OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 25 June 2009 [1]

I — Introduction

1. The Umweltsenat (Environment Tribunal), Austria, has referred for a preliminary ruling under Article 234 EC a question on the interpretation 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, [2] asking whether the overhead electrical power lines referred to in Annex I to the directive must be measured only by reference to the territory of each Member State concerned or by reference to their actual length, even where they extend over the borders of several Member States.

2. With that question as the backdrop, this case once again raises uncertainties concerning whether Austrian independent administrative tribunals (Senate) are judicial in nature. The Court has been seised on a number of occasions of references for preliminary rulings from Senate, which are enshrined in Articles 11(7) and 129 of the Austrian Constitution. Although the majority of those references were ruled admissible, there has been no shortage of critics who complain that the Senate are incompatible with Article 234 EC. Now it is the turn of the Umweltsenat, a quasi-judicial body which specialises in environmental matters, against whose decisions there is a right of appeal to the Verwaltungsgerichtshof (Administrative Court).

3. In my Opinion in *De Coster*, [3] I suggest an interpretation of Article 234 EC which restricts the dialogue between the courts of the Member States to those bodies which exercise a judicial function. In that way, I reject any opening-up of the preliminary-ruling procedure to bodies which are not part of the judicial system, to ensure that the underlying philosophy of that provision is not distorted. The reference for a preliminary ruling from the Umweltsenat will enable me to analyse that approach in more detail, with a view to supplementing the reasoning I put forward in that Opinion. My position is not to exclude all bodies that are outside the national judicial system from Article 234 EC. The *De Coster* Opinion seeks to bring some order to case-law which is extremely ambiguous. At the same time, I am aware that in a number of Member States there are bodies outside the court system whose function is substantively judicial. I shall address that point in the

1 — Original language: Spanish.
2 — OJ 1985 L 175, p. 40.
3 — Case C-17/00 [2001] ECR I-9445.

present case, since the Umweltsenat is part of a group of administrative bodies which, according to some writers, perform tasks equivalent to those of a court.

II — The facts

4. The Italian company Rette Elettrica Nazionale SpA and the Austrian company VERBUND-Austrian Power Gris AG drew up a joint project for the construction and subsequent operation of an overhead electrical power line with a power rating of 300 MVA. The project was to cover a total length of approximately 49 km, 41 km of which would be on Italian territory and around 7 km of which would be in Austria.

5. On 12 July 2007, Alpe Adria Energia SpA applied to the Austrian environmental authorities for a declaration under Paragraph 3(7) of the Umweltverträglichkeitsprüfungsgesetz 2000 (Austrian Law of 2000 on environmental impact assessment). The competent administrative authority was the Government of the Province of Carinthia which, on 11 October 2007, ruled that no environmental impact assessment ('EIA') was required because the length of the project on Austrian territory did not reach the threshold of 15 km laid down in Directive 85/337.

6. The Landesumweltanwalt von Kärnten (Environmental Ombudsman for the Province of Carinthia) appealed against that decision to the Umweltsenat, arguing that the directive is applicable to the instant case. He submitted that the reference measurement for a project with an environmental impact should not be limited to the territory of each Member State because it was necessary to assess the overall size of the project in issue. On 5 February 2008, Alpe Adria Energia SpA contested by letter the views put forward by the appellant before the Umweltsenat. The Umweltsenat stayed the main proceedings and submitted this reference for a preliminary ruling on interpretation under Article 234 EC.

III — Legal framework

A — *Community law*

7. Directive 85/337 is imbued with a preventive purpose and, by providing for the assessment of the effects of projects on the

environment, it seeks to prevent any damage caused by schemes and installations or by other interventions in the natural surroundings or landscape. That aim is made clear in Article 1, which is worded as follows:

‘Article 1

1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive:

“project” means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

…

“development consent” means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

…’

8. The preventive nature of an environmental impact assessment and the projects subject to the provisions of the directive are set out in Articles 2(1) and 4(1) thereof:

‘Article 2

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

and an assessment with regard to their effects. These projects are defined in Article 4.

Article 4

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

9. The procedural steps involved in an environmental impact assessment are set out in Articles 5 to 10 while the list referred to is included in Annex I, point 20 of which is of particular relevance to the present case:

'20. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.'

10. Where a project has a transboundary dimension or its effects transcend the territory of a Member State, Article 7 of the directive lays down the courses of action to be taken.

'Article 7

1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken,

and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to Article 6(3)(a) and (b).

3. The Member States concerned, each insofar as it is concerned, shall also:

(a) arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and

(b) ensure that those authorities and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.

4. The Member States concerned shall enter into consultations regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable time frame for the duration of the consultation period.

5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.'

B — *National law*

11. In Austria, there are specialised tribunals which are not part of the judicial system and against whose decisions an appeal may be

brought before the Verwaltungsgerichtshof. The Federal Law on the Constitution ('Basic Law') expressly provides, inter alia, for the establishment of the Umweltsenat in Article 11(7):

'In the matters referred to in point 7 of paragraph 1, it shall be for the independent Umweltsenat to take decisions once levels of executive review in each province have been exhausted. The independent Umweltsenat, composed of the chairman, judges and other legally qualified members, shall be instated at the competent Federal Ministry. The establishment, responsibilities and procedure of the Tribunal shall be regulated by federal law. Its decisions shall not be open to annulment or amendment on appeal; an application to the Verwaltungsgerichtshof shall be admissible.'

12. The Umweltsenat was established in 1993 and is governed by the Bundesgesetz über den Umweltsenat (Federal Law on the Umweltsenat; 'USG 2000').

13. According to Paragraph 1 of the USG 2000:

'1. An Umweltsenat shall be set up at the Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Ministry of Agriculture, Forestry, the Environment and Water Management).

2. The Umweltsenat shall consist of 10 judges and a further 32 legally qualified members...'

14. In accordance with Paragraph 4 of the USG 2000:

'Members of the Umweltsenat shall carry out their functions independently and are not bound by any directions.'

15. Paragraph 5 of the USG 2000 is worded as follows:

'The Umweltsenat shall rule on appeals in matters set out in the first and second chapters of the Umweltverträglichkeitsprüfungsgesetz 2000 (Austrian Law of 2000 on environmental impact assessments; "UVP-G 2000") [4] ...'

4 — BGBl I No 697/1993, last amended by BGBl I No 153/2004.

16. Paragraph 6 of the USG 2000 provides:

'Decisions handed down by the Umweltsenat may not be set aside or varied by administrative action. An application to the Verwaltungsgerichtshof shall be admissible.'

17. The UVP-G 2000 transposes Directive 85/337 into Austrian law. The conditions for carrying out an EIA of certain projects are contained in Paragraph 3(1):

'1. The projects listed in Annex I and modifications to such projects shall undergo an environmental impact assessment in accordance with the following provisions. The simplified procedure shall be applied to projects that are listed in columns 2 and 3 of Annex I …'

18. The term 'project' is defined in Paragraph 2(2) of the UVP-G 2000:

'A project is the construction of an installation or scheme or any other intervention in the natural surroundings and landscape, including all measures connected geographically and factually with the foregoing. A project may encompass one or more installations, schemes or interventions if they are connected geographically and factually.'

19. The headings in the tables in Annex I to the UVP-G 2000 refer to projects which are subject to an EIA. Columns 1 and 2 in the annex show projects subject to an EIA, in respect of which an EIA procedure (column 1) or a simplified procedure (column 2) must be carried out. Column 3 shows projects which are required to undergo an EIA only if certain conditions are satisfied.

20. In point 16, column 1, point (a), refers to 'overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km'. Also in point 16, column 3, point (b), includes 'overhead electrical power lines in category A or B protected areas with a voltage of 110 kV or more and a length of more than 20 km'.

IV — The question referred for a preliminary ruling

21. By order of 2 May 2008, the Umweltsenat made a reference for a preliminary ruling on interpretation, in accordance with

Article 234 EC. After briefly indicating that the requirements of that article are satisfied (in particular, that the referring body has the status of a court or tribunal), the Umweltsenat addresses the following question to the Court:

'Is Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment... to be interpreted as meaning that a Member State must provide for an obligation to carry out an assessment in the case of types of projects listed in Annex I to the directive, in particular in point 20 (construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km), where the proposed scheme is to extend over the territory of two or more Member States, even if the threshold giving rise to the obligation to carry out an assessment (here, a length of 15 km) is not reached or exceeded by the part of the scheme situated on its national territory but is reached or exceeded by adding the parts of the scheme proposed to be situated in a neighbouring State?'

22. The order from the Umweltsenat was registered at the Court of Justice on 19 May 2008. Observations were lodged, within the time-limit laid down in Article 23 of the Statute of the Court, by Alpe Adria Energia SpA, the Environmental Ombudsman for the Province of Carinthia and the Commission.

23. Neither the Commission nor the parties to the main proceedings requested a hearing within the period laid down for that purpose and therefore the case became ready for the preparation of this Opinion on 24 April 2009.

V — Admissibility

24. The question referred by the Umweltsenat once again raises uncertainties about the competence of Austrian independent bodies to submit references under Article 234 EC. Although no one has addressed this point in these preliminary-ruling proceedings, it is necessary to examine it because of the importance of such bodies in the Austrian judicial structure. The Court has ruled on the judicial nature of these bodies on a number of occasions but not always with the same outcome. Against that background, it is appropriate to restate the case-law and put forward a number of considerations which will help to elucidate it.

A — *The definition of 'court or tribunal' in Article 234 EC and bodies which are not part of the judicial systems of the Member States*

25. In *Vaassen-Goebbels*, [5] the Court held that a body with competence to submit a reference for a preliminary ruling must be defined in accordance with Community criteria and not pursuant to national law. On that premiss, the Court laid down the well-known criteria which require that a court or tribunal be established by law and be permanent, that its procedure be inter partes and its jurisdiction compulsory and that it apply rules of law. As I explain in my Opinion in *De Coster*, those criteria have become distorted over time, to the extent that they encompass a diverse amalgam of institutions which is not always in keeping with the judicial spirit underlying Article 234 EC.

26. The relaxation of the case-law has caused a number of difficulties which the Court has yet to overcome. As a result of opening up the preliminary-ruling procedure to bodies with functions similar to those of a court or tribunal, the procedure has been made available to bodies which are not part of the judicial system of a Member State. That outcome is not entirely negative because each national system allocates judicial authority according to its own culture and customs, and Community law must respect that arrangement. However, such an approach raises the risk of involvement in the preliminary-ruling dialogue of quasi-judicial bodies which do not have a judicial function. This delicate balance has been upset a number of times, as it was in *Gabalfrisa*, [6] in which the Court admitted a reference from a Spanish tribunal económico-administrativo (economic and administrative court). The present case entails a similar risk in connection with Austrian Senate, which are not part of the ordinary judicial structure.

27. In those circumstances, the question referred by the Umweltsenat offers the Court the chance to set out its rules in more detail. I should also like to take this opportunity to develop the view I put forward in my Opinion in *De Coster*, and to call on the Court to lay down a stricter and more consistent body of rules for cases in which bodies that invoke Article 234 EC are not connected to the judicial system. I will venture to suggest a number of criteria for safeguarding the dialogue between courts provided for by Article 234 EC, to ensure the continued existence of that dialogue and, consequently, its continued accessibility for those who are entrusted with the task of resolving *inter partes* disputes.

1. The institutional importance of the national courts in the process of integration and the role of the preliminary ruling

28. As I argue in my Opinion in *De Coster*, the expansion of the procedure under Article 234 EC beyond judicial borders gives

5 — Case 61/65 [1966] ECR 261.

6 — Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577.

rise to serious difficulties which must be criticised. [7] While not wishing to repeat myself, I would like to draw attention to a number of considerations which are particularly relevant in the light of developments in case-law.

29. It is unnecessary to emphasise the strategic role of the national courts in the enforcement of Community law. By drafting Article 234 EC and keeping it unaltered for more than half a century, the founding fathers of the European Union and their successors were committed to strengthening the institutional voice of an authority of the Member States: the judiciary. That is not an innocent choice, as history demonstrates. The European Union has been described as an integration *of law*, *through the law*, attesting to the crucial role of the courts at European Union constitutional level. [8] The reference for a preliminary ruling is procedural confirmation of that truism. Given that it embodies an authority founded on independence, on its relationship with the law and on the resolution of disputes, the judiciary has a singular voice which is isolated from the political sphere and linked only to the will of the law. [9] By granting special powers to national courts, the Treaties sought to strengthen the authority of a young legal order which was created for an unprecedented international organisation.

30. The success of this mechanism is obvious. As a result of the dialogue between courts, the genetic features of the new legal order took shape one by one: direct effect, [10] primacy, [11] accountability, [12] effectiveness, [13] and equivalence, [14] and many others which have shaped the Union's legal system. [15] Further, since they are bodies which are independent and have the means of enforcing judgments, the application of Community law has benefited from the authority conferred by impartiality. [16]

31. The strategic significance of the national courts is lost when bodies of an administrative nature, which are subject to the authority of the executive branch and do not have the status of a court, are included in the preliminary-ruling dialogue. Although a number of these administrative bodies exercise powers similar to judicial powers, it is not appropriate to conceal the true face of the public administration because it replicates a type of procedure which bears a slight resemblance to court proceedings. That complaint becomes more serious in view of the fact that the decisions of such quasi-courts are usually subject to appeal before the genuine

7 — Points 75 to 79.

8 — In a classic work, Robert Lecourt identified the elements of a Community governed by the rule of law as one provision, one judge and one authority — a clear trinomial which accords special status to the national courts (*L'Europe des juges*, Bruylant, Brussels, 1976, p. 221).

9 — Dubos, O., *Les juridictions nationales, juge communautaire*, Dalloz, Paris, 2001, p. 723.

10 — Case 26/62 *Van Gend en Loos* [1963] ECR 1.

11 — Case 6/64 *Costa* v *ENEL* [1964] ECR 585, and Case 106/77 *Simmenthal* [1978] ECR 629.

12 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

13 — Case 8/77 *Sagulo and Others* [1977] ECR 1495.

14 — Case C-231/96 *Edis* [1998] ECR I-4951.

15 — A number of writers have asserted that the history of cooperation between courts is the history of European integration. Martinico, G., *L'integrazione silente. La funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo*, Jovene, 2009, p. 138. As Dubos, O., op. cit., p. 74, rightly states with regard to the judgments in *Van Gend en Loos* and *Costa* v *Enel*: 'Si le Président Lecourt a pu s'interroger sur ce qu'aurait été le droit des Communautés sans les arrêts de 1963 et 1964, il convient encore une fois de rappeler que ces arrêts fondateurs comme tant d'autres, ont été rendus suite à une question préjudicielle, et que l'article 234 est un indice de l'immédiateté et de la primauté du droit communautaire. Dès lors qu'eût été le droit des Communautés sans l'article 234?'

16 — Dehousse, R., *The European Court of Justice*, MacMillan, London, 1998, pp. 109 to 114.

courts of the State. Given that Article 234 EC confers a preferential right of dialogue on an authority of the State, it makes no sense to extend the provision to include in the dialogue other bodies whose decisions may perhaps reach the courts anyway. For those reasons, in my Opinion in *De Coster* I propose an exception to the general rule in situations where no further legal remedy can be pursued against an administrative decision, [17] in which case the extension of Article 234 EC to other situations is wholly justified in order to avoid the risk of impairing the consistency and uniformity of Community law and infringing the fundamental right to effective legal protection.

32. Therefore, the authority of the Community order bears a strong judicial component. It is not an exaggeration to regard the Court of Justice as having ultimate responsibility for Community law thanks to the national courts.

33. The Court has not always responded consistently to the concerns raised. The desire to introduce order into the case-law appeared to take root after the *De Coster* Opinion, but there is still a certain lack of direction in the course currently steered. Although two references for a preliminary ruling from bodies closely connected to the administrative authorities were ruled inadmissible in *Schmid* [18] and *Syfait*, [19] that was on the grounds that those bodies had only faint characteristics of independence. There is no indication in those judgments that the Court acted in the interests of the institutional balance required by Article 234 EC, although a lot of imagination is needed to detect such restraint.

34. Nevertheless, there is a certain harmony between my Opinion in *De Coster* and the current state of the case-law. I propose to explain that symbiosis, while running the risk of incorrectly interpreting the primary intention of the Court.

2. The *Vaassen-Goebbels* criteria from a constitutional perspective

35. Article 234 EC provides for a dialogue between courts for the purpose of ensuring the uniform application of Community law in all the Member States. [20] The Court has allowed highly disparate bodies to participate in that dialogue, leading to an excessively broad interpretation of the *Vaassen-Goebbels* judgment. Despite the difficulties referred to above, there is a certain amount of justification for that situation. The judicial system in a Union composed of 27 Member States reflects a wide variety of criteria and objectives. It is difficult to conceive of a blueprint setting out a

17 — Opinion in *De Coster*, points 87 to 95.
18 — Case C-516/99 [2002] ECR I-4573, paragraph 34.
19 — Case C-53/03 [2005] ECR I-4609, paragraphs 31 to 35.

20 — Mancini, G.F., *Democracy and Constitutionalism in the EU*, Hart, Oxford-Portland, 2001, p. 23, expresses it with clarity, pointing out the strategic role of the reference for a preliminary ruling in the Community judicial structure: 'it seems indisputable that the only way of preventing Community law from disintegrating as a result of divergent interpretations — and thus losing its validity or rather its nature as law — was to safeguard as much as possible the role of helmsman conferred upon the Court by Article [234]'.

common description of the judiciary in so many countries, a factor which has led to such a generic and broad interpretation of the criteria laid down in the *Vaassen-Goebbels* judgment. [21] Moreover, in some legal systems, administrative justice is linked to the executive branch in the interests of the separation of powers. No one would argue that the French Conseil d'État, an essential body in the development of contemporary public law, does not have the status of a 'court or tribunal' for the purposes of Article 234 EC. However, in the division of power undertaken by successive French constitutions, the Conseil d'État has never become part of the judicial branch. Something similar occurs in those States which do not have a specialised administrative jurisdiction and instead have tribunals which are not part of the judiciary, albeit with purely formal procedural links to the administrative authorities. [22]

36. The reason why the Court included those courts in the preliminary ruling dialogue was not to increase the number of references but rather to protect the institutional autonomy of the Member States. In other words, the Court extended Article 234 EC in an effort to involve the common constitutional traditions in the creation of a European judicial dialogue. I disagree with those who argue that behind this case-law lurks the desire of the Court to control the number of cases which may be brought before it. If there were a kind of 'docket control', the rule could turn against the Court and flood it with cases. I believe that behind the case-law lies the intention to respect and show a certain deference to the concept of judicial function in each Member State. It is clear from that background that there is a need to maintain a balance between the strictly judicial nature of references for a preliminary ruling and the division of power in each Member State.

37. It is therefore appropriate to reiterate the considerations set out in the *De Coster* Opinion, while adding certain qualifications so that their significance is clear.

3. A proposal which is consistent with the case-law

38. In order to work towards a solution, I propose to explain in clear terms the role, after more than half a century in existence, of

21 — I have described the need to reconcile the functioning of the system with the judicial nature of the dialogue provided for in Article 234 EC. Ruiz-Jarabo Colomer, D., *El juez nacional como juez comunitario*, Civitas, Madrid, 1993, pp. 71 and 72. See also Chalmers, D., Hadjiemmanuil, C., Monti, G. and Tomkins, A., *European Union Law*, Cambridge University Press, 2006, p. 293.

22 — Among many others, the United Kingdom Immigration Adjudicators (Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209), professional disciplinary bodies (Case 246/80 *Broekmeulen* [1981] ECR 2311), the German Federal Public Procurement Awards Supervisory Board (Case C-54/96 *Dorsch Consult* [1997] ECR I-4961), and tax commissions (*De Coster*).

Article 234 EC. I intend to qualify certain of the consequences arising from my Opinion in *De Coster* [23] in order to steer them in a direction which is more consistent with the course taken by the Court.

(a) The general rule: a dialogue between courts under the conditions laid down in the *Vaassen-Goebbels* judgment

39. The starting point for the analysis is the judicial nature of the preliminary-ruling relationship. Before focusing on the conditions laid down by the *Vaassen-Goebbels* judgment, it is necessary to establish whether the referring body is part of the judicial system of the Member State concerned. Subsequently, the Court of Justice examines the requirements of establishment by law, permanence, whether the proceedings are inter partes, compulsory jurisdiction and the application of rules of law. For the reasons put forward in points 35 and 36 of this Opinion, those criteria have not been defined particularly rigorously. As I argue in my Opinion in *Roda Golf*, the preliminary ruling procedure is framed as cooperation between courts. [24] It is, therefore, a constructive relationship *between courts* and not *between proceedings*, which explains why, once the participants in that cooperation have been established, the approach has been more flexible [25]

40. Accordingly, bodies which are not part of the judicial system of a Member State do not have competence to seek a preliminary ruling. However, there are two crucial exceptions to that rule which I will examine next.

(b) First exception: where there is no remedy before the courts

41. As I explain in *De Coster*, where a quasi-judicial body adopts decisions which are not subject to appeal before the courts proper, there must be compliance with the fundamental right to effective judicial protection and also with the principles of uniformity and consistency in the application of Community law. [26] In those circumstances, the Court of Justice must give a reply to a body charged with resolving a dispute where there are no subsequent methods of review, to ensure that the decision adopted by that body is not incompatible with Community law.

42. In contrast to what occurs in the dialogue between courts, it is important to add that the *Vaassen-Goebbels* conditions must be imposed rigorously in that situation. That rigour is very different from what is required in respect of courts or tribunals which are part of the judicial system. It is reasonable that such a well-known exception to Article 234 EC should be offset by greater strictness in the fulfilment of the criteria inherent in the definition of a court or tribunal. That

23 — My Opinions in Case C-195/06 *Osterreicher Rundfunk* [2007] ECR I-8817 and Case C-393/06 *Ing. Aigner* [2008] ECR I-2339.

24 — Case C-14/08, judgment pending.

25 — Opinion cited in previous footnote, points 51 to 53.

26 — Opinion in *De Coster*, points 83 to 86.

approach is confirmed by case-law, since the Court has held, even where there was no appeal to a court or tribunal, that a non-judicial body which did not satisfy minimum rules of independence was not entitled to make a reference for a preliminary ruling under Article 234 EC. [27]

(c) Second exception: the allocation of judicial duties to quasi-judicial bodies in accordance with a rule which, by virtue of form or content, is constitutional

43. There is a second exception to the general rule which indisputably follows more closely the direction of case-law. It is clear that the Court has traditionally had no qualms about admitting references for a preliminary ruling from bodies situated outside the judicial system of a Member State. That situation is particularly evident in administrative systems, where the methods of review by the courts vary widely.

44. Contemporary European administrative law is the result of the revolutionary process which took place in France at the end of the 18th century, when legal scrutiny of the administrative authorities was founded on an inflexible interpretation of the separation of powers. [28] To the extent to which giving judgment on the administrative authorities could also constitute a form of administration, a system of administrative justice spread throughout Europe in parallel to the judiciary (since otherwise that branch would become executive power) but did not become part of the public administration in order to protect the principle of independence. Professor García de Enterría described it with great mastery, stating that 'over the initial use of the principle of separation a specific system of administrative justice finally appeared... which was established at the outset as a review carried out by specialised bodies within the administration itself and not by external, independent courts... The embodiment of that mechanism in what immediately became known as the contentious administrative system was the work of Napoleon himself, who was a greater legislator than he was a military commander'. [29]

45. From that concept of justice, a specific, independent jurisdiction developed, whose task was to ensure that the administrative authorities were made subject to the law: that system has survived to this day with its main original features intact. [30]

27 — Order of the Court in Case C-109/07 *Pilato* [2008] ECR I-3503, on the question of whether or not the prud'homie de pêche de Martigues was a court or tribunal despite the fact that it was not part of the French court system. The Court rightly carried out a meticulous analysis of the *Vaassen-Goebbels* conditions and ruled the proceedings inadmissible.

28 — On the revolutionary process and its effect on the French justice administration, see the classic work by Seligman, E., *La Justice en France pendant la Révolution, 1789–1792*, Plon, Paris, 1913.

29 — García de Enterría, E., *Las Transformaciones de la Justicia Administrativa: de excepción singular a la plenitud jurisdiccional. ¿Un cambio de paradigma?*, Thomson-Civitas, Madrid, 2007, pp. 37 and 38.

30 — On the historical development of this system in Europe up to its present-day use, see Bouineau, J., *Traité d'histoire européenne des institutions. XVI–XX siècle*, Vol. II, Litec, Paris, 2009.

46. It is not the only administrative-law model in Europe but it is an important example and a precursor of modern-era administrative law which has found broad acceptance in many Member States: France, the Netherlands, Belgium, Italy and Greece have opted for a pure separation model, while other States, such as Germany, Austria, the Czech Republic, Poland and Lithuania have created autonomous court systems that are separate from the ordinary court system which traditionally deals with civil and criminal cases. [31] Accordingly, it is understandable that when the Court of Justice has been seised of references for a preliminary ruling from administrative courts of that nature it has admitted them without any objections.

47. Underlying that assessment is a view which has served as a driving force in the interpretation of Article 234 EC. By making the preliminary-ruling procedure more flexible, the Court confirms the importance of constitutional decisions adopted by the Member States. By opening the gates of the dialogue between courts to bodies outside the judicial system in the strict sense, the Court acknowledges that the Member States have sovereignty to define the composition and the distribution of powers as they are framed in their constitutions. If a Member State allocates judicial duties to quasi-judicial bodies and confirms that allocation when such a body is established, that is an expression of will closely linked to national identity and national constitutional autonomy which the Court must respect. [32] Accordingly, Article 234 EC provides for a communication channel with national authorities which *constitutionally have the power to dispense justice*. In some Member States that role is entrusted exclusively to the judiciary while in others it is divided between a number of bodies, in a lawful configuration of institutional organisation which Community law does not question.

48. After that brief explanation of the origin of administrative courts, I will now focus on the second exception to the general rule, which states that a quasi-judicial body is competent to refer questions for a preliminary ruling if it carries out judicial duties in accordance with a rule which, by virtue of form or content, is constitutional.

49. As I state at point 42 of this Opinion, that variation of the general principle must be counterbalanced by a stricter application of the *Vaassen-Goebbels* criteria. Since it is outside the judicial system and is governed

31 — Fromont, M., *Droit administratif des États européens*, PUF, Paris, 2006, pp. 120 to 135.

32 — In accordance with Article 6(3) EU, the Court has shown such respect for the constitutional traditions of the Member States on many occasions, inter alia in the judgments in Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207 and Case C-36/02 *Omega* [2004] ECR I-9609. See also the Opinion of Advocate General Poiares Maduro in Case C-213/07 *Michaniki* [2008] ECR I-9999 and Berranger, T., *Constitutions nationales et construction communautaire*, LGDJ, Paris, 1995, pp. 249 to 492.

by different procedural rules, the referring body might not adhere to the conventional practices of proceedings. Accordingly, it is necessary for the Court to carry out a more rigorous review of the criteria set out above, in particular the criterion of independence, in order to ensure that the underlying aim of Article 234 EC is not distorted; that requirement was established in the recent case-law of the Court and explains the outcome of the proceedings in *Schmid* and *Syfait*.

4. Corollary

50. Article 234 EC provides for a dialogue between courts which only allows for exceptions in specific circumstances. The first is where there is no remedy before a national court, and the second is where, notwithstanding the fact that it is a quasi-judicial body, the referring body is entrusted with judicial duties in accordance with a rule which, by virtue of form or content, is constitutional. In both cases, the *Vaassen-Goebbels* criteria must be applied strictly so that the foundations of the preliminary-ruling procedure, a crucial mechanism in the development of Community law, are not undermined.

51. That interpretation of Article 234 EC, which is firmly rooted in the case-law of the Court, brings advantages in other fields which warrant some reconsideration. In accordance with the principle of the primacy of Community law, where there is a conflict of laws, there is an obligation to disapply national law. In *Fratelli Costanzo*, [33] the Court confirmed the extension of that principle to public administrations, which are also required to refrain from applying national rules that are incompatible with Community rules. [34] Despite the criticism, that rule has become settled and was upheld in cases such as *CIF* [35] and *Ciola*. [36] The main objection raised against it is derived from the preliminary-ruling mechanism laid down in Article 234 EC, since it is unlikely that an administrative authority which lacks competence to seek a preliminary ruling would, nevertheless, have an obligation to disapply provisions of national law. A national court can always count on the Court of Justice to assist it with interpretation under the preliminary-ruling dialogue, but the administration must act without such assistance. [37]

52. That conflict would be resolved if the Court were to limit the scope of the *Fratelli Costanzo* judgment to bodies which are competent to submit references to it. Article 234 EC, as it has been interpreted,

33 — Case 103/88 [1989] ECR 1839.

34 — 'It would... be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply those provisions' (judgment in *Fratelli Costanzo*, paragraph 31).

35 — Case C-198/01 [2003] ECR I-8055, paragraph 49.

36 — Case C-224/97 [1999] ECR I-2517, paragraph 26.

37 — Alonso García, R., criticises that approach in *Derecho comunitario. Sistema constitucional y administrativo de la Comunidad Europea*, Centro de Estudios Ramón Areces, Madrid, 1994, pp. 332 and 333. Bobek, M., 'Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member Status', *Review of European Administrative Law*, Vol. 1, No 1, 2008, pp. 62 and 63, also questions the viability of *Fratelli Costanzo* in the new Member States.

permits quasi-judicial bodies to participate in the preliminary-ruling dialogue. If the right to refrain from applying rules that are incompatible with Community law were restricted to bodies which are competent to refer questions for a preliminary ruling, the risks inherent in the *Fratelli Costanzo* judgment would disappear. The uncertainty generated by that decision, resulting from the practical difficulties of extending the right to disapply national rules to bodies governed by the principle of administrative hierarchy, would be reduced to its due proportions. Thus, the issue of primacy of Community law would be confined to the judicial sphere, in the same way as the primacy of the constitution or of the law, thereby ensuring that no officials refuse to carry out the instructions they receive or to disregard the administrative rules which govern their decision-making powers. [38]

53. Having described the current guiding the Court's interpretation of Article 234 EC, and the advantages of steering it on a new course, it is now necessary to analyse the application to the referring body of the criteria set out above.

B — *Application to the Umweltsenat of the case-law on the definition of 'court or tribunal'*

54. The Umweltsenat is one of the collegiate bodies referred to in Article 133(4) of the Austrian Constitution. That provision provides for an exception to the general rule conferring jurisdiction on the Verwaltungsgerichtshof, to the effect that independent bodies may hear appeals against decisions adopted by the administration. In addition, Article 11(7) of the Constitution expressly recognises the Umweltsenat, although that fact does not remove it from the classification enshrined in Article 133(4).

55. The Verfassungsgerichtshof (Austrian Constitutional Court) has interpreted restrictively the power to establish independent administrative bodies, on the grounds that they constitute a derogation from the principle that jurisdiction to determine actions against the administration rests with the Verwaltungsgerichtshof. [39] However, the Verfassungsgerichtshof has imposed substantive conditions on such bodies with a view to making their functions more like those of a court than an administrative review body. Sound evidence of that is the fact that, among other requirements, the tribunals set up under Article 133(4) must comply with Article 6 of the European Convention on Human Rights

38 — Bobek, M., op. cit., finds that, from the point of view of the separation of powers, there is something 'deeply disturbing' underlying the *Fratelli Costanzo* case-law.

39 — Judgments of 14 October 1987, B267/86 (VfSlg. 11.500); 24 February 1999, B1625/98-32 (VfSlg. 15.427); 29 June 2000, G175/95 (VfSlg 15.886); and 13 June 2001, G 141/00 (VfSlg 16.189).

and the case-law of the European Court of Human Rights on that article.

56. The Umweltsenat was established in 1993 as an independent tribunal of the kind referred to in Article 133(4) of the Austrian Constitution, in order to rule on appeals brought against decisions adopted by the environmental authorities under the first and second parts of the UVP-G 2000. It is composed of 42 members, 10 of whom belong to the judiciary and 32 of whom are legally qualified experts; their mandate is irrevocable and they benefit from all the safeguards of impartiality.

57. The internal operation of the Umweltsenat is similar to that of an ordinary court, in that there are objective rules governing the allocation of cases, although the president has specific powers to assign the role of rapporteur and to appoint a third member of the tribunal. [40] Deliberations are secret and the members are bound by complete confidentiality. [41]

58. The procedure of the Umweltsenat is governed by the general provisions of the Verwaltungsverfahrensgesetz (Law on administrative procedure; 'AVG'), and the special provisions laid down in the USG 2000. An appeal must be lodged with the respondent administrative authority within four weeks of notification of the decision, [42] the effects of which are suspended *ex lege* unless there is express provision to the contrary. [43] The right of appeal rests with anyone who participated in the administrative proceedings and with a number of institutions referred to in the UVP-G 2000. [44] The procedure, which is mainly written, is governed by the rule that both parties shall be heard, and the tribunal may hold a hearing of its own motion or at the request of one of the parties. [45] Although there is no requirement that those entering an appearance must have legal representation, any party appearing may be assisted by a lawyer. [46]

59. The Umweltsenat has unlimited jurisdiction. Although its decisions have the characteristics of an administrative act, they have the force of *res judicata*, they must state reasons, they are delivered in open court, they are enforceable, and they may be contested only before the Verwarltungsgericht. [47]

60. According to the criteria set out in points 54 to 59 of this Opinion, the Umweltsenat is a body which is not part of the Austrian judicial system, even though it is explicitly recognised in the Austrian constitution. Article 133(4) and Article 11(7) of the Austrian Basic Law assign judicial duties to

40 — Paragraphs 9 and 10 of the USG 2000.
41 — Paragraph 67f(2) of the AVG.
42 — Paragraph 40(2) of the UVP-G 2000.
43 — Paragraph 64(1) of the AVG.
44 — Paragraph 19(1) of the UVP-G 2000.
45 — Paragraph 67d(1) of the AVG.
46 — Paragraph 10 of the AVG.
47 — With the sole exception of a possible appeal to the Verfassungsgerichtshof, but only on the grounds of infringement of a constitutional provision.

bodies situated outside the basic judicial structure, albeit that they have substantive features which make the performance of their duties similar to those of an ordinary court. As I explain in point 49 of this Opinion, where judicial duties are allocated to quasi-judicial bodies, the *Vaassen-Goebbels* conditions must be applied with the utmost rigour. It follows from the rigorous application of those conditions that the Umweltsenat satisfies the following requirements: it is established by law, it is permanent, its procedure is inter partes, its jurisdiction compulsory and it applies rules of law. A highly significant, although not conclusive, piece of evidence is the fact that the Austrian Constitutional Court requires the Umweltsenat to observe the procedural safeguards laid down in Article 6 of the European Convention on Human Rights.

61. For all the reasons set out, it is my view that the Umweltsenat, in its capacity as a quasi-judicial body which carries out judicial duties, is formally recognised in the Austrian constitution and complies strictly with the criteria laid down in the *Vaassen-Goebbels* judgment. Accordingly, the referring court is fully competent to make a reference for a preliminary ruling under Article 234 EC.

VI — Substance

62. The uncertainty raised in this case warrants a simple, categorical reply. Essentially, the Umweltsenat asks whether measurement of a transboundary project subject to Directive 85/337 must take into account only the distance covered in each Member State or the entire physical length of the project. The practical consequences of the decision which the Court adopts are significant: if the Court opts for the first approach, an EIA which affects more than one country would have to be split in respect of each one, as though there were separate projects; if the Court chooses the second approach, the environmental impact assessment would refer to the project as a whole, irrespective of borders, which will require cooperation between the national authorities.

63. As the Commission rightly points out in paragraph 20 of its observations, the situation raised in the instant case refers only to the obligation to assess the environmental impact and not to the content or the effects of such an assessment. To express it clearly, the proceedings concern a dispute about jurisdiction to establish whether administrative supervision is required. Therefore, it is necessary to determine the 'projects' to which Directive 85/337 refers, the areas in which its thresholds must be applied and the authority responsible for carrying out the preventive administrative duties laid down in the directive.

A — *The definition of 'projects likely to have significant effects on the environment' in Directive 85/337*

64. As a basis for its environmental policy, the European Community asserted that the best

form of public intervention in the sector 'consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects'. [48] That was the aim behind the adoption of Directive 85/337, which harmonises the administrative procedures which make up the assessment of the effects of certain projects on the environment. The philosophy of the directive is expressed in Articles 2 and 4, which provide for an assessment to take place before projects are executed, dividing them into two groups: projects with an indisputable impact (listed in Annex I) which must always be made subject to an assessment, and projects with less serious effects (listed in Annex II) which must be monitored in accordance with the criteria established by each Member State, taking into account the criteria listed in Annex III. [49]

65. Because of the cost of an EIA, Directive 85/337 defines in detail the projects listed in Annex I. In Annex II, the specifications of each category are set out in more general terms but the Member States must give a comprehensive description of the circumstances in which an EIA is required. [50] It is no surprise that the Court has interpreted restrictively the latitude available to each national legislature, in order to ensure that Annex II is not distorted by excessively vague or superficial domestic criteria. Accordingly, the description in Directive 85/337 of each type of project is highly specific, so that the national authorities cannot rely on the ambiguity of the provision to evade their assessment obligations.

66. That high level of detail is, however, accompanied by a broad description of the 'projects' covered by Directive 85/337. Thus, according to Articles 1(2) and 2(1), projects are 'construction works or... other installations or schemes' and 'other interventions in the natural surroundings and landscape'. The picture is completed by the requirement that an EIA must be carried out when such projects are 'likely to have significant effects on the environment by virtue inter alia, of their nature, size or location'. Finally, Annex IV sets out the information which the developer must supply to the competent authority so that the relevant assessment may be carried out. [51]

67. A number of consequences arise from that combination of requirements.

48 — First recital in the preamble to Directive 85/337. On the preventive aims of European environmental policy, see Jans, J.H. and Vedder, H.H.B., *European Environmental Law*, 3rd ed., Europea Law Publishing, Groningen, 2008, pp. 40 to 42.

49 — Annex III refers to the 'characteristics of projects', their 'location', and the '[c]haracteristics of the potential impact'; each section also includes criteria which reduce the discretion of the Member State to establish their own criteria.

50 — On that point see the judgments in Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50; Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 65; Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 36; Case C-474/99 *Commission* v *Spain* [2002] ECR I-5293, paragraph 31; judgment of 16 March 2006 in Case C-332/04 *Commission* v *Spain* [2006] ECR I-40, paragraph 76; and Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 53.

51 — Annex IV states that there must be a description of the project, an outline of the main alternatives studied, a description of the aspects of the environment affected, and a description of the likely significant effects. In addition, the developer must supply a description of the measures for reducing any significant adverse effects on the environment and a summary of any difficulties encountered by him in compiling the required information.

68. First, the projects referred to in Annexes I and II must be interpreted in the light of Articles 1(2) and 2(1) of Directive 85/337, since the detailed list of projects is framed within a broader legal framework and the specific provisions must be applied consistently with the more general ones. [52] Accordingly, the reference in point 20 of Annex I to the construction of 'overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km' concerns such projects where they have 'significant effects on the environment by virtue inter alia, of their nature, size or location'.

69. Second, in the context of the foregoing, the general definition is very helpful for the purposes of establishing the limitations on projects, that is, projects listed in Annex I by reference to production levels, [53] storage capacities [54] and length, [55] criteria which are also known as 'environmental impact thresholds'. [56] The specifications which determine each type of project act as thresholds of that kind which, in turn, establish whether there is an obligation to carry out an EIA in accordance with Articles 5 to 10 of Directive 85/337. Given that they are characteristics which reduce the scope of the legislation, they must be interpreted in accordance with two rules: first, the criterion for interpretation which requires that derogations must be construed restrictively, [57] and, second, in the light of the overall effects which the project entails, with particular regard to Article 2(1) of the directive which refers to the 'nature', 'size' and 'location' of a project. Those criteria are construed in a manner in keeping with the overall effects of a project on the environment. Accordingly, where Annexes I and II set thresholds based on one of those characteristics, Directive 85/337 is consistent as a whole and refers to the same situation as that set out in Article 2(1).

70. Third and finally, it is necessary to avoid interpretations which render meaningless other provisions of Directive 85/337. In accordance with that rule, a galvanised and territorially fragmented interpretation impedes the effectiveness of Annex IV. As I observed in point 66 of this Opinion, the annex lists the information which the project developer must supply. The list refers, amongst other particulars, to 'the physical characteristics of the whole project', [58] an estimate 'of expected residues and emissions... resulting from the operation of the proposed project', [59] and a description of 'the aspects of the environment likely to be significantly affected, by the project'. [60] It is difficult to imagine that those obligations would be fulfilled if only the sections of the project situated on the national territory of the authority responsible for carrying out the EIA were taken into account. The 'physical characteristics of the whole project' are investigated by assessing the overall situation rather than just the national situation. It is

52 — That approach constitutes a requirement of consistency in legislative texts as a whole, which the Court laid down, inter alia, in its judgments in Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, paragraphs 21 to 30, and Case C-225/91 *MATRA* v *Commission* [1993] ECR I-3203, paragraph 41.

53 — Points 1, 2, 5 and 18(b).

54 — Points 10, 12, 13, 15, 18(b) and 21.

55 — Points 7, 8, 16, 19 and 20.

56 — Moreno Molina, A.M., *Derecho comunitario del medio ambiente. Marco institucional, regulación sectorial y aplicación en España*, Marcial Pons, Madrid, 2006, p. 201.

57 — Judgments in Case 7/68 *Commission* v *Italy* [1968] ECR 617; Case C-6/98 *ARD* [1999] ECR I-7599, paragraphs 9 to 31; and Case C-321/96 [1998] ECR I-3809, paragraph 25.

58 — Point 1, first indent, of Annex IV.

59 — Point 1, third indent, of Annex IV.

60 — Point 3 of Annex IV.

only possible to evaluate seriously the potential for pollution when all of the residue is taken into account and not just the amount of pollution in each State.

71. In addition, there are further reasons which support a broad interpretation of the concept of 'project', and which are not derived solely from Directive 85/337 but also from the case-law of the Court.

B — *The splitting of projects subject to an EIA in case-law*

72. Although this case raises for the first time the question whether a national border limits the projects which are subject to Directive 85/337, there are other examples in the case-law of Member States proposing to split projects subject to an assessment in order to circumvent Community law. There are no precedents relevant to the dispute which has arisen in these proceedings but guidance may be found in the judgments concerning extensions to projects, partial execution of works in the context of transport networks, and successive works carried out over a period of time. In all those cases, the Court advocated a broad interpretation of Directive 85/337 and rejected efforts to limit its scope.

73. In *Commission* v *Spain*, [61] the Court was seised of a complaint concerning the absence of an EIA in a project for a 13 km railway line linking the towns of Las Palmas and Oropesa. The project formed part of a larger project known as the 'Mediterranean Corridor', a 251-km-long railway line along the Spanish coast from Tarragona to Valencia. The Spanish Government argued that only the section concerned was subject to an assessment and that its length could not be classified as a '[line] for long-distance railway traffic', in accordance with point 7 of Annex I to Directive 85/337. The Court rejected that argument outright on the grounds that the effectiveness of the directive would be seriously compromised, since 'the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division'. [62] Moreover, in his Opinion, Advocate General Poiares Maduro points out that large projects, such as the one in issue in that case, are usually executed in several stages. [63] If the Spanish Government's arguments had

61 — Case C-227/01 [2004] ECR 8253.

62 — Judgment in *Commission* v *Spain*, paragraph 53.

63 — In point 48 of his Opinion, the Advocate General states: 'As a railway line 251 km long is constructed in stages, if Spain's reasoning were followed it would mean that a specific project would never be regarded as involving long-distance traffic because the successive sections of the line would all cover small distances and would connect neighbouring places. Adopting this interpretation of the Directive would be likely to restrict its scope considerably and to jeopardise the attainment of its objective.'

been accepted, it would have excluded from the scope of Directive 85/337 not only the railway line in issue but also a huge number of the public works undertaken by the Member States.

74. The difficulties raised by projects that are divided into a number of temporary sections were highlighted in *Wells*, [64] *Commission* v *United Kingdom* [65] and *Barker*, [66] in which the Court reiterated the need to assess such projects as a whole. In order to preclude the subject-matter of a project from being distorted by splitting it into a number of administrative stages, thereby leading to a failure to apply Directive 85/337, the Court held that an EIA 'must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.' [67] In short, the review obligation laid down in Directive 85/337 does not allow for any loose ends and the different administrative stages of a project must not impede the achievement of the directive's aims.

75. A similar situation arises where an EIA has not been carried out because a project which is in principle not subject to an environmental assessment involves a modification or an extension of another project which is referred to in the annexes to Directive 85/337. That situation arose in *Abraham and Others*, [68] in which individuals living in the vicinity of Liège-Bierset airport brought an action against the developers carrying out the extension of the airport in order to enable it to be used 24 hours per day and 365 days per year. Point 7 of Annex I to the directive referred to the '[c]onstruction … of airports with a basic runway length of 2 100 m or more'. However, the directive does not lay down any provisions concerning the extension of an airport, particularly where such an extension does not alter the size of the runway. In that connection, the proposed project was for the modification of the airport's infrastructure, the construction of a control tower, new runway exits and aprons, and work to restructure and widen the runways without altering their length. The Court was aware that such a project would have serious effects on the environment and that the requirement to carry out an EIA would be circumvented on the pretext that there was no alteration of the length of the runway. The Court, with an overall assessment criterion and with a view to ensuring the effectiveness of Directive 85/337, held that 'works to modify an airport with a runway length of 2 100 metres or more thus comprise not only works to extend the runway, but all works relating to the buildings, installations or equipment of that airport where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself'. [69]

76. The judgments cited reflect a concern to prevent the splitting of a project from affecting the obligation to carry out an EIA. By requiring a *comprehensive* assessment of projects, the Court concluded that an environmental impact is a phenomenon without lengths, production levels or storage

64 — Case C-201/02 [2004] ECR I-723.
65 — Case C-508/03 [2006] ECR I-3969.
66 — Case C-290/03 [2006] ECR I-3949.
67 — *Barker*, paragraph 48.
68 — Case C-2/07 [2008] ECR I-1197.
69 — Paragraph 36.

capacities. In *Ecologistas en Acción-CODA*, the Court reiterated that 'the purpose of... Directive [85/337] cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment'. [70]

77. That expression of that concern appears repeatedly in the case-law, as a well-known rule in all cases relating to Directive 85/337. Thus, the Court emphasises that its 'scope... is wide and its purpose very broad'. [71] It is specifically for that reason that circumvention of the provisions of the directive would breach the principle of consistency, in particular when failure to carry out an EIA results in the approval of projects with potentially harmful effects on the environment.

78. Accordingly, given that a project listed in Annex I to Directive 85/337 is governed by the provisions of the directive where it is executed in a number of stages, where the administrative procedure comprises several procedures, or where it is modified, the same occurs where a project is split between the territories of more than one Member State. In any event, before concluding, it is appropriate to consider the effect of the territorial factor on the application of Directive 85/337.

70 — Case C-142/07 [2008] ECR I-6097, paragraph 44.

71 — *Kraaijeveld and Others*, paragraph 31; *WWF and Others*, paragraph 40; *Commission* v *Spain*, paragraph 46; and *Abraham*, paragraph 32.

C — *National borders as a restriction on EIAs*

79. The walls in Europe bear witness to a dramatic common past. The European Communities were created specifically to demolish barriers and fences, in the belief that borders represent obstacles to growth, development and communication, and to coexistence among peoples. 'We unite people, not States', asserted Jean Monnet, describing the integrationist driving force behind his plan. In that joint project, the physical division between countries gradually disappeared until fusion was enshrined with the entry into force of the Schengen Agreement. [72]

80. Given that individuals, goods, services and capital are able to move around the European Union without restrictions, it would be paradoxical to restore those barriers in the case of a phenomenon like pollution which, by its very nature, disregards countries

72 — **Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders** (OJ 2000 L 239, p. 19), concluded on 19 June 1990 in Schengen, Luxembourg.

and continents. Accordingly, since Community environmental policy entails the tackling of pollution in different States and since that campaign cannot be waged from one location, it would be inconsistent to split projects subject to an EIA by reference to the territory in which they take place.

81. That assertion is supported by Directive 85/337, Article 7 of which sets out the methods of inter-State cooperation where a project affects a number of Member States. The same premiss may be deduced from the Espoo Convention of 25 February 1991 on environmental impact assessment in a transboundary context. [73] Article 7 of Directive 85/337 complies with the provisions of that convention and, in paragraphs 1 and 2, provides for a Member State to participate in an EIA procedure commenced in another State, on the grounds that the project affects the former Member State. [74] The wording of the provision does not allow for that method of cooperation alone. On the contrary, where a project is undertaken jointly by a number of States, each one must carry out its own EIA and must cooperate with the other States in their procedures. In the absence of a Europe-wide assessment, there must be cooperation between the Member States. [75]

82. However, that joint action must involve the use of common criteria, such as a single, global definition of 'project', since, otherwise, the cooperation would be reduced to a sham and the obligations laid down in Directive 85/337 would be circumvented during projects. In the present case, it must be assumed that the obligatory EIA was carried out in Italy because, in that Member State, the project covers a distance of more than 15 km. The reason for my concern becomes clear if one imagines a situation such as that in the instant case, but with a difference: a transboundary project with a total length of 29 km, of which 14.5 km is to be carried out in each Member State. According to Annex I, an EIA would not be required in either Member State, leading to the risk that the whole project would be exempt from any kind of review, thereby demonstrating the worrying consequences of the view put forward by Alpe Adria Energia.

83. I am, therefore, of the opinion that a national boundary does not constitute a restriction with regard to the definition of

73 — An instrument to which the European Community acceded by Council Decision of 15 October 1996 on the adoption of the Convention on environmental impact assessment in a transboundary context (unpublished).

74 — That assertion follows from Article 7(2), which provides that, if a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the Environmental Impact Assessment procedure, the Member State in whose territory the project is intended to be carried out is, if it has not already done so, to send to the affected Member State the information gathered pursuant to Article 5. Article 7 provides for a situation in which a project takes place in a single Member State but has effects on a neighbouring country or countries.

75 — Otherwise it would make little sense to create a Community environmental policy. Based on the experiences of federal states, the Community drew up an environmental agenda on this subject, which aims to avoid the difficulties inherent in the plurality of laws and to ensure that the policy is applied at territorial level. The United States model is highly significant, since, like the Community, it adopts harmonised legal instruments calling for the cooperation of the individual states. Hall, N.D., 'Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy', *Harvard Environmental Law Review,* No 32, 2008, and Revesz, R.L., 'Environmental Regulation in Federal Systems', *Yearbook of European Environmental Law*, Oxford University Press, 2000, pp. 10 to 14.

the projects referred to in Directive 85/337. Accordingly, a Member State must lay down an obligation to carry out an assessment of the projects listed in Annex I to the directive, in particular in point 20, where the proposed scheme is to extend over the territory of two or more Member States, even if the threshold giving rise to the obligation to carry out an assessment is not reached in the section carried out on its territory but is reached by adding the section planned on the neighbouring State or States.

VII — Conclusion

84. In the light of the foregoing considerations, I suggest that the Court should reply to the question referred for a preliminary ruling by the Umweltsenat, declaring that:

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment is to be interpreted as meaning that a Member State must provide for an obligation to carry out an assessment of the projects listed in Annex I to the directive, in particular in point 20, where the proposed scheme is to extend over the territory of two or more Member States, even if the threshold giving rise to the obligation to carry out an assessment is not reached in the section situated on its territory but is reached by adding the section planned on the neighbouring State or States.