OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 15 January 1998 *

I — Introduction

1. In the present case, the Court is called upon to interpret, for the first time, Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information relating to the environment ('the Directive'). [1] In particular, the Court is asked to define the extent of the derogations which the Directive provides for public authorities in relation to their duty to provide information in the case of matters which are the subject of 'preliminary investigation proceedings'.

II — The facts of the case

2. On 1 January 1993 the plaintiff applied to the municipality of Pinneberg for a copy of the statement of views by the competent countryside protection authority in connection with planning approval for the construction of the 'western by-pass'. The plaintiff made a similar application to the defendant on 18 March 1993. The plaintiff based his two applications directly upon the provisions of Directive 90/313/EEC. The German law implementing the Directive, the Umweltinformationsgesetz (Law on information on the environment), was passed on 8 July 1994 and entered into force on 16 July 1994, that is to say, not until after the commencement of the action which led to the present proceedings.

3. On 17 March 1993 the defendant rejected the plaintiff's application on the ground that the statement of views requested did not constitute information relating to the environment within the meaning of the Directive since it simply evaluated information which was in any case already available to the plaintiff. In any event, as the referring court has stated, the defendant was of the view that the exception provided for in the third indent of Article 3(2) of the Directive fell to be applied in this case, since the proceedings in question were preliminary investigation proceedings. Challenging both of the views expressed by the defendant, the plaintiff requested it to reconsider its decision. The defendant rejected the plaintiff's request by decision of 3 September 1993 and on 4 October 1993 the plaintiff brought an action against that decision.

4. In support of his case, the plaintiff argued first that the authority's statement of views

* Original language: Italian.

1 — OJ 1990 L 158, p. 56.

constituted an administrative measure and as such fell within the concept of information relating to the environment and that, in any event, the authority's evaluation of the information in its possession did not detract from its nature as 'information relating to the environment'. Secondly, the plaintiff argued that the reference to the third indent of Article 3(2) of the Directive was irrelevant. Development consent proceedings did not constitute preliminary investigation proceedings within the meaning of the Directive.

5. Supporting the plaintiff's case, the Representative of the Public Interest attached to the Oberverwaltungsgericht (Higher Administrative Court) maintained that the authority's statement of views which was in issue before the referring court had to be regarded as an administrative measure for the protection of the environment in the sense contemplated by the Directive. According to that intervening party, every act on the part of a public authority fell within the broader concept of 'administrative measure'. Moreover, there was the particular circumstance that the act in question was adopted for the protection of the environment in that the activity of the defendant authority, which was responsible for the protection of the countryside, was also designed to protect the environment in development consent proceedings.

6. On 30 June 1995 the Verwaltungsgericht (Administrative Court) Schleswig-Holstein dismissed the action, basing its decision on the Umweltinformationsgesetz, the German law on access to environmental information, which was in force on the date when the facts of the case occurred. Among the grounds on which the Verwaltungsgericht dismissed the action was the restriction constituted by the confidentiality of the deliberations of public authorities as defined in Paragraphs 7(1) and (3) of the Umweltinformationsgesetz. On 27 October 1995 the plaintiff appealed against that decision at first instance to the Oberverwaltungsgericht Schleswig-Holstein. In its appeal the plaintiff submitted that the provisions of the Umweltinformationsgesetz had been infringed, arguing that what was involved in this case was not a deliberation by a public authority and that, for what it was worth, such an act did not fall within the proviso in Paragraph 7(1) of the Umweltinformationsgesetz. In response to that argument the defendant contended that the case did indeed fall within the said provisions of that law. The Representative of the Public Interest attached to the Oberverwaltungsgericht Schleswig-Holstein supported the arguments developed by the plaintiff. He maintained that interpretation of the provisions of the Umweltinformationsgesetz in isolation would indeed lead to the dismissal of the plaintiff's application in that there had been deliberations of a public authority which, as such, were exempt from the requirement to communicate information. Nevertheless, he considered that those provisions conflict with the terms of the Directive because the administrative measure in question could not be classified as 'preliminary investigation proceedings' within the meaning of the third indent of Article 3(2) of the Directive. In conclusion, the Representative of the Public Interest maintained that, in this regard, the Directive had not been correctly transposed into German law.

7. In order to remove any doubt as to the correct interpretation of the relevant provi-

sion of the directive, both the plaintiff and the Representative of the Public Interest requested the administrative court of appellate jurisdiction to submit the matters in dispute to this Court for a preliminary ruling.

The referring court, for its part, was of the view that the question whether the appeal was well founded turned essentially on the nature of the statement of views of the administrative authority competent in the matter of protection of the countryside and, in particular, whether that statement constituted information relating to the environment. In the event of an affirmative answer to that first question, it needed to be ascertained whether or not access to such information is precluded on the basis of the exception provided for under the Community legislation.

8. For those reasons, the referring court has submitted to this Court the following questions for a preliminary ruling:

'(1) Does the statement of views given in development consent proceedings by a subordinate countryside protection authority participating in those proceedings as a representative of a public interest constitute an administrative measure designed to protect the environment within the meaning of Article 2(a) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment?

(2) Are the proceedings of an administrative authority within the meaning of Paragraph 7(1)(2) of the Umweltinformationsgesetz (Law on information on the environment) "preliminary investigation proceedings" within the meaning of the third indent of Article 3(2) of that directive?'

III — The applicable Community legislation

9. Directive 90/313/EEC provides:

'The object of this Directive is to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available.

For the purposes of this Directive:

(a) "information relating to the environment" shall mean any available information in written, visual, aural or database form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give

rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes;

...

(b) "public authorities" shall mean any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity.

Save as provided in this Article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest.

Member States shall define the practical arrangements under which such information is effectively made available.

Member States may provide for a request for such information to be refused where it affects:

— matters which are, or have been, *sub judice*, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings,

...

Information held by public authorities shall be supplied in part where it is possible to separate out information on items concerning the interests referred to above.

...'

IV — Examination of the dispute

10. The first question raised by the referring court concerns the concept of 'administrative measure'. The plaintiff maintains that the concept of 'measure' as used in Article 2(a) of the Directive also includes the activity of the administrative authority when it describes and evaluates the consequences of a project and where it formulates the proposals it considers necessary for that purpose.

Alternatively, the plaintiff argues that, should this Court hold that the administrative authority's statement of views, at issue in this case, does not fall within the description of environmental management measures, it must nevertheless be held to rank among the activities referred to in Article 2(a) of the Directive. In the further alternative, if that approach is not accepted by the Court, the plaintiff contends that what is concerned, in a more general way, is environmental information, in view of the objectives to which the statement of views, which constitutes the basis upon which the public authority must then found its decision, is directed.

11. The defendant is of the opposite view. It maintains that the concept of 'administrative measure' is, on the basis of the French ('mesure administrative') and the English ('administrative measure') versions of the Directive, denotes an act adopted by an authority in relation to a specific matter, aimed at attaining a given objective, and having the effect of regulating a given situation. In support of its contention, the defendant also refers to what emerged from a statement by the Council and the Commission contained in a minute [2] dealing with the directive in question in which those two institutions affirm that the 'administrative measures referred to in Article 2(a) include authorisations and *a priori* and *posteriori* monitoring measures in so far as this does not impede the execution of such measures'.

The defendant further maintains that the statement of views of the authority in question is no more than a preparation for the actual measure itself which will subsequently be adopted by a different administrative body. Moreover, the statement in question is nothing more than a legal appraisal of facts and information. These, in the defendant's view, are almost inseparably linked with the appraisal itself and upon which it is necessarily based. To provide the information separately from the appraisal of it would impose upon the defendant authority a burden out of all proportion to the objective pursued by the Directive.

12. The Commission, for its part, states that the question posed by the Oberverwaltungsgericht Schleswig-Holstein, even though it refers to 'administrative measures for envi-

2 — Council Document No 6888/90, ENV 136 of 5 June 1990.

ronmental management', is seeking, essentially, to ascertain what is covered by the more general concept of 'administrative measure for the protection of the environment'. This is, according to the Commission, because the Directive uses the expression 'environmental management' only in connection with 'programmes'.

Having adopted that premiss, the Commission concludes on the point at issue that the concept of 'administrative measure' is a very broad one and is capable of including any kind of administrative activity carried out by a public authority. Proof of this is the alternative and complementary use of the terms 'measure' and 'activity'. By this means the Community legislature sought to cover all possible areas in which an administrative activity concerning the environment is carried on. The Commission goes on to add that the nature of the concept in question does not change and that concept thus continues to be governed by the law of the Directive even if the administrative activity does not give rise to factual or legal consequences.

The Commission also stresses the relationship which must in any event exist between the administrative measure and the objective pursued by the public authority's activity, which is of no interest for the purposes of the Directive unless it is directed to the protection of the environment. In the present case, the Commission is of the view that this link indubitably exists, since the institutional task of the authority in question is the protection of the environment. Furthermore, the position taken by the defendant authority influences the decision approving the project taken by the administrative body competent for that purpose. It is also worth mentioning that this type of project also falls within the scope of Council Directive 85/337/EEC [3] under which public authorities play a preponderant role and are required to follow certain procedures for the specific purpose of protecting the environment.

13. In view of the considerations thus put forward by the parties, and in particular by the Commission, it is my opinion that the statement of views in question must be linked to the measures and activities contemplated by the directive in question. There can be no doubt that the Community legislature intended to include within the concept of 'information relating to the environment' all conduct on the part of public authorities, as defined in the Directive, subject only to the exceptions specially provided for in that regard. The concept of information relating to the environment is, by the express intention of the Community legislature, all-embracing. [4] For the rest, it is possible to identify it on the basis of the two criteria that the provision in point of the Directive implicitly lays down. The first relates to the substantive element, that is to say, to the existence of information and in this connection it is of no importance whether this consists of information accessible in the form of a collection of raw data or, instead, material which has already been the subject of technical or logico-juridical analysis. The second is

3 — Council Directive 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).

4 — Academic legal writing concurs with this view. See Krämer, 'La directive 90/313/EEC sur l'accès à l'information en matière d'environnement: genèse et perspectives d'application', in *Revue du Marché Commun*, 1991, p. 872; Magalhães, *Rumo ao espaço comum informativo?*, Coimbra, 1991, p. 30, Vercher Noguera, *El medio ambiente y el derecho de aceso a la información*, La Ley, 1992, p. 1078.

concerned with the relationship linking the information to the protection of the environment. For the definition in the Directive to be satisfied, the data or other information in point must be produced or collected or processed with the principal aim of protecting the environment or must at least be related to the environment. [5]

14. Where the data in question satisfy both criteria, we are, in my opinion, dealing with 'information relating to the environment' within the meaning of the Directive. The Directive itself swiftly goes on to give, purely by way of illustration, some examples of data or activities which can fall within the concept in question. Significantly, the word which introduces that definition and which the Directive itself uses to identify the information that is the subject of the body of rules laid down by it, is the adjective 'any'. Such a formulation, which in fact employs terms whose accepted meaning is very broad and inclusive, cannot therefore be construed in a restrictive manner.

15. Thus, administrative acts of the type at issue also fall within the 'activities or measures designed to protect' the environment, in so far as they constitute information gathered by public administrative bodies with responsibilities for the protection of the environment, such as the public authority in the present proceedings. Moreover, it is in my opinion altogether irrelevant for the purposes of its inclusion within the class of information to which the Directive refers, that such information as a whole, which in the present case could equally well be classified as a 'measure', contains assessments of a legal nature. Indeed, in this connection, I would observe that the text of the Commission's proposal for a directive [6] contained a much more detailed list of 'information relating to the environment'. The list proposed by the Commission began with the phrase 'all data, of a factual or legal nature, concerning ...'. This idea of listing data in the possession of public authorities has not disappeared from the text of the directive adopted by the Council. That institution, however, simplified the wording and, as I mentioned earlier, made it all-embracing. The term 'measure' employed by the Community legislature reflects the need to include within the acts governed by the Directive even the most diverse forms in which administrative activity is carried on. However, this does not mean that, as the defendant erroneously maintains, a 'measure' in the sense intended by the Community legislature corresponds solely to acts which may have an impact upon particular legal situations by regulating their effects. On close inspection, it can be seen that the Directive is not solely concerned with administrative measures in a technical sense, against which it is possible to bring a legal action or raise other forms of claim in accordance with the procedures prescribed by law. On the contrary, the 'measure' to which the Directive refers must here be given its true meaning, that is, the result of administrative action lacking in specified characteristics. This holds true even where the public authority's activity takes the form of the production of instruments or docu-

5 — See Krämer, op. cit.

6 — COM(88) 484 final, submitted on 31 October 1988 (OJ 1988 C 335, p. 5).

ments which do not in themselves constitute the final stage of the procedure but define the point of view ('the position') of the body which produces them and assist, directly or indirectly, in the formation of the authority's intention or at least exert an influence upon it. The Community legislature purposely avoided giving any definition that could lead to the exclusion of any of the activities engaged in by the public authority. The aim of the Directive is to allow access to all information relating to the environment held by the authorities. A listing, no matter how exhaustive, of the acts falling within the definition of 'information relating to the environment' could have proved counterproductive and it was precisely in order to avoid such situations that the legislature adopted the view and adhered to the principle that, in this area, *omnis definitio periculosa est.*

16. In the case before this Court, the information is in the possession of a body responsible, *inter alia*, for protecting general interests of a higher order relating to the protection of the environment when it exercises its own technical competence in the matter of planning approval. This is how the matter was presented by the referring court and on this point the parties are not in dispute. It follows from this premiss that the information in the possession of the public authority in question meets both of the criteria set out above: it constitutes a set of data and it is produced for the purpose of environmental protection. We are therefore clearly dealing with a measure designed to protect the environment.

17. It now remains to resolve the second question put by the referring court which relates to the exception laid down in the third indent of Article 3(2) of the Directive and, more particularly, to the concept of 'preliminary investigation proceedings'.

The views of the plaintiff and defendant are opposed on this matter. The former maintains, and the latter denies, that the concept also includes the phase preparatory to the formation of an administrative measure properly so called.

More specifically, the plaintiff maintains that the term 'preliminary proceedings' must be interpreted in the context of the sentence in which it appears. That sentence, thus read, provides for an exception only in the case of proceedings before a court. Thus, the plaintiff maintains, the preliminary investigation proceedings referred to by the Directive fall within the context of criminal investigation proceedings preparatory to proceedings before a court. In short, what is in point are administrative proceedings which precede and are designed to lead to the imposition of a penalty.

18. The defendant, for its part, rejects the plaintiff's argument on the ground that the concept of 'preliminary investigation proceedings' refers to administrative acts which are susceptible to subsequent judicial control. In support of this view, the defendant relies upon the declaration annexed to the minutes of the meeting of the Council and the Commission [7] in which it is stated that '*Le Conseil et la Commission notent que cette disposition s'applique aussi aux questions qui sont réglées administrativement avant d'être soumises aux tribunaux, par exemple par une amende*'. The exception in question, the defendant maintains, is intended essentially to protect an authority's freedom of decision in conducting a procedure the result of which is the production of an act which may be challenged before a court.

19. The Commission is of a different opinion. It interprets the exception in question in the light of the seventh recital in the preamble to the Directive which provides that 'in certain specific and clearly defined cases, it may be justified to refuse a request for information relating to the environment'. The Commission considers that the exception must therefore be construed narrowly, in conformity with the Court's case-law on derogations from the application of Community rules. The Court has indeed already made it clear that a derogating provision 'may not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure' and that 'the scope of the derogations ... must be determined in the light of the aims' pursued by the provision into which they are inserted. [8]

The Commission maintains that the term 'preliminary investigation proceedings' refers to a type of investigation which precedes court proceedings or an enquiry. The concept of preliminary investigation must be linked to the other cases mentioned in the paragraph in which the term at issue appears. On that basis, the Commission maintains, only investigation proceedings which are comparable or equivalent to proceedings before a court or to other enquiries, and which constitute the preceding phase of such proceedings or enquiries, are concerned here.

That interpretation is moreover also based upon a linguistic comparison with the other versions of the Directive and in particular with the English ('preliminary investigation proceedings'), the Italian ('azione investigativa preliminare'), the French ('instruction préliminaire'), the Spanish ('investigación preliminar') and the Portuguese ('investigação preliminar').

20. A further point raised by the Commission in support of its argument relates to the

7 — Council Document no 6888/90, ENV 136, of 5 June 1990.

8 — See Case C-116/91 *Foster and Others* v *British Gas* [1992] ECR I-4071 and Case C-335/94 *Mrozek and Jäger* [1996] ECR I-1573.

genesis of the provision in question. In this connection, the Commission points to the fact that Article 8 of the version of the Directive which was originally proposed contained a derogation relating to 'the secrecy of procedures brought before the courts'. The Economic and Social Committee then proposed, at paragraph 2.6.1 of its opinion [9] that 'investigative proceedings (i. e. proceedings involving the police and public prosecutors)' should also be included.

The Commission accordingly concludes that the objective underlying the provision in question is to exclude certain information affecting the normal process of justice. On the other hand, to permit information held in the context of the normal conduct of administrative procedures to be systematically withdrawn from the ambit of the Directive would be to go far beyond the objective pursued by the Community legislature. It follows, according to the Commission, that the provision at issue, on its true construction, makes it permissible to exclude from the duty of communication information relating to preliminary enquiry proceedings which precede one or other of the types of proceeding mentioned immediately beforehand in the text of the provision in question.

21. It is my opinion that the provision in question must be construed organically within the text of the Directive. However an immediate clarification is called for here. Information relating to proceedings before a court and held by judicial bodies is excluded from the application of the Directive not primarily by virtue of the provision which is relied upon by the parties and which the referring court asks this Court to interpret, but rather on the basis of the very concept of public authorities as laid down in Article 2(b) of the Directive. This provision expressly excludes from that definition 'bodies acting in a judicial ... capacity'.

22. Now that this point has been clarified, it remains to be determined which of the authorities required to comply with the Directive are entitled to the benefit of the exception at issue. The answer, in all truth evident enough, is that they are to be found within the wide range of administrative authorities. The exception at issue in the proceedings can thus only relate to information held by administrative authorities which do not act in a judicial capacity.

It is just as easy, next, to establish what information is concerned by referring, as the Commission has done, to the genesis of the provision and comparing the texts of the Directive as drafted in the various languages.

23. First, the provision excludes information held by public authorities which relates to

9 — Opinion on the proposal for a Council Directive on the freedom of access to information on the environment, Document 89/C 139/13 (OJ 1989 C 139, p. 47).

current judicial proceedings. It goes on to extend the exception to information relating to enquiries (including disciplinary enquiries) and ends with the term at issue 'preliminary investigation proceedings'. The positioning of that term is decisive: what are concerned are proceedings of a judicial or quasi-judicial nature or at least proceedings which will inevitably lead to the imposition of a penalty if the offence (administrative or criminal) is established.

In that context, the term 'preliminary investigation proceedings' cannot but signify proceedings which are capable of constituting an immediate, direct and functional prologue to one of the other types of proceeding listed immediately before it. Such a reading does not, in my view, present any difficulty and finds confirmation in the origin of the provision which, as mentioned above, was inserted at the suggestion of the Economic and Social Committee in order to exclude from the duty of communication information that is not formally the subject of judicial or quasi-contentious proceedings but which nevertheless constitutes the necessary prerequisite for them. In that regard, the example which the Economic and Social Committee itself mentions in brackets '(... proceedings involving the police and public prosecutors)', provides a striking confirmation and indeed, I dare to suggest, clear proof of this.

24. If, to the contrary, one were minded to ascribe to the term upon which the present dispute centres a broader meaning in order generally to exclude all procedures for the preparation of administrative measures and other acts on the part of public authorities, the Directive would lose the most important part of its substance and would be of no practical utility. If the Court were, perchance, to go on to find in favour of the defendant when it submits that all administrative acts fall within the ambit of the provision at issue, in that they are challengeable before a court, the Directive would then contain an illogical and paradoxical syllogism, since it would be *de facto* inapplicable to all the activities of public authorities whereas in a State based on the rule of law those activities are in any event subject to judicial control. Such an interpretation would, furthermore, conflict with the general principle of law which requires that legislative provisions be construed in such a way that they can be vested with their full meaning and that they do not become in practice illogical or inapplicable.

25. The line of interpretation I have followed finds support also, were it needed, in a comparative reading of the different linguistic versions of the Directive. As the Commission rightly pointed out, the expression used in the German version of the Directive, 'Vorverfahren', which is in itself somewhat misleading, clearly appears, when compared with the other language versions of the Directive, as necessarily referring to the group of activities which precede the other contentious or quasi-contentious proceedings mentioned in the provision at issue. What is in point is essentially administrative acts which arise from the need to obtain proof or to investigate a matter before the procedural phase properly so called has even

begun. In that sense, it is of no consequence that the preliminary investigation proceedings are antecedent only to proceedings of a genuinely judicial nature. The provision, even though it must be construed narrowly, as required by the canons of interpretation laid down by the Court in the case of Community provisions which derogate from precepts of general application, is intended to safeguard the interest of the administration and the parties (public or private, as the case may be) also in relation to an act connected with proceedings which may result in a penalty or to any other act designed to bring to light the existence of offences, even if these be of an administrative nature.

Understood in this way, the exception in question does not lend itself to systematically removing from the authority of the Directive the procedural administrative phase preparatory to the adoption of an administrative measure when the measure in question does not have the particular connotation of a penalty, to which I have referred earlier.

26. Finally, the defendant's observation as to the lack of direct effect of the provisions in question and as to their unsuitability as a basis for deciding the matter before the national court is wholly without merit. To dispel any doubt on this point, it will be sufficient to note first of all that the Directive imposed a deadline of 31 December 1992 for the transposition of its provisions into national law, that is to say, the date earlier than the one on which the facts of the case occurred. Equally decisive, secondly, is the point that the obligation to provide information relating to the environment is contained in a provision the terms of which are sufficiently clear and precise and constitute an unconditional obligation. Those characteristics therefore satisfy the criteria which, according to the case-law of the Court, [10] must be met for the provisions in question to produce direct effects. Nor, in this connection, can the objection, as raised by the defendant, be taken that the direct effects of directives cannot apply as between private individuals. The doctrine developed by the Court in the matter of the 'horizontal' direct effects of directives would not, it is true, permit the provisions of a directive to be relied on in relationships between private individuals where those provisions had not yet been or had been incorrectly transposed into national law. [11] However, in the present case, the defendant does not possess the status of a 'private individual' as defined in this connection by the case-law of the Court in similar cases. [12] We are concerned here with a public territorial body which is incorporated into the administrative structure of the State and with respect to which the provisions of the directive in point may, therefore, according to the doctrine established by the Court, be applied directly.

10 — See Case 8/81 *Becker* [1982] ECR 53.

11 — See Cases C-91/92 *Faccini Dori* [1994] ECR I-3325 and C-192/94 *El Corte Inglés* [1996] ECR I-1281.

12 — See Cases 103/88 *Fratelli Costanzo* [1989] ECR 1839 and C-188/89 *Foster and Others* v *British Gas* [1990] ECR I-3313.

V — Conclusion

27. In light of the foregoing, I propose that the questions submitted for a preliminary ruling by the Oberverwaltungsgericht Schleswig-Holstein be answered as follows:

(1) The statement of views given in development consent proceedings by a subordinate countryside protection authority participating in those proceedings as a representative of a public interest constitutes an 'administrative measure designed to protect the environment' and fall within the concept of 'information relating to the environment' within the meaning of Article 2(a) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information relating to the environment.

(2) The concept of 'preliminary investigation proceedings' within the meaning of the third indent of Article 3(2) of Directive 90/313/EEC includes proceedings before a court and contentious or quasi-contentious administrative proceedings in the nature of a preliminary investigation or of an enquiry which precede the imposition of a penalty, or administrative proceedings designed to establish facts which are of significance for penal purposes or constitute an offence.