Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

12 November 2019*

(Failure of a Member State to fulfil obligations — Judgment of the Court establishing a failure to fulfil obligations — Non-compliance — Directive 85/337/EEC — Consent for, and construction of, a wind farm — Project likely to have significant effects on the environment — Absence of a prior environmental impact assessment — Obligation to regularise — Article 260(2) TFEU — Application for an order to pay a penalty payment and a lump sum)

In Case C-261/18,

ACTION under Article 260(2) TFEU for failure to fulfil obligations, brought on 13 April 2018,

European Commission, represented by M. Noll-Ehlers and J. Tomkin, acting as Agents,

applicant,

v

Ireland, represented by M. Browne, G. Hodge and A. Joyce, acting as Agents, and by J. Connolly and G. Simons, Senior Counsel, and G. Gilmore, Barrister-at-Law,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot (Rapporteur), A. Arabadjiev, A. Prechal, M. Safjan and S. Rodin, Presidents of Chambers, L. Bay Larsen, T. von Danwitz, C. Toader, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: G. Pitruzzella,

Registrar: R. Şereş, administrator,

having regard to the written procedure and further to the hearing on 1 April 2019,

after hearing the Opinion of the Advocate General at the sitting on 13 June 2019,

gives the following

* Language of the case: English.

Judgment

1 By its application, the European Commission claims that the Court should:

– declare that, by failing to take the necessary measures to comply with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380) as regards the second indent of point 1 of the operative part thereto, Ireland has failed to fulfil its obligations under Article 260 TFEU;

– order Ireland to pay the Commission a lump sum of EUR 1 343.20 multiplied by the number of days between the delivery of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380) and, either the date of compliance by Ireland with that judgment, or the date of the judgment delivered in the present case if that date is sooner than the date of compliance with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), with a minimum lump sum of EUR 1 685 000;

– order Ireland to pay the Commission a penalty payment of EUR 12 264 per day from the date of the judgment delivered in the present case to the date of compliance by Ireland with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380); and

– order Ireland to pay the costs.

Legal context

Directive 85/337/EEC before amendment by Directive 97/11

2 Article 2(1),(2) and (3), first subparagraph, of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) provided:

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

These projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

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

3 Article 3 of that directive provided:

‘The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora,

– soil, water, air, climate and the landscape,

– the inter-action between the factors mentioned in the first and second indents,

– material assets and the cultural heritage.'

4 Article 4 of that directive was worded as follows:

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

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

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

5 Article 5 of Directive 85/337 provided:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

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

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

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

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

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

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

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

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

6 Article 6 of Directive 85/337 was worded as follows:

'1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall

designate the authorities to be consulted for this purpose in general terms or in each case when the request for consent is made. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. Member States shall ensure that:

– any request for development consent and any information gathered pursuant to Article 5 are made available to the public,

– the public concerned is given the opportunity to express an opinion before the project is initiated.

…'

7 Article 7 of that directive provided:

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

8 Under Article 8 of Directive 85/337:

'Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.'

9 Article 9 of that directive was worded as follows:

'When a decision has been taken, the competent authority or authorities shall inform the public concerned of:

– the content of the decision and any conditions attached thereto,

– the reasons and considerations on which the decision is based where the Member States' legislation so provides.

The detailed arrangements for such information shall be determined by the Member States.

If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question.'

10 Article 10 of Directive 85/337 provided:

'The provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national regulations and administrative provisions and accepted legal practices with regard to industrial and commercial secrecy and the safeguarding of the public interest.

Where Article 7 applies, the transmission of information to another Member State and the reception of information by another Member State shall be subject to the limitations in force in the Member State in which the project is proposed.'

11 Annex II to Directive 85/337 listed the projects subject to Article 4(2) of that directive, namely those for which an environmental impact assessment was necessary only where the Member States considered that their characteristics so required. The projects referred to in point 2(a) of that annex were accordingly for the extraction of peat, and in point 2(c) of that annex, for the extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash.

Directive 85/337 following amendment by Directive 97/11

12 Article 2(1),(2) and (3), first subparagraph, of Directive 85/337/EEC, as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) provides:

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

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

…

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

13 Article 3 of that directive provides:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.'

14 Article 4 of that directive provides:

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

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

(a) a case-by-case examination,

or

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

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

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

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

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

15 Point 3(i) of Annex II to that directive refers to installations for the harnessing of wind power for energy production (wind farms).

16 Pursuant to point 13 of Annex II, any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment, must be regarded as a project falling within the scope of Article 4(2) of Directive 85/337.

17 Annex III to Directive 85/337, relating to the selection criteria referred to in Article 4(3) of that directive, states that the characteristics of projects must be considered in relation, inter alia, to pollution and nuisances, and to the risk of accidents having regard in particular to technologies used. That annex also states that the environmental sensitivity of geographical areas likely to be affected by projects must be considered having regard, inter alia, to the absorption capacity of the natural environment, paying particular attention to certain areas, including mountain and forest areas.

The judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380)

18 In its judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), the Court held that, by failing to adopt all measures necessary to ensure that:

– projects which are within the scope of Directive 85/337, either before or after amendment by Council Directive 97/11 ('Directive 85/337') are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and

– the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway (Ireland), were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of that directive,

Ireland failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of Directive 85/337.

19 As regards the second complaint relating to the absence of an assessment of the effects of the wind farm and the associated works at Derrybrien ('the wind farm'), the Court concluded that there was a failure to fulfil obligations on the grounds set out in paragraphs 94 to 111 of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380).

20 In particular, as regards the first two phases of construction of the wind farm project, the Court stated, in paragraph 98 of that judgment, that Ireland was bound to subject the projects relating to that construction to an impact assessment if they were likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location.

21 In that regard, the Court held, in paragraph 103 of that judgment, 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, constituted specific characteristics which demonstrated that those projects, which were inseparable from the installation of 46 wind turbines, were likely to have significant effects on the environment and, accordingly, had to be subject to an assessment of their effects on the environment.

22 In addition, as regards the application for consent relating to the third phase of construction of the wind farm and for alteration of the first two phases of construction originally authorised, the Court found, in paragraph 110 of that judgment, that since the installation of 25 new turbines, the construction of new service roadways and the change in the type of wind turbines initially authorised — which was intended to increase the production of electricity — were projects which were likely to have significant effects on the environment, they should, before being authorised, have therefore been subject to a requirement for development consent and to an assessment of their effects on the environment, in conformity with the conditions laid down in Articles 5 to 10 of Directive 85/337.

Pre-litigation procedure and proceedings before the Court

23 Following the delivery of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), the Commission, by letter dated 15 July 2008, requested Ireland to provide it, within 2 months of the date of that judgment, with information on the measures taken in order to comply with the terms of that judgment. By letter dated 3 September 2008, Ireland confirmed in particular that it fully accepted the judgment and that an updated environmental impact assessment, in compliance with Directive 85/337, was anticipated before the end of 2008.

24 By letters of 10 March and 17 April 2009, and further to a meeting with the Commission, Ireland informed the latter that it was drafting a bill in order to introduce a regularisation procedure which, in exceptional cases, would allow for consents granted in breach of Directive 85/337 to be regularised through the grant of 'substitute consent' and that, in accordance with that procedure, the wind farm operator would apply for such consent.

25 On 26 June 2009, the Commission sent a letter of formal notice to that Member State, in which it stated, first, that it had received only a preliminary outline of the legislation to be enacted by Ireland in order to ensure compliance with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), and, secondly, that it was still awaiting information on the envisaged assessment of the wind farm's effects on the environment. On 9 September 2009, Ireland replied to that letter of formal notice, confirming, first, that the legislative change introducing the substitute consent procedure would shortly be enacted and that the wind farm operator had agreed in principle to apply for substitute consent.

26 On 22 March 2010, the Commission sent a further letter of formal notice to Ireland requesting it to submit observations to the Commission within 2 months of receipt of that letter. Ireland replied by letters dated 18 May 2010, 22 July 2010 and 13 September 2010. In the letter of 13 September 2010, the Irish authorities informed the Commission of the enactment in July 2010 of the Planning and Development (Amendment) Act 2010 ('the PDAA'). Part XA of the PDAA, in particular Sections 177B and 177C thereto, provides for a regularisation procedure for consents granted in breach of the obligation to conduct an environmental impact assessment.

27 Following further contacts between the Irish authorities and the Commission and the notification by Ireland of additional legislative measures adopted between 2010 and 2012, the Commission, by letter of 19 September 2012, requested Ireland to inform it in particular whether the developer of the wind farm would be subject to that regularisation procedure.

28 By letter dated 13 October 2012, Ireland stated that the wind farm operator, wholly owned by a semi-public sector company, was refusing to apply the regularisation procedure provided for in Part XA of the PDAA and that neither national nor EU law made provision for its application to be imposed. In particular, EU law, it was claimed, did not require the consents granted for the construction of the wind farm, which had become final, to be called into question and the principles of legal certainty and of the non-retroactive effect of laws, as well as the case-law of the Court on the procedural autonomy of the Member States, precluded the withdrawal of those consents.

29 By letter of 16 December 2013, the Irish authorities reported to the Commission that the wind farm operator had indicated its willingness to undertake an unofficial, that is non-statutory, environmental impact assessment in respect of that wind farm which would nevertheless conform to the requirements of Directive 85/337.

30 In the course of 2014, Ireland provided the Commission with a concept document which set out a road map for the non-statutory environmental impact assessment of the wind farm. Ireland also agreed, at a meeting with the Commission held on 13 May 2014, to send it the draft memorandum of understanding which would be concluded between the wind farm operator and the Irish Minister for Environment providing for an agreement on the carrying out of a non-statutory environmental review. Such a draft was provided to the Commission on 11 March 2015, with the Irish authorities communicating a further version of that draft on 7 March 2016.

31 The Commission stated on several occasions that those documents did not enable Ireland to fulfil its obligations. Following a meeting held on 29 November 2016, the Commission's services informed the Irish authorities by email on 15 December 2016 that the final text of the signed memorandum of understanding should reach the Commission by the end of 2016, failing which the Commission would refer the matter back to the Court in early 2017.

32 On 22 December 2016, Ireland sent the Commission a new version of the concept document and a scoping document dated 2 December 2015. In the covering letter, the Irish authorities stated that the two documents were due to be signed at the end of January 2017.

33 Following further exchanges with the Irish authorities, the Commission informed Ireland, by letter of 26 January 2018, that, notwithstanding the signature of the concept document, it considered that the failure to fulfil the obligation of complying fully with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380) persisted. Nine years after that judgment was delivered, no substantive progress had been made as regards the environmental impact assessment of the wind farm.

34 By letter of 1 February 2018, Ireland acknowledged that discussions on resolution of the case had already been ongoing for a number of years. In that letter, Ireland nonetheless maintained that it had awaited, before taking the measures necessary to comply, the Commission's observations on the documents that Ireland had sent it by letter of 22 December 2016.

35 Since it considered that the second indent of point 1 of the operative part of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380) had still not been complied with, the Commission brought the present action.

36 Following the closure of the written part of the procedure in the present case, the Commission informed the Court, by letter lodged at the Registry on 1 April 2019, of a letter from the Irish authorities which it had received on 29 March 2019 ('the letter of 29 March 2019') from which it is apparent that the wind farm operator had agreed that it would cooperate in a substitute consent procedure, to be initiated under the PDAA, 'as soon as possible, so as to ensure [that an *ex post* environmental impact assessment] is carried out.' On 1 April 2019, the Irish authorities also sent that letter to the Court Registry.

The failure to fulfil obligations

Arguments of the parties

37 The Commission notes that, in its judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), the Court held, in particular, that Ireland had failed to fulfil its obligations under Directive 85/337 in that it had failed to take all measures necessary to ensure that the development consents given for, and the execution of, the wind farm developments and associated works were preceded by an environmental impact assessment. According to the Commission, Ireland does not deny that it is under an obligation to take positive steps to address that failure.

38 The Commission submits that it was not for the Court to determine, in that judgment, the specific measures enabling the failure to fulfil obligations declared to be remedied. It is apparent, on the other hand, from the case-law of the Court (judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraphs 64 and 65, and of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraphs 42, 43 and 46) that Ireland is required to eliminate the unlawful consequences of the failure to carry out an environmental impact assessment of the wind farm and to take all measures necessary to remedy that failure. In any event, mere preparatory steps, such as those taken in the present case, are insufficient.

39 In support of its arguments, the Commission also relies on the judgments of 26 July 2017, *Comune di Corridonia and Others* (C-196/16 and C-197/16, EU:C:2017:589, paragraph 35) and of 28 February 2018, *Comune di Castelbellino* (C-117/17, EU:C:2018:129, paragraph 30), which confirm that the competent national authorities are under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment. EU law does not preclude regularisation through the conducting of an environmental impact assessment, subject to certain conditions.

40 During the pre-litigation procedure, Ireland made two different proposals, referred to in paragraphs 24 and 29 above, in order to remedy the failure to assess the wind farm's impact without, however, giving concrete effect to them.

41 First, Ireland referred to the possibility of carrying out a non-statutory assessment. However, no specific measure to implement it has been adopted.

42 Secondly, the Commission submits that Ireland amended its legislation in order to establish a procedure that would allow for the regularisation of consents granted in breach of the obligation to conduct an environmental impact assessment under EU law. However, Ireland now maintains that that procedure, provided for in Part XA of the PDAA, could be applied only prospectively and that, notwithstanding the fact that the wind farm operator is a wholly owned subsidiary of a semi-public sector company, it cannot be required to apply it.

43 The Commission submits, however, that Ireland is required to revoke or suspend the consents at issue and carry out an ex post remedial assessment, even if those measures affect the wind farm operator's vested rights. The possibility for a Member State to rely, in that regard, on the principle of procedural autonomy is, in accordance with the judgment of 17 November 2016, *Stadt Wiener Neustadt* (C-348/15, EU:C:2016:882, paragraph 40), limited by the principles of effectiveness and equivalence.

44 In addition, it is apparent from the judgment of 14 June 2007, *Medipac-Kazantzidis* (C-6/05, EU:C:2007:337, paragraph 43) that the wind farm operator is subject to the obligations arising from EU directives since it is a wholly owned subsidiary of an entity controlled by the public authorities.

45 Moreover, the Commission submits that the delay in complying with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), cannot be justified. In accordance with the case-law of the Court (judgment of 9 December 2008, *Commission* v *France*, C-121/07, EU:C:2008:695, paragraph 21), although Article 260 TFEU does not specify the period within which a judgment must be complied with, the process of compliance must be initiated at once and completed as soon as possible. In the present case, neither the complexity of the issues arising nor the alleged breakdown of communications between Ireland and the Commission at the end of 2016 can justify that Member State's failure to take action over a prolonged period. The Commission further notes that it had stated that December 2016 was the final deadline for complying with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380).

46 In its reply, the Commission submits that Ireland has still not carried out, by way of regularisation, an environmental impact assessment of the wind farm. Consequently, Ireland has not taken the minimum steps required to comply with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380).

47 Ireland contends that the Commission's action should be dismissed.

48 It contends that it is apparent from the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380) and the pleadings in the case giving rise to that judgment, that the two indents of point 1 of the operative part in that judgment related in fact to one and the same failure to fulfil obligations, namely the failure to transpose in full Directive 85/337. Consequently, apart from transposing that directive, the adoption of specific measures as regards the wind farm was not necessary.

49 In addition, in its application, the Commission failed to identify the specific measures which it considers Ireland as being required to take in order to comply with the second indent of point 1 of the operative part of that judgment.

50 Furthermore, that same judgment did not set aside or invalidate the development consents granted between 1998 and 2003 for the wind farm's construction. Infringement proceedings pursuant to Article 226 EC (now Article 258 TFEU) cannot have any effect on the vested rights of third parties, in particular when those third parties are not heard in those proceedings.

51 As regards the procedures enabling a national administrative decision to be annulled, they fall within the procedural autonomy of the Member States. The judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380, paragraph 59), confirms that an obligation to remedy a failure to carry out an environmental impact assessment is limited by the procedural framework applicable within each Member State. In Ireland, a development consent may only be set aside by the High Court, on a direct application to that end.

52 In that regard, it is apparent from the judgment of 17 November 2016, *Stadt Wiener Neustadt* (C-348/15, EU:C:2016:882), that, subject to compliance with certain conditions, Member States may establish time limits governing proceedings brought against decisions adopted in the field of town planning. Under Irish procedural law in force prior to the enactment of the PDAA, any challenge seeking to set aside a planning permission was subject to a two-month time limit. The PDAA itself set an eight-week time limit. Consequently, the consents granted for the wind farm's construction have become final.

53 Ireland contends that, accordingly, the situation of the present case may be distinguished from those of the cases giving rise to the judgments of 26 July 2017, *Comune di Corridonia and Others* (C-196/16 and C-197/16, EU:C:2017:589) and of 28 February 2018, *Comune di Castelbellino* (C-117/17, EU:C:2018:129) referred to by the Commission. It is apparent from the summary of the facts in those judgments that the development consents at issue were in fact annulled by a national court. It was in

the course of the proceedings subsequent to those annulments, seeking the grant of fresh development consents for the projects concerned, that questions relating to the obligation to carry out an environmental impact assessment were raised.

54 The present case may also be distinguished from that which gave rise to the judgment of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12), delivered in preliminary ruling proceedings in a dispute concerning a national permission which had been challenged within the time limits. The Court states in that judgment that it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended. In addition, in the judgment of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78), the Court confirmed that, where an administrative decision has become final, EU law does not require that a national authority be placed under an obligation, in principle, to reopen that decision.

55 Furthermore, where planning consents may no longer be subject to judicial review proceedings, the principles of the protection of legitimate expectations and of legal certainty and the property rights of the holders of planning permissions must be respected.

56 In the present case, the withdrawal of the consents granted, which have become final, would be contrary to the principle of legal certainty. Ireland is not, therefore, required to annul or withdraw them. A fortiori, nor is it required to carry out, *ex post facto*, an environmental impact assessment on the basis of the relevant provisions of the PDAA.

57 In the alternative, Ireland contends that it has now complied with the obligations stemming from the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), in that it has taken steps to arrange for a non-statutory assessment to be carried out at Derrybrien. The history of the engagement between Ireland and the Commission, as detailed in the application, demonstrates that the Irish Government has acted in good faith in that regard.

58 In support of that argument, Ireland contends, in particular, that the Irish Government drew up a concept paper in agreement with the wind farm's developer. That document provides that the developer will have to prepare an environmental report, in accordance with the scoping document, which will have to include possible mitigation measures. That document also provides that the report will be subject to a form of public consultation process.

59 The initiation of such a process constitutes sufficient compliance with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), since, contrary to the full transposition of Directive 85/337, which fell entirely under the control of the Irish authorities, the implementation of the assessment of the effects of a project on the environment in fact requires the participation of third parties.

60 In the further alternative, Ireland contends that it will have complied with its obligations at the latest as of the date of any hearing before the Court in the present case.

61 In addition, the duration of the procedure necessary to implement the environmental impact assessment of the wind farm is linked to the lack of reaction from the Commission following the submission, on 22 December 2016, of a new version of the concept document intended to prepare for the environmental impact assessment of the wind farm to be carried out. The Irish authorities awaited the formal approval of that document. In any event, a Member State cannot be penalised for taking the time necessary to discern the appropriate measures, for the purposes of complying with a judgment of the Court, or for failing to identify them.

62 At the hearing, Ireland confirmed that it no longer envisaged carrying out a non-statutory environmental impact assessment in relation to the wind farm. As is apparent from the letter of 29 March 2019, it now maintains that the wind farm operator has agreed that it will cooperate in

order for a regularisation procedure under Part XA of the PDAA to be initiated. In the context of that procedure, an environmental impact assessment in accordance with Directive 85/337 will be carried out as soon as possible.

63 In answer to the questions put by the Court at the hearing, Ireland stated that the formal agreement of the wind farm's operator was still lacking. In addition, it is not decided whether the latter would itself apply for substitute consent pursuant to Section 177 C of the PDAA, or whether, pursuant to Section 177 B of the PDAA, the competent authorities would themselves commence the regularisation procedure of their own initiative.

Findings of the Court

Preliminary observations

64 In the context of the present action, brought on the basis of Article 260(2) TFEU, the Commission submits that Ireland has not complied with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), as regards the second complaint only, in the second indent of point 1 of the operative part of that judgment. The Court held, in that regard, that by failing to adopt all measures necessary to ensure that the development consents given for, and the execution of, the developments and associated works at the wind farm were preceded by an environmental impact assessment, in accordance with Articles 5 to 10 of Directive 85/337, Ireland failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

The admissibility of the action

65 In so far as Ireland contends, in essence, that the Commission has failed to define the subject matter of its action and to identify the measures that are necessary in order to comply with the second indent of point 1 of the operative part of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), it must be found that it in fact contests the admissibility of the present action.

66 In that regard, the Commission submits, in its application, that, in order to comply with the second indent of point 1 of the operative part of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), Ireland should eliminate the unlawful consequences of the breach of the obligation to carry out a prior environmental impact assessment of the wind farm and initiate, to that end, a procedure to regularise the project in question. That procedure should include an environmental impact assessment of that project in accordance with the requirements of Directive 85/337.

67 Consequently, Ireland is mistaken to complain that the Commission has failed to define the measures required to comply with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380) and, for that reason, to complain that the Commission has failed to specify sufficiently the subject matter of its action.

68 It must, therefore, be concluded that Ireland's contentions are not capable of affecting the admissibility of the present action.

The substance

69 Ireland contends that the present action is unfounded, arguing that, beyond the transposition of Directive 85/337, the adoption of specific measures as regards the wind farm is unnecessary and that, in particular, it is impossible, under its national law, to withdraw the consents granted to the wind farm's operator, which have become final.

70 The Commission submits, on the other hand, that Ireland is required, as recalled in paragraph 66 above, to eliminate the unlawful consequences of the failure to fulfil obligations established and, in the context of a regularisation procedure, to carry out an environmental impact assessment of the wind farm in accordance with the requirements of Directive 85/337.

71 In those circumstances, it is necessary to examine the obligations on a Member State when a project has been authorised in breach of the obligation to carry out a prior environmental impact assessment under Directive 85/337, in particular where the consent was not challenged within the period prescribed by national law and has, therefore, become final in the national legal order.

72 In that regard, it should be borne in mind that, under Article 2(1) of Directive 85/337, projects likely to have significant effects on the environment, as referred to in Article 4 of that directive, read in conjunction with Annexes I or II thereto, must be made subject to an assessment with regard to such effects before consent is given (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 42).

73 The requirement to undertake such an assessment in advance is justified by the fact that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to deal with their effects (judgments of 3 July 2008, *Commission* v *Ireland*, C-215/06, EU:C:2008:380, paragraph 58, and of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 33).

74 However, Directive 85/337 does not contain provisions governing the consequences of a breach of that obligation to carry out a prior assessment (see, to that effect, judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 34).

75 Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are nevertheless required to eliminate the unlawful consequences of that breach of EU law. That obligation applies to every organ of the Member State concerned and, in particular, to the national authorities which have the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 64, and of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35).

76 As regards the possibility of regularising such an omission a posteriori, Directive 85/337 does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law, provided that such a possibility does not offer the persons concerned the chance to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception (judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraphs 37 and 38).

77 An assessment carried out in the context of such a regularisation procedure, after a plant has been constructed and has entered into operation cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion (see, to that effect, judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 41).

78 By contrast, Directive 85/337 precludes national legislation which allows the national authorities, where no exceptional circumstances are proved, to issue regularisation permission which has the same effects as those attached to a prior consent granted after an environmental impact assessment carried out in accordance with Article 2(1) and Article 4(1) and (2) of that directive (see, to that effect, judgments of 3 July 2008, *Commission* v *Ireland*, C-215/06, EU:C:2008:380, paragraph 61; of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 37; and of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 39).

79 Directive 85/337 also precludes a legislative measure, which would allow, without even requiring a later assessment and even where no exceptional circumstances are proved, a project which ought to have been subject to an environmental impact assessment, within the meaning of Article 2(1) of Directive 85/337, to be deemed to have been subject to such an assessment (see, to that effect, judgment of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 38).

80 Similarly, Directive 85/337 precludes projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, from being purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment (judgment of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 43).

81 In the present case, it is not in dispute that, during a legislative reform in July 2010, Ireland introduced into its legislation a procedure for regularising projects which had been authorised in breach of the obligation to carry out an environmental impact assessment. It is apparent from the file before the Court that the detailed rules for that procedure were laid down in Part XA of the PDAA, the provisions of which were enacted in order to comply with the requirements flowing from the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380).

82 First, according to Section 177 B(1) and (2)(b) of Part XA of the PDAA, where, in particular, by 'a final judgment of … the Court of Justice of the European Union', it is held that a permission for a project for which an environmental impact assessment was required was unlawfully granted, the competent planning authority must give notice in writing directing the project manager to apply for substitute consent. Subsection (2)(c) of Section 177 B of Part XA of the PDAA states that the notice is to require the project manager to furnish a remedial environmental impact statement with the application.

83 Secondly, Section 177 C of Part XA of the PDAA enables, in those same circumstances, the manager of a project authorised in breach of the obligation to carry out a prior environmental impact assessment to apply itself for the regularisation procedure to be initiated. If its application is allowed, the manager must furnish, in accordance with Section 177 D(7)(b) of Part XA of the PDAA, a remedial environmental impact statement.

84 The fact remains that, as at the reference date for assessing whether there has been a failure to fulfil obligations under Article 260(2) TFEU, namely the expiry of the period prescribed in the letter of formal notice issued under that provision (see, to that effect, judgment of 11 December 2012, *Commission* v *Spain*, C-610/10, EU:C:2012:781, paragraph 67), that is to say, in accordance with the letter of formal notice of 22 March 2010 mentioned in paragraph 26 above, at the end of May 2010, Ireland had failed to carry out a new environmental impact assessment of the wind farm within the

context of the regularisation of the consents at issue and thereby failed to have regard to the authority attaching to the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), as regards the second indent of point 1 of the operative part thereto.

85 Ireland nonetheless argued, at the hearing, that, as regards the consents granted for the construction of the wind farm, it is not ultimately in a position to apply the regularisation procedure of its own initiative. After commencing that procedure pursuant to Section 177 B of Part XA of the PDAA, the local authorities that were responsible in that regard put an end to that procedure. Although those authorities are an emanation of the State, they are independent and therefore fall outside the Irish Government's control.

86 Similarly, Ireland contends that it could not require the wind farm operator to apply for substitute consent pursuant to Section 177 C of Part XA of the PDAA. Admittedly, that operator is a wholly owned subsidiary of a semi-public sector entity that is 90% owned by Ireland. However, the operator is independent as regards the daily management of its affairs.

87 Ireland also contends that the principles of legal certainty and of the protection of legitimate expectations preclude the revocation of an administrative decision, such as the consents at issue in the present case, which because of the expiry of the period for bringing an action, can no longer be the subject of a direct application to a court and has, therefore, become final.

88 Ireland's arguments must, however, be rejected.

89 First of all, the Court points out that, according to settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under EU law (judgments of 2 December 2014, *Commission* v *Greece*, C-378/13, EU:C:2014:2405, paragraph 29, and of 24 January 2018, *Commission* v *Italy*, C-433/15, EU:C:2018:31, paragraph 56 and the case-law cited). It follows that Ireland, for the purposes of justifying the failure to comply with the obligations stemming from the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), cannot rely on national provisions limiting the possibilities for commencing a regularisation procedure, such as Section 177 B and Section 177 C of Part XA of the PDAA, a procedure which it introduced into its national legislation specifically in order to ensure compliance with that judgment.

90 In any event, as regards the alleged impossibility for that Member State to require the competent local authorities to commence the regularisation procedure provided for by the Irish legislation, it must be borne in mind that, according to the case-law cited in paragraph 75 above, every organ of that Member State and, in particular, those local authorities are required to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment of the wind farm.

91 As regards, next, the wind farm operator's inaction, or even its refusal to initiate the regularisation procedure pursuant to Section 177 C of Part XA of the PDAA, it suffices to refer, *mutatis mutandis*, to the considerations set out in paragraph 89 above, since that operator is controlled by Ireland. Consequently, the operator must be considered an emanation of that Member State on which, as the Commission rightly argued, the obligations arising from EU directives are binding (judgment of 14 June 2007, *Medipac — Kazantzidis*, C-6/05, EU:C:2007:337, paragraph 43 and the case-law cited).

92 As regards Ireland's argument based on the contention that the principle of legal certainty and the principle of the protection of legitimate expectations preclude the consents unlawfully granted to the wind farm's operator from being withdrawn, it must be borne in mind, first, that the infringement procedure is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation and, secondly, that while the withdrawal of an unlawful measure must occur within a reasonable time and regard must be had to how far the person

concerned might have been led to rely on the lawfulness of the measure, the fact remains that such withdrawal is, in principle, permitted (judgment of 4 May 2006, *Commission* v *United Kingdom*, C-508/03, EU:C:2006:287, paragraphs 67 and 68).

93 Ireland cannot, therefore, rely on legal certainty and legitimate expectations derived by the operator concerned from acquired rights in order to contest the consequences flowing from the objective finding that Ireland has failed to fulfil its obligations under Directive 85/337 with regard to assessment of the effects of certain projects on the environment (see, to that effect, judgment of 4 May 2006, *Commission* v *United Kingdom*, C-508/03, EU:C:2006:287, paragraph 69).

94 In any event, Ireland simply states that, after the expiry of the period of 2 months, or 8 weeks set by the PDAA, respectively, the consents at issue could no longer be the subject of a direct application to a court and cannot be called in question by the national authorities.

95 By its argument, Ireland fails to have regard, however, to the case-law of the Court referred to in paragraph 80 above, according to which projects in respect of which the consent can no longer be subject to challenge before the courts, because the time limit for bringing proceedings laid down in national legislation has expired, cannot be purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment.

96 It must further be noted that while it is not precluded that an assessment carried out after the plant concerned has been constructed and has entered into operation, in order to remedy the failure to carry out an environmental impact assessment of that plant before the consents were granted, may result in those consents being withdrawn or amended, this is without prejudice to any right of an economic operator, which has acted in accordance with a Member State's legislation that has proven contrary to EU law, to bring against that State, pursuant to national rules, a claim for compensation for the damage sustained as a result of the State's actions or omissions.

97 In the light of the foregoing, it must be held that, by failing to take all measures necessary to comply with the second indent of point 1 of the operative part of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), Ireland has failed to fulfil its obligations under Article 260(1) TFEU.

The financial penalties

Arguments of the parties

98 Taking the view that Ireland has still not complied with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), the Commission claims that the Court should order Ireland to pay a lump sum of EUR 1 343.20 multiplied by the number of days between the delivery of that judgment and, either the date of compliance by Ireland with that judgment, or the date of the judgment delivered in the present case if that date is sooner than the date of compliance with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), with a minimum lump sum of EUR 1 685 000.

99 The Commission also claims that the Court should order Ireland to pay a penalty payment of EUR 12 264 per day from the date of the judgment delivered in the present case to the date of compliance by Ireland with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380).

100 Referring to its communication SEC(2005) 1658 of 12 December 2005, entitled 'Application of Article [260 TFEU]', as updated by its communication of 15 December 2017, entitled 'Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the [Court] in

infringement proceedings' (OJ 2017 C 431, p. 3), the Commission proposes that the daily penalty payment be determined by multiplying a standard flat-rate amount of EUR 700 by a coefficient for seriousness of 2 on a scale of 1 to 20 and also by a coefficient for duration of 3, that is the maximum coefficient. The result obtained would be multiplied by an 'n' factor, set at 2.92 for Ireland. As regards the calculation of the lump sum, the flat-rate amount would be set at EUR 230 per day and should by multiplied by a coefficient for seriousness of 2 and an 'n' factor set at 2.92. The total obtained would be multiplied by the number of days during which the failure to fulfil obligations persists.

101 As regards the seriousness of the failure to fulfil obligations, the Commission submits that account must be taken of the objectives of an environmental impact assessment, such as that provided for by Directive 85/337, of the facts established by the Court in paragraphs 102 and 104 of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), and of the landslide, linked to the construction of the wind farm, which caused substantial environmental damage.

102 In addition, the Commission submits that cases brought before the Court show that Ireland has already infringed Directive 85/337 on several occasions. While Ireland has in the meantime proceeded to transpose that directive, the fact remains that, in the Commission's view, it has not made any progress such as to remedy the failure to fulfil obligations at issue, which has persisted over a particularly long period.

103 As regards the duration of the infringement, the Commission states that the adoption of regularisation measures is entirely Ireland's responsibility and does not depend on the Commission's opinion. Ireland ought to have adopted such measures as soon as possible.

104 Ireland contends that, in the present case, it has already complied with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), since it has taken the measures within its control in adopting a concept document providing for an environmental impact assessment of the wind farm by its operator.

105 The fact that a certain lapse of time was necessary in order to draw up that document does not constitute a failure to fulfil obligations, since consultation with the Commission was essential for the purposes of determining the content of that document.

106 In addition, the Commission's application fails to identify the measures whose adoption is required in order to comply with the second indent of point 1 of the operative part of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380). The objective of setting a penalty payment is precisely to ensure compliance with that judgment.

107 In any event, the circumstances of the present case may be distinguished, on the ground referred to in paragraph 53 above, from those giving rise to the judgments of 26 July 2017, *Comune di Corridonia and Others* (C-196/16 and C-197/16, EU:C:2017:589) and of 28 February 2018, *Comune di Castelbellino* (C-117/17, EU:C:2018:129). If the Court held, however, that those judgments support the Commission's line of argument, they would mark a departure in the case-law in that area. Consequently, no penalty ought to accrue for any breach in the period before July 2017.

108 Ireland further observes that the Commission's communications are not binding upon the Court and that the Court is required to set an appropriate and proportionate penalty. The present case is unique and anomalous, which the Court must take into account when it determines the amount of the financial penalties.

109 As regards the seriousness of the infringement, Ireland contends that the minimum coefficient should apply, in particular in the light of the full transposition of Directive 85/337, the good faith shown by Ireland and the factual and legal difficulties of the present case. Account must also be taken of progress made by Ireland as regards compliance with its obligations and the fact that it is not proven

that the landslide at Derrybrien was linked to the construction of the wind farm. In addition, Ireland has cooperated with the Commission constructively and has been committed to achieving a resolution for the problems at issue. The delay between December 2016 and October 2017 is attributable to a simple misunderstanding between Ireland and the Commission and is not indicative of a lack of cooperation.

110 Given the particular circumstances of the present case and the difficulties of establishing a regularisation mechanism consistent with the principles of legal certainty and of the protection of legitimate expectations, it is likewise not appropriate to apply a duration coefficient.

Findings of the Court

111 As a preliminary point, it should be borne in mind that, in each case, it is for the Court to determine, in the light of the circumstances of the case before it and according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties appropriate, in particular, for preventing the recurrence of similar infringements of EU law (judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraph 107 and the case-law cited).

The lump sum payment

112 As a preliminary point it must be borne in mind that, in exercising the discretion conferred on it in such matters, the Court is empowered to impose a penalty payment and a lump sum payment cumulatively (judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraph 153).

113 The imposition of a lump sum payment and the fixing of that sum must depend in each individual case on all the relevant factors relating both to the characteristics of the failure to fulfil obligations established and to the conduct of the Member State involved in the procedure initiated under Article 260 TFEU. That provision confers a wide discretion on the Court in deciding whether to impose such a penalty and, if it decides to do so, in determining the amount (judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraph 154).

114 In addition, it is for the Court, in the exercise of its discretion, to fix the lump sum in an amount appropriate to the circumstances and proportionate to the infringement. Relevant considerations in this respect include factors such as the seriousness of the infringement and the length of time for which the infringement has persisted since the delivery of the judgment establishing it, and the relevant Member State's ability to pay (see, to that effect, judgments of 2 December 2014, *Commission* v *Italy*, C-196/13, EU:C:2014:2407, paragraphs 117 and 118, and of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraphs 156, 157 and 158).

115 In the first place, as regards the seriousness of the infringement, it must be borne in mind that the objective of protecting the environment constitutes one of the essential objectives of the European Union and is both fundamental and inter-disciplinary in nature (see, to that effect, judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraph 57 and the case-law cited).

116 An environmental impact assessment, such as that provided for by Directive 85/337, is one of the fundamental environmental protection mechanisms in that it enables, as recalled in paragraph 73 above, the creation of pollution or nuisances to be prevented at source rather than subsequently trying to deal with their effects.

117 In accordance with the case-law recalled in paragraph 75 above, in the event of a breach of the obligation to assess the environmental impact, Member States are nevertheless required by EU law to eliminate at least the unlawful consequences of that breach (see, to that effect, judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35).

118 As is apparent from paragraphs 23 to 36 above, from the time it was held in the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380) that there was a failure to fulfil obligations, consisting in the breach of the obligation to carry out an environmental impact assessment before consent for, and construction of, the wind farm, more than 11 years have elapsed without Ireland adopting the measures necessary in order to comply with the second indent of point 1 of the operative part of that judgment.

119 Admittedly, in July 2010 Ireland enacted the PDAA, Part XA of which provides for a procedure for regularising the projects authorised in breach of the obligation to carry out an environmental impact assessment. However, a little over 2 years later, Ireland informed the Commission that it was not going to apply the regularisation procedure, whereas, from April 2009 it had been stating the contrary. On the other hand, Ireland proposed to carry out an unofficial, non-statutory assessment. By letter of 29 March 2019, and thus 2 days before the hearing before the Court in the present case, Ireland changed its position again and now contends that the wind farm operator will request that the regularisation procedure provided for in Part XA of the PDAA be applied. At the hearing, Ireland was, however, unable to state whether that procedure would be commenced, on their own initiative, by the competent authorities, pursuant to Section 177 B of Part XA of the PDAA, or on the application of the operator, pursuant to Section 177 C of Part XA of the PDAA. Nor was it in a position to state the start date for the procedure. To date, the Court has received no other information in that regard.

120 It must be found that, in those circumstances, Ireland's conduct shows that it has not acted in accordance with its duty of sincere cooperation to put an end to the failure to fulfil obligations established in the second indent of point 1 of the operative part of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), which constitutes an aggravating circumstance.

121 Since that judgment has not yet been complied with, the Court cannot, therefore, but confirm the particularly lengthy character of an infringement which, in the light of the environmental protection aim pursued by Directive 85/337, is a matter of indisputable seriousness (see, by analogy, judgment of 22 February 2018, *Commission* v *Greece*, C-328/16, EU:C:2018:98, paragraph 94).

122 As regards, in the second place, the duration of the infringement, it should be borne in mind that that duration must be assessed by reference to the date on which the Court assesses the facts and not the date on which proceedings are brought before it by the Commission. In the present case, the duration of the infringement, of over 11 years from the date of delivery of the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), is considerable (see, by analogy, judgment of 22 February 2018, *Commission* v *Greece*, C-328/16, EU:C:2018:98, paragraph 99).

123 Although Article 260(1) TFEU does not specify the period within which a judgment must be complied with, it follows from settled case-law that the importance of immediate and uniform application of EU law means that the process of compliance must be initiated at once and completed as soon as possible (judgment of 22 February 2018, *Commission* v *Greece*, C-328/16, EU:C:2018:98, paragraph 100).

124 In the third place, as regards the ability to pay of the Member State concerned, it is apparent from the case-law of the Court that it is necessary to take account of recent trends in that Member State's gross domestic product (GDP) at the time of the Court's examination of the facts (judgment of 22 February 2018, *Commission* v *Greece*, C-328/16, EU:C:2018:98, paragraph 101).

125 Having regard to all the circumstances of the present case, it must be found that if the future repetition of similar infringements of EU law is to be effectively prevented, a lump sum payment of EUR 5 000 000 must be imposed.

126 Ireland must, therefore, be ordered to pay the Commission a lump sum of EUR 5 000 000.

The penalty payment

127 According to settled case-law, the imposition of a penalty payment is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts (judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraph 108 and the case-law cited).

128 In the present case, it is not in dispute that, as noted, in particular in paragraphs 118 and 119 above, Ireland has still not carried out an environmental impact assessment of the wind farm in the context of a procedure for regularising the consents at issue, granted in breach of the obligation to carry out a prior environmental impact assessment laid down in Directive 85/337. As at the date on which the facts were examined by it, the Court does not have any information that would show that there has been any change to that situation.

129 In the light of the foregoing, it must be held that the failure to fulfil obligations of which Ireland stands criticised continued up until the Court's examination of the facts in the present case.

130 In those circumstances, the Court considers that an order imposing a penalty payment on Ireland is an appropriate financial means by which to induce it to take the measures necessary to bring to an end the failure to fulfil obligations established and to ensure full compliance with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380).

131 As regards the calculation of the amount of the penalty payment, according to settled case-law, the penalty payment must be decided upon according to the degree of persuasion needed in order for the Member State which has failed to comply with a judgment establishing a breach of obligations to alter its conduct and bring to an end the infringement established. In exercising its discretion in the matter, it is for the Court to set the penalty payment so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of the Member State concerned (judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraphs 117 and 118).

132 The Commission's proposals regarding the amount of the penalty payment cannot bind the Court and are merely a useful point of reference. The Court must remain free to set the penalty payment to be imposed in an amount and in a form that it considers appropriate for the purposes of inducing the Member State concerned to bring to an end its failure to comply with its obligations arising under EU law (see, to that effect, judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraph 119).

133 For the purposes of determining the amount of a penalty payment, the basic criteria which must be taken into consideration in order to ensure that that payment has coercive effect and that EU law is applied uniformly and effectively are, in principle, the seriousness of the infringement, its duration and the ability to pay of the Member State in question. In applying those criteria, regard must be had, in particular, to the effects on public and private interests of the failure to comply and to how urgent it is for the Member State concerned to be induced to fulfil its obligations (judgment of 14 November 2018, *Commission* v *Greece*, C-93/17, EU:C:2018:903, paragraph 120).

134 In the present case, having regard to all the legal and factual circumstances culminating in the breach of obligations established and the considerations set out in paragraphs 115 to 124 above, the Court considers it appropriate to impose a penalty payment of EUR 15 000 per day.

135 Ireland must, therefore be ordered to pay the Commission a periodic penalty payment of EUR 15 000 per day of delay of implementing the measures necessary in order to comply with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380) from the date of delivery of the present judgment until the date of compliance with that judgment of 3 July 2008.

Costs

136 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by failing to take all measures necessary to comply with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380), Ireland has failed to fulfil its obligations under Article 260(1) TFEU;**

2. **Orders Ireland to pay the European Commission a lump sum in the amount of EUR 5 000 000;**

3. **Orders Ireland to pay the Commission a periodic penalty payment of EUR 15 000 per day from the date of delivery of the present judgment until the date of compliance with the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380);**

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

Lenaerts	Silva de Lapuerta	Bonichot
Arabadjiev	Prechal	Safjan
Rodin	Bay Larsen	von Danwitz
Toader	Biltgen	Jürimäe
Lycourgos		

Delivered in open court in Luxembourg on 12 November 2019.

A. Calot Escobar	K. Lenaerts
Registrar	President