to the Member States at different points in the directive in a restrictive fashion. This approach has sharpened the effectiveness of the directive as a means of challenging controversial planning decisions before the national courts. Following a protracted and unsatisfactory period of uncertainty, it is now beyond doubt that qualified members of the public may invoke the directive against the State and organs of the State. The fact that the directive reserves an element of discretion to the Member States at various points does not preclude judicial review. Thus the

[358] In the Irish context see Department of the Environment, Heritage and Local Government, *Environmental Impact Assessment (EIA) Guidance for Consent Authorities regarding Sub-threshold Development* (2003), text available at: www.environ.ie.

ECJ confirmed that the directive may be deployed as a benchmark against which the legality of Member State action may be scrutinised. *Wells* laid any doubts concerning horizontal effect to rest. In the words of the ECJ, 'mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned'.[359]

The ECJ expects the national courts to provide effective judicial protection for the procedural rights conferred by the directive. Following *Kraaijeveld*, national courts are under a duty to raise the question of whether the obligations set down in the directive have been met of their own motion—even in cases where the parties themselves have not sought to rely on the directive. The ECJ has not elaborated to date on the standard of review to be applied by national courts when called upon to examine the exercise of discretion by competent authorities in EIA cases. Following *Upjohn*, it appears that merits-review is not required. The ruling in *Commission v United Kingdom*[360] indicates that a 'manifest error' test applies in such cases, although this important point is not free from doubt. Article 10a of the directive, which Member States were required to implement by 25 June 2005, sets minimum standards for national review procedures in EIA cases. It provides a firm legal basis on which the ECJ can develop the principles governing remedies for breach of the directive.

[359] Case C-201/02 *Wells* [2004] ECR I-723 para 57.
[360] Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969 para 92.