Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 November 2014 [1]

Case C-570/13

Karoline Gruber

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Environment — Directive 2011/92/EU — Assessment of the effects of certain public and private projects on the environment — Construction of a retail park — Binding effect of an administrative decision not to carry out an environmental impact assessment — No public participation)

I – **Introduction**

1. Under Austrian law, neighbours affected by a project cannot challenge an official decision that the project does not require an environmental impact assessment, nor object to the permission given for the project on the basis that it ought to have been subject to such an assessment. The Court is now asked whether this is compatible with the EIA Directive. [2]

2. In this connection it is to be recalled that, in certain cases, the EIA Directive confers a right on individuals to require an environmental impact assessment to be carried out. Consequently, it needs to be ascertained whether Austrian law is compatible with that directive.

II – **Legal framework**

A – *The EIA Directive*

3. The fourth and fourteenth recitals in the preamble to the EIA Directive set out the objectives of environmental impact assessments so far as they concern the interests of individuals:

‘(4) In addition, it is necessary to achieve one of the objectives of the Union in the sphere of the protection of the environment and the quality of life.

…

1 — Original language: German.

2 — Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1). That directive was most recently amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1), which is, however, not applicable in the main proceedings.

(14) The effects of a project on the environment should be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.'

4. Article 1(2)(d) and (e) of the EIA Directive define the concept of public concerned:

'(d) "public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups;

(e) "public concerned" means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

5. With a view to implementing Articles 2(4) and (5) of the Aarhus Convention,[3] those definitions were inserted into the initial version of the EIA Directive by means of Directive 2003/35.[4]

6. Article 2 of the EIA Directive contains some fundamental provisions:

'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. Those 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. …

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

In that event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.

…'

3 — Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (OJ 2005 L 124, p. 4).

4 — 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).

7. Article 4 of the EIA Directive requires a determination to be made as to whether a project requires an environmental impact assessment. In the present case, Article 4(2) and (3) are relevant, which confer discretion on Member States:

‘2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination; or

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

Member States may decide to apply both procedures referred to in points (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.’

8. Article 11 of the EIA Directive contains a provision concerning access to the courts, which broadly corresponds to Article 9(2) of the Aarhus Convention and was also inserted by Directive 2003/35:

‘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.

…

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. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

…’

B – *Austrian law*

9. The decision as to whether an environmental impact assessment is necessary is governed by Paragraph 3(7) of the Law on Environmental impact assessments (Umweltverträglichkeitsprüfungsgesetz) 2000,[5] as in force at the material time for the present case[6] ('the LEIA 2000'):

'The authority shall, upon request by the project applicant, by a participating authority or by the ombudsman for the environment, determine whether a project requires an environmental impact assessment as provided for in this Federal Law … The decision shall be taken at first and second instance by administrative order within six weeks at each instance. The project applicant, the participating authorities, the ombudsman for the environment and the host municipality shall have the status of parties to the proceedings … The essential substance of the decisions, including the main grounds on which they are based, shall be appropriately disclosed or made available for public inspection by the authority. The host municipality may appeal against that decision to the Verwaltungsgerichtshof.'

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

10. Before the national courts, Ms Gruber contests the general development consent dated 21 February 2012 granted to EMA Beratungs- und Handels GmbH ('EMA') for the construction and operation of a trading and services complex ('retail park') with a total floor space of 11437.58 m^2. She objects in particular to the fact that no environmental impact assessment was carried out.

11. However, on 21 July 2010 the *Land* Carinthia had already decided that such an assessment was not necessary. This decision was notified to Ms Gruber only subsequently and after it had become final.

12. The Verwaltungsgerichtshof (Administrative Court) now refers the following questions to the Court of Justice:

'(1) Does EU law, in particular [the EIA Directive], in particular Article 11 thereof, preclude a provision of national law under which a decision finding that a particular project does not require an environmental impact assessment is also binding on neighbours who did not have the status of parties in the previous proceedings for a declaratory decision and can be relied on as against them in subsequent development consent proceedings even though they have the opportunity to raise their objections to the project in those consent proceedings (the objection in the main proceedings being that the effects of the project will pose a risk to the appellant's life, health or property or represent an unreasonable nuisance to her in the form of smell, noise, smoke, dust, vibration or otherwise)?

(2) If Question 1 is answered in the affirmative: does EU law, in particular the [EIA Directive], if applied directly, require that the binding effect referred to in Question 1 be invalidated?'

13. Written observations were submitted by Ms Gruber, EMA, the Republic of Austria and the European Commission, which except for EMA, each also made submissions at the hearing on 9 October 2014.

5 — BGBL No 697/1993.

6 — BGBL I No 87/2009.

IV – **Legal analysis**

A – *The applicable version of the EIA Directive*

14. EMA submits that in the main proceedings the applicable version of the EIA Directive is not the one referred to in the reference for preliminary ruling, namely Directive 2011/92, but the version in force as at 21 June 2010, that is at the time of the adoption of the decision that an assessment was not necessary.

15. However, EMA fails to recognise that the reference for preliminary ruling arises from an appeal against the development consent for the project granted on 21 February 2012. Contrary to the Commission's submission at the hearing, at that time Directive 2011/92 was already in force. Specifically, in accordance with Articles 14 and 15 it came into force twenty days after its publication on 28 January 2012, that is on 17 February 2012. And it did not contain any specific time-limit for implementation, as, by comparison with the version previously in force, it did not effect any substantive changes, but merely consolidated previous amendments and improved the presentation of the provisions.

16. Contrary to what EMA submits, this applies also for Article 2(3) and Article 10a of the older version, which correspond to Article 2(4) and Article 11 of the more recent version. Thus, Article 14(2) of Directive 2011/92 provides that references to the repealed directive shall be construed as references to Directive 2011/92 and shall be read in accordance with the correlation table in Annex VI.

17. *Because* the new version did not effect any substantive changes, it may also be applied without difficulty to the procedure which led to the grant of development consent on 21 February 2012, which was still on-going. In any event, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force.[7] This can be called into question only by substantive changes to procedural requirements[8] or specific transitional provisions.[9]

18. It follows that there is no reason to question the decision of the Verwaltungsgerichtshof to make a reference to the Court for a preliminary ruling in relation to Directive 2011/92.

B – *The first question*

19. The core of the present case lies in the first question referred. However, that question requires clarification (see below, 1.). The right to have an environmental impact assessment carried out will then be set out (see below, 2.), which is supported by a right to effective legal protection (see below, 3.), that is, however, not conferred on everyone but only on persons concerned (see below, 4.) Only for the sake of completeness is it necessary to consider the specific procedure for legal protection which is provided for by Article 11 of the EIA Directive (see below, 5.), as well as the possibility of making up for omitting an environmental impact assessment when applying specialist laws (see below, 6.), and finally EMA's submission that the present case concerns an exemption from the EIA Directive (see below, 7.)

7 — Judgments in *Meridionale Industria Salumi and others* (Cases 212/80 to 217/80, EU:C:1981:270, paragraph 9); *CT Control (Rotterdam) and JCT Benelux* v *Commission* (Cases C-121/91 and C-122/91, EU:C:1993:285, paragraph 22); and *Toshiba Corporation and others* (C-17/10, EU:C:2012:72, paragraph 47).

8 — See the judgments in ***Gedeputeerde Staten van Noord-Holland*** **(C**-81/96, EU:C:**1998:305, paragraph 23), and** *Križan and Others* (**C-416/10**, **EU:C**:2013:8, paragraph 94).

9 — See Article 3(2) of Directive 97/11/EC (OJ 1997 L 73, p. 5), and Article 3(2) of Directive 2014/52/EU (OJ 2014 L 124, p. 1), which each amend the EIA Directive.

1. Interpretation of the question referred

20. The Verwaltungsgerichtshof's question concerns whether EU law precludes the conditions in which a declaration that a project does not require an environmental impact assessment becomes legally binding. In order to give the referring court a useful answer, however, the question is to be understood as asking whether such a declaration is also binding on neighbours who were not entitled to challenge the decision through the courts.

21. Specifically, the Verwaltungsgerichtshof states that Paragraph 3(7) of UVP-G 2000 makes provision for a specific procedure for determining whether a given project requires an environmental impact assessment, which culminates in a declaratory decision. Only the project applicant, the participating authorities, the environmental ombudsman and the host municipality, as well as, according to the most recent case-law, certain non-governmental organisations, have the status of parties to those proceedings; residents in the neighbouring area to the project do not. This means that neighbours (such as Ms Gruber in this case) do not have a decision declaring an environmental impact assessment unnecessarily brought to their attention until the subsequent development consent proceedings. By that time, the decision has become binding for all the participants.

22. Clearly, it follows from this that while neighbours can object to a project being granted development consent, for example, on the ground that it breaches environmental standards such as limit values, they cannot complain that, in breach of the EIA Directive, no environmental impact assessment was carried out at all. Nor does it seem that they can challenge the decision not to carry out an assessment. [10]

23. It follows that what must be clarified is whether it is compatible with the EIA Directive that the decision that a project does not require an environmental impact assessment is binding on neighbours who were not entitled to challenge that decision before the courts.

24. For this purpose, in what follows it is necessary to discuss, first, the bases of a possible duty to carry out an assessment; then, legal protection against a decision not to carry out an assessment; and, finally, the class of entitled persons.

2. The bases of a possible duty to carry out an assessment

25. In the present case the duty to carry out an environmental impact assessment could arise under Article 2(1) as well as Article 4(2) and (3) of the EIA Directive, as EMA's project is to be regarded as an urban development project, including the construction of shopping centres and car parks, within the meaning of Annex II, No. 10(b).

26. Article 4(2) of the EIA Directive provides that for projects listed in Annex II which are likely to have significant effects on the environment, Member States shall determine whether the project shall be made subject to an environmental impact assessment, and shall make that determination through a case-by-case examination or thresholds or criteria set by the Member State.

10 — This is supported by the article by Wolfgang Berger, *UVP-Feststellungsverfahren und Rechtsmittelbefugnis; Revolution durch "Mellor"*? (2009) 25 Recht der Umwelt (Sonderbeilage Umwelt und Technik) 66, at p. 67, submitted by EMA as Annex 3.

27. As regards setting thresholds or criteria for determining whether such a project is to be made subject to an environmental impact assessment, Article 4(2)(b) of the EIA Directive does indeed confer a discretion on Member States. However, this discretion is limited by the duty in Article 2(1), to ensure that 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. [11]

28. Thus, the need for an environmental impact assessment can arise directly under Article 2(1) or Article 4(2) and (3) of, or indeed Annex II to, the EIA Directive, if the project falls within that annex and is likely to have significant effects on the environment. [12] The competent national authorities may also have to make an individual assessment of the question whether an environmental impact assessment is required having regard to the criteria [13] in Annex III to the directive. [14] This is the so-called preliminary screening.

3. Legal protection against the preliminary screening decision

29. As regards legal protection, the Court has already held that an individual may rely on the duty to carry out an environmental impact assessment under Article 2(1) in conjunction with Article 4 of the EIA Directive. [15]

30. It has also already held that, 'third parties, as well as the administrative authorities concerned' must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary. Furthermore, according to that case-law, interested parties must be able to ensure, if necessary through legal action, compliance with this screening obligation. That requirement may be met by the possibility of bringing an action directly against the decision not to carry out an EIA. [16]

31. The Government of Austria and EMA submit that the Court merely held that judicial supervision of the duty to undertake preliminary screening *might* mean the possibility of bringing an action directly against the decision not to carry out an EIA. [17] However, their view is that there is no duty to enable such an action.

32. However, this submission fails to recognise that in the sentence before the quote referred to by the Government of Austria and EMA the Court stated that interested parties *must* be able to ensure, if necessary through legal action, compliance with this screening obligation. [18]

11 — Judgments in *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraph 50); *WWF and Others* (*C-435/97, EU:C:1999:418*, paragraph 36); and *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraph 29).

12 — Judgments in *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraph 61); *Wells* (C-201/02, EU:C:2004:12, paragraph 65); and *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraphs 41 to 43).

13 — See judgment in *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraph 32).

14 — Judgment in *Mellor* (C-75/08, EU:C:2009:279, paragraph 51).

15 — Judgments in *Wells* (C-201/02, EU:C:2004:12, paragraph 61), and *Leth* (C-420/11, EU:C:2013:166, paragraph 32).

16 — Judgments in *Mellor* (C-75/08, EU:C:2009:279, paragraphs 57 and 58), and *Solvay and Others* (C-182/10, EU:C:2012:82, paragraphs 57 and 58).

17 — Judgments in *Mellor* (C-75/08, EU:C:2009:279, paragraph 58), and *Solvay and Others* (C-182/10, EU:C:2012:82, paragraphs 58).

18 — Judgments in *Mellor* (C-75/08, EU:C:2009:279, paragraph 58), and *Solvay and Others* (C-182/10, EU:C:2012:82, paragraph 58).

33. This decision is also logical, as EU law confers on persons concerned a right to an environmental impact assessment if the requirements of Article 2(1) in conjunction with Article 4 of the EIA Directive are met.[19] For that reason, the principle of effective legal protection, which is laid down in Article 47(1) of the Charter of Fundamental Rights of the European Union, requires that persons concerned have the possibility of bringing proceedings in order to subject the decision not to carry out an environmental impact assessment to judicial scrutiny.

34. Such judicial scrutiny could take place for example within the framework of an action against the preliminary screening decision or a challenge to the later decision on development consent. However, if it is not possible to challenge the preliminary screening decision directly, the decision not to carry out an environmental impact assessment must be capable of being challenged at the latest within the framework of a challenge to the development consent. It follows that the binding effect of a preliminary screening decision against those able to rely on Article 2(1) and Article 4(2) and (3) of the EIA Directive, but who are not entitled to challenge the preliminary screening decision before the courts, is incompatible with those provisions as well as with Article 47 of the Charter of Fundamental Rights.

4. Category of persons concerned

35. As regards who can rely on the duty to carry out an environmental impact assessment, the case-law is in part misunderstood. The Court often refers to 'interested parties',[20] but also sometimes simply to 'individuals',[21] or sometimes even generally to 'third parties',[22] and thus a potentially very wide category of possible right-holders. It is therefore not surprising that at the oral hearing the fear was voiced that allowing reliance on this duty would permit an *actio popularis*.

36. There is, however, no basis for such a fear.

37. Specifically, it is to be inferred from the EIA Directive that it can in fact concern only persons concerned. In particular, Article 6(3) and (4) provides that not everyone is to be involved in an environmental impact assessment but only 'the public concerned'. Article 1(2)(e) defines this as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. In that context Article 1(2)(d) of the EIA Directive provides that the public encompasses natural and legal persons.

38. It follows that in this sense the 'public concerned' cannot be restricted to persons recognised by Austrian law as parties to the preliminary screening procedure, namely the project applicant, the participating authorities, the environmental ombudsman and the host municipality, as well as certain non-governmental organisations.

39. Instead, neighbours too are members of the public concerned and for that reason are entitled to rely on the duty to carry out an environmental impact assessment if they are affected, or are at least likely to be affected, by the environmental decision-making.

40. However, EMA submits that Ms Gruber is not to be regarded as a neighbour who is affected, as she lives several kilometres from the project and is merely the owner of leased property that is close to it. Ms Gruber contended at the hearing that she also lives at that property.

19 — Apart from the cases cited in footnote 15 above, see the judgments in *Mellor* (C-75/08, EU:C:2009:279, paragraph 59), and *Solvay and Others* (C-182/10, EU:C:2012:82, paragraph 59).

20 — Judgments in *Mellor* (C-75/08, EU:C:2009:279, paragraph 58), and *Solvay and Others* (C-182/10, EU:C:2012:82, paragraph 58).

21 — Judgments in *Wells* (C-201/02, EU:C:2004:12, paragraph 61), and *Leth* (C-420/11, EU:C:2013:166, paragraph 32).

22 — Judgments in *Mellor* (C-75/08, EU:C:2009:279, paragraph 57), and *Solvay and Others* (C-182/10, EU:C:2012:82, paragraphs 57).

41. Even if EMA's submission were correct, it may be sufficient if the project's potential environmental effects on the property affected Ms Gruber's patrimony. The Court has already recognised that pecuniary damage, in so far as that damage is the direct consequence of the environmental effects of a project, is covered by the objective of protection pursued by the EIA Directive.[23] Should Ms Gruber suffer such damage, or at least be likely to suffer it, it follows that she would be affected by the decision-making for the purposes of Article 1(2)(e) of the EIA Directive. However, whether such effects are to be expected is ultimately a matter for the competent national authorities to determine by reference to all the relevant circumstances of the individual case.

42. The objection made by the Government of Austria, that at the time of the preliminary screening it is not foreseeable which persons will actually be affected, is also not convincing. As Ms Gruber also submits, this amounts to saying that at that time there is not sufficient information about the environmental effects of the project in order to make a preliminary screening decision. If that is the case, then the decision as to whether an assessment is necessary should not have been made at all at that time.

5. The legal protection conferred by Article 11 of the EIA Directive

43. The decision as to the binding effect of the decision whether to carry out an environmental impact assessment does not depend on the requirements of Article 11 of the EIA Directive, referred to in the request for a preliminary ruling.

44. This is because the present case does not concern a comprehensive assessment of the substantive and procedural legality of the decision which this provision enables. Instead, all that is to be decided is whether the binding effect of the preliminary screening decision can be relied on against a neighbour in proceedings challenging the development consent decision.

45. If the Court none the less regards Article 11 of the EIA Directive as relevant, its requirements are in any event satisfied.

46. EMA rightly submits that the decision on carrying out an environmental impact assessment does not require any public participation,[24] and concludes that Article 11 of the EIA Directive does not apply. This is because Article 11 concerns only measures which are subject to the directive's public-participation provisions. However, the question whether any public proceedings are required to be carried out is the central, fundamental provision concerning public participation. Observance of the duty to involve the public must therefore fall, at least as a preliminary question, within the scope of application of Article 11 of the EIA Directive.

47. This is confirmed by the origin of the reference to the provisions concerning public participation. Specifically, this point is intended to implement the minimum requirements of Article 9(2) of the Aarhus Convention, which provides that this right of review is to be available at least in respect of all measures which are subject to the provisions of Article 6 of the Convention. The latter provision applies to all decisions, acts or omissions concerning projects which are to be made subject to an environmental impact assessment. An incorrect decision not to assess a project would count as such a measure.

23 — Judgment in *Leth* (C-420/11, EU:C:2013:166, paragraphs 35 and 36).

24 — See my Opinion in *Križan and Others* (C-416/10, EU:C:2012:218, paragraphs 133 to 136).

48. A further requirement of Article 11 of the EIA Directive concerns the rights which may be asserted by an individual under Article 11. The Court has held that the national legislature is entitled to confine those rights to individual public-law rights. [25] However, the right of the public concerned to have an environmental impact assessment carried out is such an individual public-law right, and Member States may not deprive it of its effectiveness by refusing those entitled to it recourse to the courts.

49. The EIA Directive confers certain rights on persons concerned where a project is required to be submitted to an environmental impact assessment. In particular, they are entitled to be informed about the environmental effects of the project in question by means of a procedure laid down by the directive (Articles 5 and 6), and within this framework are entitled themselves to make representations (Articles 6 and 7). In addition, the results of the public participation must be taken into consideration in the decision concerning the project (Article 8), and the most important details of the decision concerning the project are to be made available to the public (Article 9).

50. These rights are not ends in themselves. First, they are intended to improve the decision concerning the project, as they are apt to improve the basis and the reasons for the decision. Second, the information obtained and published in this procedure assists persons concerned to enforce further rights which are granted by the substantive provisions on environmental protection — for example certain limit values for air quality. This information at least enables persons concerned to engage with the environmental effects of the project, for example by improving the protection of their property from noise. [26]

51. This is confirmed by the purposes of environmental impact assessments. The fourth and fourteenth recitals in the preamble to the EIA Directive indicate that it is intended to realise one of the objectives of the Union in the sphere of the protection of the environment and the quality of life. The effects of a project on the environment should be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life and to maintain the reproductive capacity of the ecosystem as a basic resource for life. [27] The Court has repeatedly mentioned protection of health against deleterious environmental effects as an (additional) [28] ground for enabling individuals to rely directly on applicable provisions of EU environmental law. [29]

52. In addition, it must be recalled that since being supplemented by Directive 2003/35, the EIA Directive has been intended to contribute to aligning EU law with the Aarhus Convention. For that reason, the EIA Directive, and in particular provisions inserted by Directive 2003/35 such as Article 1(2)(d) and (e), is to be interpreted in the light of, and having regard to, the purposes of that Convention. [30]

25 — Judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* ([Trianel], C-115/09, EU:C:2011:289, paragraph 45).

26 — See my Opinion in *Leth* (C-420/11, EU:C:2012:701, paragraphs 50 and 51).

27 — See the judgment in *Leth* (C-420/11, EU:C:2013:166, paragraphs 28; 29 and 34).

28 — On this point, see Kokott and Sobotta, *Rechtsschutz im Umweltrecht — Weichenstellungen in der Rechtsprechung des Gerichtshofs der Europäischen Union*, 2014 Deutsches Verwaltungsblatt 132.

29 — See, for example, judgments in *Janacek* (C-237/07, EU:C:2008:447, paragraph 37), and *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraph 94).

30 — Judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* ([Trianel], C-115/09, EU:C:2011:289, paragraph 41).

53. According to the seventh recital in the preamble to the Convention, every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations. According to the eighth recital, to be able to assert this right and observe this duty, citizens must be entitled to participate in decision-making and have access to justice in environmental matters. [31]

54. Thus, it is not permissible to interpret the EIA Directive so that the public concerned — including affected neighbours — has no right to require an environmental impact assessment to be carried out and to enforce that right before the courts.

6. A '*de facto* EIA' on the basis of subsequent objections

55. Finally, the Government of Austria relies upon the possibility mentioned in the reference for preliminary ruling of a '*de facto* EIA', which enables sufficient consideration to be given to environmental objections. According to the Verwaltungsgerichtshof, under national law the neighbours of an industrial facility have the right to argue that the effects of the project will pose a risk to their life, health or property and represent an unreasonable nuisance to them in the form of smell, noise, smoke, dust, vibration or otherwise.

56. In response to a question put at the hearing, the Government of Austria refined this submission to the effect that the relevant environmental effects of a project would be identified within the framework of specialist laws, and that in this way the public would be involved.

57. The Court has indeed recognised that in principle the requirements of an environmental impact assessment may be met by some other form of procedure. [32] Accordingly, it is not necessary to describe this assessment as an environmental impact assessment provided that *all* the requirements of the directive are fulfilled in one or more other procedures.

58. That means in particular, first, that all the information under Article 5 of the EIA Directive must be obtained, and rights to participate must be ensured *without restriction* for, in particular, all the public concerned, but also for other authorities under Articles 6 and 7. On this basis, all the direct and indirect effects of a project on the different aspects of the environment and the interaction between them must be identified and evaluated, in accordance with Article 3. [33] Article 8 also requires that the results of consultations and the information on environmental effects shall be taken into consideration in making the decision in relation to a project. Finally, the right of recourse under Article 11 must be available against the development consent, even though it is made without there having been a formal environmental impact assessment.

59. Accordingly, in the main proceedings the competent court must assess, if necessary, whether the application of specialist laws in fact fulfils all of these requirements in relation to the development consent. However, it would be surprising to find that they were, since, if they did, one could not explain why Austrian law did not provide for a parallel, formal environmental impact assessment designated as such, or why the Austrian authorities refused to apply it in the present case.

31 — On this point see the opinion of Advocate General Cruz Villalon in *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:422, paragraphs 96 and 98), and also Kokott and Sobotta, cited above, footnote 28, p. 136.

32 — Judgment in *Commission* v *Germany* ([Großkrotzenburg], C-431/92, EU:C:1995:260, paragraphs 43 to 45).

33 — On this point see *Commission* v *Ireland* (C-50/09, EU:C:2011:109, paragraph 37).

7. Whether there is an exemption from the EIA Directive

60. Finally, so far as EMA sees the Austrian provisions as exempting certain projects from the EIA Directive pursuant to Article 2(4), it is to be pointed out that the requirements for such an exemption are not fulfilled. It can be relied on only in exceptional cases for individual projects, and not for a number of projects defined by reference to threshold values. In addition, it is not apparent that the Government of Austria has, in accordance with Article 2(4)(a), considered whether another form of assessment would be appropriate, or whether the public and the Commission were informed in accordance with Article 2(4)(b) and (c).[34] Finally, not even the Government of Austria relies on that exemption in its submissions.

8. Interim conclusion

61. For those reasons, it is not compatible with Article 47 of the Charter of Fundamental Rights or with Article 2(1) or Article 4(2) and (3) of the EIA Directive for members of the public concerned to be held bound by a preliminary screening decision not to carry out an environmental impact assessment when they seek to challenge the development consent to a project on the ground that an environmental impact assessment ought to have been carried out, if they were not entitled before that time to challenge that preliminary screening decision.

C – *The second question*

62. By its second question the Verwaltungsgerichtshof seeks to ascertain whether EU law, in particular Directive 2011/92, if applied directly, require that the binding effect referred to in Question 1 be invalidated.

63. According to consistent case-law, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by individuals as against the Member State before the national court.[35]

64. It might be argued against direct effect that, in principle, Member States are free to choose to enable direct legal protection against the preliminary screening decision or to limit legal protection to the possibility of raising an incidental objection in the context of a challenge to development consent. Both possibilities appear to be compatible with EU law, and indeed one cannot simply exclude other possibilities too.

65. However, this discretion concerns merely the form in which legal protection is conferred, and not the result required, namely that the preliminary screening decision be subject to review by the courts.

66. Thus, this is a typical case of procedural autonomy conferred on Member States, and restricted by the principles of equivalence and effectiveness.[36] Moreover, it would be incompatible with the principle of effectiveness for the public concerned to be deprived of *every* opportunity to challenge a preliminary screening decision before the courts.[37] For if that were so, it would be practically impossible to enforce the right to have an environmental impact assessment carried out.

34 — As regards the necessity of these steps, see judgment in *Commission* v *Ireland* (C-392/96, EU:C:1999:431, paragraphs 84 to 87).

35 — See, for example, judgments in *Foster and Others* (C-188/89, EU:C:1990:313, paragraph 16), and *Napoli* (C-595/12, EU:C:2014:128, paragraph 46).

36 — Judgments in *Wells* (C-201/02, EU:C:2004:12, paragraph 67); *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103, paragraph 45); and *Leth* (C-420/11, EU:C:2013:166, paragraph 38).

37 — This conclusion is also reached by Berger in the article lodged by EMA, cited in footnote 10 above, p. 70 et seq.

67. It follows that Article 2(1) and Article 4(2) and (3) of the EIA Directive have direct effect to the extent that members of the public concerned cannot be bound by a preliminary screening decision when challenging through the courts the development consent for a project if there was no other opportunity available to them to challenge that preliminary screening decision.

V – **Conclusion**

68. I accordingly propose that the Court answer the questions referred for a preliminary ruling in the following terms:

(1) It is not compatible with Article 47 of the Charter of Fundamental Rights or with Article 2(1) or Article 4(2) and (3) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment for members of the public concerned to be held bound by a preliminary screening decision not to carry out an environmental impact assessment when they seek to challenge the development consent to a project on the ground that an environmental impact assessment ought to have been carried out, if they were not entitled before that time to challenge that preliminary screening decision.

(2) Article 2(1) and Article 4(2) and (3) of the Directive 2011/92 have direct effect to the extent that members of the public concerned cannot be bound by a preliminary screening decision when challenging before the courts the development consent for a project if there was no other opportunity available to them to challenge that preliminary screening decision.