

JUDGMENT OF THE COURT (Second Chamber)

7 November 2013 (*)

(Request for a preliminary ruling – Environment – Directive 85/337/EEC – Environmental impact assessment – Århus Convention – Directive 2003/35/EC – Right to challenge a development consent decision – Temporal application – Development consent procedure initiated before the period prescribed for transposing Directive 2003/35/EC expired – Decision taken after that date – Conditions of admissibility of the action – Impairment of a right – Nature of the procedural defect that may be invoked – Scope of the review)

In Case C-72/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Germany), made by decision of 10 January 2012, received at the Court on 13 February 2012, in the proceedings

Gemeinde Altrip,

Gebrüder Hört GbR,

Willi Schneider

v

Land Rheinland-Pfalz,

party intervening:

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 January 2013,

after considering the observations submitted on behalf of:

- Gemeinde Altrip, Gebrüder Hört GbR and Mr Schneider, by S. Lesch, F. Heß, W. Baumann and C. Heitsch, Rechtsanwälte,
- the Land Rheinland-Pfalz, by M. Schanzenbächer, H. Seiberth and U. Klein, acting as Agents,
- the German Government, by T. Henze and A. Wiedmann, acting as Agents,
- Ireland, by E. Creedon, acting as Agent, assisted by G. Gilmore, BL,
- the European Commission, by P. Oliver and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 June 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17) and of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35 ('Directive 85/337').
- 2 The request has been made in proceedings between the Gemeinde Altrip (municipality of Altrip), the civil-law company Gebrüder Hört GbR and Mr Schneider, and the Land Rheinland-Pfalz (Rhineland-Palatinate) concerning a decision approving plans to construct a flood retention scheme covering over 320 hectares of a former Rhine floodplain.

Legal context

International law

- 3 Article 9 of the Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Århus Convention'), provides:

'...

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
 - (a) [h]aving a sufficient interest or, alternatively,
 - (b) [m]aintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of [A]rticle 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in [Article 2(5)] shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion

of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

...'

European Union ('EU') law

Directive 2003/35

4 Article 1 of Directive 2003/35 is worded as follows:

'The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention, in particular by:

...

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

5 Article 3(7) of Directive 2003/35 provides that an Article 10a is to be inserted into Directive 85/337.

6 Article 6 of Directive 2003/35 states:

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

...'

Directive 85/337

7 Article 10a of Directive 85/337 is worded as follows:

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

(a) having a sufficient interest, or alternatively,

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

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

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice ...

...'

German law

The VwGO

8 Paragraph 61 of the Rules of Procedure of the Administrative Courts (Verwaltungsgerichtsordnung) ('the VwGO') is worded as follows:

'The following shall have capacity to take part in proceedings:

1. natural and legal persons,
2. associations, in so far as they are so entitled,

...'

The UVPG

9 The first sentence of paragraph 2(1) of the Law on Environmental Impact Assessments (Gesetz über die Umweltverträglichkeitsprüfung) ('the UVPG') provides:

'The environmental impact assessment shall be an integral part of the administrative procedures for making decisions on the permissibility of projects.'

10 Under paragraph 2(3) of the UVPG, '[f]or the purposes of the first sentence of subparagraph 1, "decisions" mean ... planning approvals'.

The UmwRG

11 Article 10a of Directive 85/337 was implemented in Germany by the Law concerning supplementary provisions on the remedies available in environmental matters pursuant to Directive 2003/35/EC (Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG) ('the UmwRG').

12 The first sentence of paragraph 1(1) of the UmwRG states:

'This Law shall apply to actions challenging

1. Decisions within the meaning of paragraph 2(3) of the [UVPG] concerning the lawfulness of projects in respect of which, in accordance with

(a) the UVPG,

...

there may be an obligation to carry out an environmental impact assessment.'

13 The first sentence of paragraph 4(1) of the UmwRG provides:

'An application for the annulment of a decision on the lawfulness of a project within the meaning of [point 1 of the first sentence of paragraph 1(1)] may be made if

1. an environmental impact assessment or
2. a preliminary assessment of the requirement in the individual case for an environmental impact assessment

as required in accordance with the provisions of the UVPG has not been carried out and that

omission has not been made good.'

14 Paragraph 4(3) of the UmwRG is worded as follows:

'[Subparagraphs 1 and 2] shall apply *mutatis mutandis* to actions by the parties provided for in [points 1 and 2 of paragraph 61] of the [VwGO].'

15 Paragraph 5(1) of the UmwRG contains the following provision:

'This Law shall apply to proceedings as provided for in [the first sentence of paragraph 1(1)] which were or should have been initiated after 25 June 2005.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 The applicants, who are all affected by the project as owners or tenants of land located within the area acquired for the work in question for public purposes, brought an action before the Verwaltungsgericht (Administrative Court) seeking the annulment of the regional authority's decision approving plans to construct that work. In challenging that decision, they claimed that the environmental impact assessment carried out beforehand was inadequate. Their action having been dismissed, they lodged an appeal with the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Higher Administrative Court).

17 The Oberverwaltungsgericht Rheinland-Pfalz dismissed that appeal, taking the view, in particular, that the applicants had no right to appeal since, under paragraph 5(1) of the UmwRG, they might not plead irregularities affecting the environmental impact assessment carried out as part of an official procedure initiated before 25 June 2005. In any case, the Oberverwaltungsgericht expressed doubts as to the admissibility of the proceedings on the ground that paragraph 4(3) of the UmwRG provides that an action may be brought only in the case of a pure and simple failure to carry out an environmental assessment and would therefore not apply in the case of a mere irregularity in the environmental assessment.

18 The applicants in the main proceedings then lodged an appeal on a point of law with the Bundesverwaltungsgericht (Federal Administrative Court). That court is uncertain whether the interpretation of paragraph 5(1) of the UmwRG as precluding the application of that law to administrative procedures initiated before 25 June 2005, even though, as in the present case, the decisions resulting from such procedures have been adopted after that date, accords with Directive 2003/35 when under Article 6 of the latter the date of 25 June 2005 is simply the date of expiry of the period allowed for transposing that directive into national law.

19 The referring court is also uncertain whether paragraph 4(3) of the UmwRG, which limits the right of action to that situation alone in which an environmental assessment has quite simply not been carried out, correctly transposes Article 10a of Directive 85/337 which requires a right of action making it possible to challenge the legality of decisions vitiated by procedural irregularities. Lastly, that court seeks to ascertain whether the case-law consistently applied by the national courts is compatible with that right, given that it holds that the rights of a person concerned by a project subject to the carrying out of an environmental assessment may be impaired only if there is a causal link between the procedural irregularity and the final result of the planning approval decision that adversely affects him.

20 In those circumstances the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 6(1) of [Directive 2003/35] to be interpreted as meaning that Member States were required to declare the rules of national law adopted in implementation of Article 10a of [Directive 85/337] applicable also to those administrative development consent procedures which had been initiated before 25 June 2005 but in which development

consents were not issued until after that date?

2. If Question 1 is answered in the affirmative:

Is Article 10a of [Directive 85/337] to be interpreted as meaning that Member States were required to extend the applicability of the rules of national law adopted in implementation of that article for the purpose of challenging the procedural legality of a decision to include cases in which an environmental impact assessment was carried out but was irregular?

3. If Question 2 is answered in the affirmative:

In cases in which, in accordance with subparagraph (b) of the first paragraph of Article 10a of [Directive 85/337], the administrative procedural law of a Member State lays down in principle that access to a judicial review procedure for members of the public concerned is conditional upon maintaining the impairment of a right, is Article 10a of [Directive 85/337] to be interpreted as meaning

- (a) that a challenge before a court to the procedural legality of decisions to which the provisions of that directive which relate to public participation are applicable can be successful and lead to the decision's being annulled only if, in the circumstances of the case, there is a definite possibility that the contested decision would have been different without the procedural irregularity and if, at the same time, that procedural irregularity affected a substantive legal position of the applicant's, or
- (b) that, in judicial proceedings challenging the procedural legality of decisions to which the provisions of that directive relating to public participation are applicable, it must be possible for procedural irregularities to lead to annulment on a greater scale?

If it is necessary to answer the above question as in (b):

What substantive requirements must apply to procedural irregularities, in order for these to be taken into account in favour of an applicant in judicial proceedings challenging the procedural legality of the decision?

Consideration of the questions referred

The first question

- 21 By its first question, the referring court asks, in essence, whether, by providing that it was to be transposed into national law by 25 June 2005 at the latest, Directive 2003/35, which inserted Article 10a into Directive 85/337, is to be interpreted as meaning that the rules of national law adopted in order to transpose that article into the national legal order ought also to apply to administrative development consent procedures initiated before 25 June 2005 when they would have resulted in the granting of development consent after that date.
- 22 It should be borne in mind that, in principle, a new rule of law applies from the entry into force of the act introducing it. While it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations too (see, to that effect, Case C-428/08 *Monsanto Technology* [2010] ECR I-6765, paragraph 66). It is otherwise – subject to the principle of the non-retroactivity of legal acts – only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (Case C-266/09 *Stichting Natuur en Milieu and Others* [2010] ECR I-13119, paragraph 32).
- 23 Directive 2003/35 does not include any particular provision as regards the conditions for the temporal application of Article 10a of Directive 85/337.

- 24 In addition, it should be borne in mind that, under Article 6 of Directive 2003/35, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 25 June 2005 at the latest. Article 10a of Directive 85/337, which extended the rights of members of the public concerned to challenge the decisions, acts or omissions referred to in that directive on the assessment of the effects of certain public and private projects on the environment, is among the measures which, by the same token, had to be implemented by that date.
- 25 The Court has previously held that the principle that projects likely to have significant effects on the environment must be subject to an environmental impact assessment does not apply when the application for consent for a project was formally lodged before the expiry of the period set for implementing Directive 85/337 (Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraphs 29 and 32; Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23; and Case C-416/10 *Križan and Others* [2013] ECR I-0000, paragraph 94).
- 26 That directive is primarily designed to cover large-scale projects, the completion of which will most often be spread over a long period. It would therefore not be appropriate for the relevant procedures, which are already complex at national level, to be made even more cumbersome and time-consuming by the specific requirements imposed by that directive and for situations already established to be affected by it (*Gedeputeerde Staten van Noord-Holland*, paragraph 24, and *Križan and Others*, paragraph 95).
- 27 However, neither the new requirements arising from Article 10a of Directive 85/337, nor the actual requirement that project be subject to an environmental assessment, can in themselves be considered to make administrative procedures more cumbersome and time-consuming. As the Advocate General observed in point 59 of his Opinion, the legislation at issue in the main proceedings does not create new requirements of that kind but is instead designed to improve access to a legal remedy. Furthermore, if extending the right of action of the public concerned to challenge acts or omissions relating to such projects is likely to increase the risk that those projects will become the subject of contentious proceedings, that increase of a pre-existing risk cannot be regarded as affecting a situation already established.
- 28 Although it is true that that extension may have the effect, in practice, of delaying the completion of the projects involved, a disadvantage of that kind is inherent in the review of the legality of decisions, acts or omissions falling within the scope of Directive 85/337, a review in which the legislature of the European Union has, in accordance with the objectives of the Århus Convention, sought to involve members of the public concerned having a sufficient interest in bringing proceedings or maintaining the impairment of a right, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health.
- 29 In the light of those objectives, the disadvantage mentioned in the preceding paragraph cannot warrant rendering Article 10a of Directive 85/337 (inserted by Directive 2003/35) redundant in situations already existing at the date by which that article had to be transposed into national law when those procedures resulted in the grant of development consent after that date.
- 30 In those circumstances, even though the Member States, by virtue of their procedural autonomy and subject to observance of the principles of equivalence and effectiveness, enjoy discretion in implementing Article 10a of Directive 85/337 (Case C-182/10 *Solvay and Others* [2012] ECR I-0000, paragraph 47), they may not, for all that, restrict the application of that provision exclusively to administrative development consent procedures initiated after 25 June 2005 alone.
- 31 It follows from the foregoing considerations that the answer to Question 1 must be that, by providing that it was to be transposed into national law by 25 June 2005 at the latest, Directive 2003/35, which inserted Article 10a into Directive 85/337, is to be interpreted as meaning that the rules of national law adopted in order to transpose that article into the national legal order

ought also to apply to administrative development consent procedures initiated before 25 June 2005 when they resulted in the granting of development consent after that date.

The second question

32 In view of the answer to the first question, it is necessary to examine the second question, in which the referring court asks, in essence, whether Article 10a of Directive 85/337 precludes the Member States from limiting the applicability of the provisions transposing that article solely to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular.

Admissibility of the second question

33 Ireland submits that the question is inadmissible, owing to the hypothetical nature of the issue raised, for the national court has failed to indicate what irregularities in the environmental impact assessment are at issue in the present case.

34 However, as the Advocate General observed in point 45 of his Opinion, if an environmental impact assessment has been carried out, the national law in question does not, according to the referring court, recognise any right to annulment of a decision such as those referred to in Directive 85/337, whatever the procedural defect invoked. The referring court states that, if Article 10a of that directive were to be interpreted as meaning that if it is permissible to review procedural defects in the context of application of that directive, it would have to set aside the judgment of the appeal court and refer the case in the main proceedings back to that court to be reconsidered since the appellants maintain precisely that the administrative procedure is vitiated by such defects.

35 It must accordingly be held that an answer to the second question proves to be useful for resolving the dispute before the national court and that the question is, consequently, admissible.

Substance

36 In providing that the decisions, acts or omissions referred to therein must be actionable before a court of law through a review procedure to challenge their substantive or procedural legality, the first paragraph of Article 10a of Directive 85/337 has in no way restricted the pleas that may be put forward in support of such an action (Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* [2011] ECR I-3673, paragraph 37).

37 The provisions of national law transposing that provision may not limit their applicability solely to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment has been carried out. Excluding that applicability in cases in which, having been carried out, an environmental impact assessment is found to be vitiated by defects – even serious defects – would render largely nugatory the provisions of Directive 85/337 relating to public participation. Such exclusion would therefore run counter to the objective of ensuring wide access to courts of law as mentioned in Article 10a of that directive.

38 In those circumstances, the answer to Question 2 is that Article 10a of Directive 85/337 must be interpreted as precluding the Member States from limiting the applicability of the provisions transposing that article solely to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular.

The third question

39 In view of the answer to the second question, it is necessary to examine the third question, in which the referring court asks, in essence, whether Article 10a of Directive 85/337 is to be

interpreted as precluding decisions of national courts that make the admissibility of actions subject to cumulative conditions requiring the person bringing the action, in order to establish that a right has been impaired within the meaning of that article, to prove that the procedural defect invoked is such that, in the light of the circumstances of the case, there is a possibility that the contested decision would have been different were it not for the defect and that a substantive legal position is affected thereby.

Admissibility of the third question

40 For the same reason as set out in paragraph 33 above, Ireland submits that the third question is purely hypothetical and is, accordingly, inadmissible.

41 However, it is clear from the statements made by the Bundesverwaltungsgericht that, when referring the case back to the national appeal court, the referring court must provide a binding statement indicating whether or not the appeal court is to abide by the conditions for the admissibility of actions as referred to in the third question. Thus, the Court's answer to that question, which will affect the outcome of the case before the national court, serves a useful purpose. The question is, accordingly, admissible.

Substance

42 When answering the question whether the cumulative criteria as applied by decisions of national courts in order to determine whether an action is admissible are compatible with the requirements of Article 10a of Directive 85/337, it is to be borne in mind that that article provides for two possibilities as regards the conditions of that admissibility: the admissibility of such an action may be conditional either on the applicant's having 'a sufficient interest in bringing the action' or on the applicant's maintaining 'the impairment of a right', depending on which of those conditions is adopted in the national legislation (see, to that effect, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 38).

43 The first sentence of the third paragraph of Article 10a of Directive 85/337 further states that what constitutes impairment of a right is to be determined by the Member States consistently with the objective of giving the public concerned wide access to justice (*Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 39).

44 Accordingly, it is in the light of that objective that the compatibility with Union law must be assessed of the conditions invoked by the national court that make it possible to determine, according to the national law at issue, whether a right has been impaired, as a necessary condition of the admissibility of those actions.

45 Where, there being no rules fixed in this sphere by Union law, it is for each Member State to lay down, in its legal system, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law, those detailed rules (as pointed out in paragraph 30 above), in accordance with the principle of equivalence, must not be less favourable than those governing similar domestic actions and, in accordance with the principle of effectiveness, must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law (*Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 43).

46 Accordingly, although it is for the Member State to determine, where this is provided for in its legal system, as it is in the present case, which rights, if impaired, may give rise to an action relating to the environment, within the limits laid down by Article 10a of Directive 85/337, the conditions fixed by the Member States for that purpose may not make it in practice impossible or excessively difficult to exercise the rights conferred by that directive in order to give the public concerned wide access to justice, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health.

47 In the present case, concerning, in the first place, the criterion that there must be a causal link

between the procedural defect invoked and the content of the final contested decision ('the condition of causality'), it is to be noted that, by requiring Member States to ensure that the members of the public concerned have the opportunity to bring an action challenging the substantive or procedural legality of decisions, acts or omissions falling within the scope of Directive 85/337, the Union legislature – as has been pointed out in paragraph 36 above – has in no way limited the pleas in law that may be put forward in support of an action. In any event, it was not the intention of the legislature to make the possibility of invoking a procedural defect conditional upon that defect's having an effect on the purport of the contested final decision.

48 Moreover, given that one of the objectives of that directive is, in particular, to put in place procedural guarantees to ensure the public is better informed of, and more able to participate in, environmental impact assessments relating to public and private projects likely to have a significant effect on the environment, it is particularly important to ascertain whether the procedural rules governing that area have been complied with. Therefore, as a matter of principle, in accordance with the aim of giving the public concerned wide access to justice, that public must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by that directive.

49 Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a Member State, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.

50 In that regard, it should be borne in mind that Article 10a of that directive leaves the Member States significant discretion to determine what constitutes impairment of a right (see, to that effect, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 55).

51 In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of subparagraph (b) of Article 10a of that directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked.

52 It appears, however, with regard to the national law applicable in the case in the main proceedings, that it is in general incumbent on the applicant, in order to establish impairment of a right, to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked. That shifting of the burden of proof onto the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive 85/337 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments.

53 Therefore, the new requirements thus arising under Article 10a of that directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.

54 In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337.

55 As regards, in the second place, the condition that a substantive legal position of the applicant should be affected, the fact remains that the national court has not itself provided any details of what constitutes that condition and that nothing in the grounds of the order for reference enables the Court to determine whether examining that condition would be useful for resolving the dispute in the main proceedings.

56 In those circumstances, there is no need for the Court to give a ruling, that being so, on the issue of whether Union law precludes that condition.

57 Accordingly, the answer to Question 3 is that subparagraph (b) of Article 10a of Directive 85/337 must be interpreted as not precluding national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of the case-file documents submitted to that court or body, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. By providing that it was to be transposed into national law by 25 June 2005 at the latest, Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, which inserted Article 10a into Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, must be interpreted as meaning that the rules of national law adopted for the purposes of transposing that article into national law were intended also to apply to administrative development consent procedures initiated before 25 June 2005 when the latter resulted in the granting of consent after that date.**
- 2. Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as precluding the Member States from limiting the applicability of the provisions transposing that article to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular.**
- 3. Subparagraph (b) of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not precluding national courts from refusing to**

recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337.

[Signatures]

[*](#) Language of the case: German.