Reports of Cases

OPINION OF ADVOCATE GENERAL
Bobek
delivered on 10 January 2017 [1]

Case C-529/15

Gert Folk
v
Unabhängiger Verwaltungssenat für die Steiermark

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Administrative Court, Austria))

(Directive 2004/35/EC — Environmental liability — Operation of a hydroelectric power plant — Authorisation and operation before the transposition period of the directive — Temporal scope of application — Definition of environmental water damage — National law excluding damage covered by an authorisation — Exclusion of adverse effects where Article 4(7) of Directive 2000/60/EC applies — Access to justice in environmental matters — Standing for review procedures — Persons affected or likely to be affected)

I – **Introduction**

1. In 1998, a hydroelectric power plant was authorised on the river Mürz in Austria. It has been operational since 2002. Dr Folk ('the Applicant') holds fishing rights for both banks of the river downstream from the power plant. According to the Applicant, the operation of the power plant causes significant and repeated short-term variations in the water level. Some areas that are submerged under water consequently dry up rather rapidly. This leads to separation of the outlet areas from the current of the river, rendering it impossible for small and young fish to follow the downstream flow. The fish die.

2. The Applicant submitted a complaint to the competent authorities. However, his application was rejected on the basis that the operation of the power plant is covered by an authorisation. The referring court — the Austrian Verwaltungsgerichtshof (Administrative Court, Austria) — poses a series of questions pertaining to three issues. The first concerns the temporal scope of application of Directive 2004/35/EC (the Environmental Liability Directive, 'ELD'). [2] The second is whether the definition of environmental damage in Austrian law is in line with the ELD, as with regard to water it excludes any damage that is 'covered by an authorisation'. The national court also asks about the role

1 — Original language: English.

2 — Directive of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56) as amended by Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 (OJ 2006 L 102, p. 15) and by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 114).

of Article 4(7) of Directive 2000/60/EC (the Water Framework Directive, 'WFD')[3] in the definition of 'water damage' under the ELD. The third is whether a national provision that prevents persons with fishing rights from initiating a review procedure is compatible with provisions governing the access to justice of private parties under the ELD.

II – **Legal framework**

A – *EU law*

1. The Environmental Liability Directive

3. Article 2(1)(b) of the ELD (in the version applicable to the main proceedings) specifies that 'environmental damage' means 'water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies'. According to Article 2(5) of the same directive, '"waters" mean all waters covered by Directive 2000/60/EC'.

4. Article 12(1) of the ELD, entitled 'Request for action', reads as follows:

'Natural or legal persons:

(a) affected or likely to be affected by environmental damage, or

(b) having a sufficient interest in environmental decision-making relating to the damage or, alternatively,

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

shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

What constitutes a "sufficient interest" and "impairment of a right" shall be determined by the Member States.

…'

5. Article 13 of the ELD, which concerns 'Review procedures', states that:

'1. The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.

2. This Directive shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.'

3 — Directive of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1).

6. Article 17 of the ELD, entitled ‘Temporal application’, provides that directive shall not apply to:

‘– damage caused by an emission, event or incident that took place before the date referred to in Article 19(1),

— damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19(1) when it derives from a specific activity that took place and finished before the said date,

— damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred.’

2. The Water Framework Directive

7. Article 4(7) of the WFD provides that Member States will not be in breach of that directive when:

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‘— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

— failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.’

B – *Austrian law*

8. The ELD has been implemented at the federal level in Austria by the Bundes-Umwelthaftungsgesetz (Federal Law on Environmental Liability, 'B-UHG').[4] According to Paragraph 4(1)(a) of the B-UHG, 'environmental damage' includes 'any significant damage to water, that is to say, any damage that has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential, as defined in the 1959 Wasserrechtsgesetz (Law on matters relating to water, 'WRG'[5]), of the waters concerned … and that is not covered by an authorisation granted pursuant to the [WRG] …'.

9. According to Paragraph 11 of the B-UHG:

'(1) Natural or legal persons whose rights may be breached by environmental damage that has occurred may, by way of written complaint, request the district administrative authorities responsible for the area in which the alleged environmental damage has occurred to take action pursuant to Paragraphs 6 and 7(2). …

(2) For the purposes of the first sentence of subparagraph (1), rights include...

2. in relation to water: existing rights within the meaning of Paragraph 12(2) of the [WRG] …'

III – **Facts, procedure and questions referred**

10. The company Wasserkraftanlagen Mürzzuschlag GmbH runs a hydroelectric power plant on the river Mürz with an outlet area of 1 455 m. The Applicant has fishing rights on both banks of the river Mürz downstream from the power plant along a stretch which is approximately 12 km long.

11. The power plant was authorised to operate by decision of the Landeshauptmann von Steiermark (Governor of the *Land* of Styria) in 1998. It has been in operation since 2002.

12. On 29 September 2009, the Applicant lodged an environmental complaint with the Bezirkshauptmannschaft Mürzzuschlag (Mürzzuschlag District Administration) following the procedure in Paragraph 11 of the B-UHG. He submitted that the hydroelectric power plant has caused significant environmental damage, which has disrupted the natural reproduction of fish. Significant short-term variations in the water level lead to the areas under water drying up rapidly, which in turn leads to separation of the outlet areas from the current of the river. This makes it impossible for small and young fish to follow the downstream flow. It repeatedly causes fish to die along extended stretches of the river. The Applicant alleged that this is attributable to the absence of a bypass channel at the power plant and to the power plant's mode of operation.

13. The Mürzzuschlag District Administration and, subsequently, the Unabhängiger Verwaltungssenat für die Steiermark (Independent Administrative Chamber for the *Land* of Styria) ('the UVS'), rejected the Applicant's complaint. The UVS's decision dated 15 May 2012 was essentially based on the fact that the Governor of the *Land* of Styria had granted authorisation for the operation of the hydroelectric power plant. That decision also prescribed reservoir volumes. Therefore the alleged damage was covered by an authorisation made pursuant to the WRG. For that reason there was no environmental damage, in line with Paragraph 4(1)(a) of the B-UHG.

14. The Applicant contests the decision of the UVS before the Verwaltungsgerichtshof (Administrative Court, Austria), the referring court. He alleges that the B-UHG is incompatible with the ELD: not every authorisation granted under the WRG should exclude environmental damage.

4 — BGBl. I, No 55/2009 of 19 June 2009.

5 — BGBl. No 215/1959 of 16 October 1959, as subsequently modified.

15. In this context, the referring court decided to stay proceedings and to refer the following questions for a preliminary ruling:

‘(1) Does [the ELD] apply also to damage which, although it arises after the date specified in Article 19(1) of [the ELD], none the less results from the operation of a facility (a hydroelectric power station) authorised and brought into operation prior to that date and is covered by an authorisation granted under the law governing matters relating to water?

(2) Does [the ELD], in particular Articles 12 and 13 thereof, stand in the way of a national provision which precludes persons holding fishing rights from initiating a review procedure within the meaning of Article 13 of [the ELD] in relation to environmental damage as defined in Article 2(1)(b) of the Directive?

(3) Does [the ELD], in particular Article 2(1)(b) thereof, preclude a national provision which excludes damage that has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential of the water in question from the notion of “environmental damage”, in the case where that damage is covered by an authorisation granted under a national legislative provision?

(4) If Question 3 is answered in the affirmative:

In cases where, in the granting of an authorisation under provisions of national law, no assessment has been made of the criteria laid down by Article 4(7) of [the WFD] (or of the national measures implementing it), is, for the purpose of determining whether environmental damage within the meaning of Article 2(1)(b) of [the ELD] has arisen, Article 4(7) of [the WFD] to be applied directly, and is it necessary to determine whether the criteria laid down by that provision are satisfied?’

16. The Applicant, the Austrian Government and the Commission have submitted written observations. The Applicant and the Commission participated in the oral hearing held on 19 October 2016.

IV – **Assessment**

17. This Opinion is structured as follows. First, I shall examine the temporal scope of application of the ELD (A). Second, I shall analyse the two questions that concern the definition of ‘environmental damage’. In particular, I shall examine whether the exclusion provided for in Austrian law concerning damage ‘covered by an authorisation’ is in line with the definition of water damage under Article 2(1)(b) of the ELD (B). Then I shall address the question relating to the exclusion contained in that definition of the ‘adverse effects where Article 4(7) of the WFD applies’ (C). Finally, I shall discuss the issue of the standing of holders of fishing rights (Articles 12 and 13 of the ELD) (D).

A – *First question — temporal application of the ELD*

18. By its first question, the referring court asks whether the ELD applies to damage which has arisen *after* the transposition date of that directive, but that results from the operation of a hydroelectric power plant authorised and brought into operation *prior* to that date.

19. Member States should have transposed the ELD into national law by 30 April 2007 (Article 19(1) of the ELD). There are three temporal refinements, or rather exclusions to this, added by Article 17 of the ELD. The first indent of Article 17 of the ELD, relevant for the circumstances of the present case, provides that that directive shall not apply to ‘damage caused by an emission, event or incident that took place before the date referred to in Article 19(1)’.

20. The referring court points out that the power plant was authorised in 1998 and has operated since 2002. Both of these dates are prior to 30 April 2007. However, the damage is alleged to have occurred after that date. The referring court queries whether the first indent of Article 17 of the ELD (transposed by Paragraph 18 of the B-UHG) applies. It has doubts as to what constitutes an 'event' or an 'incident' in the context of damage brought about by the operation of a hydroelectric power plant. According to the referring court, if the 'event' or 'incident' were the bringing into operation of the hydroelectric power plant, the ELD would not be applicable.

21. The Applicant submits that the 'event' or 'incident' which causes the damage is not the bringing into operation of the power plant. It is the repeated occurrence of the event (the stopping of the turbine) which happens several times a year, and which has continued occurring after 30 April 2007. The Austrian Government submits that the determining element in order to interpret the first indent of Article 17 is whether the damage was caused before or after the expiration of the transposition deadline. As a consequence, the ELD applies to any damage that is still being produced after 30 April 2007, caused by the operation of the power plant, which was authorised and set up before that date. According to the Commission, Article 17 makes clear that the 'event' giving rise to the damage 'results' from an 'activity', but it does not equate the event with the activity.

22. Thus, the referring court and parties that submitted written observations to the Court propose various relevant points in time: (i) the authorisation date; (ii) the bringing into operation of the power plant; and (iii) the individual (repetitive) events — namely the stopping of the turbine which causes fluctuations in the water level. The referring court seeks to ascertain which of those three points in time is the 'event' or 'incident' to which the first indent of Article 17 refers.

23. As I see it, there is little doubt that the relevant 'event' or 'incident' relates to the third category: the actual physical changes in the water level of the river, which appear to be the immediate and necessary reason for the alleged damage.

24. This is supported by the Court's case-law, from which it follows that the first and second indents of Article 17 of the ELD, read in conjunction with its recital 30, entail that that directive applies to damage caused by an emission, event or incident having taken place on or after 30 April 2007, 'where the damage derives from activities which took place on or after that date or from activities which took place before that date, but were not brought to completion before that date'.[6]

25. Thus, both *continued* events as well as *repetitive* events causing damage after 30 April 2007 are caught by the ELD. It is for the national court to ascertain, with the detailed knowledge of the present case, what type of event is present here and whether the damage at issue thus falls within the temporal scope of application of the ELD.[7] From the information presented before the Court, it would appear that the relevant 'event' or 'incident' in the present case is neither the authorisation nor the bringing into operation of the power plant, but the individual instances whereby the operation of the power plant leads to fluctuations in the water level.

26. The fact that the alleged damage results from the operation of a power plant which was authorised and began operating before the deadline fixed by the ELD is immaterial.

6 — Judgments of 9 March 2010, *ERG and Others* (C-378/08, EU:C:2010:126 paragraphs 40 and 41), and of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 34); order of 9 March 2010, *Buzzi Unicem and Others* (C-478/08 and C-479/08, not published, EU:C:2010:129, paragraph 32); and judgment of 4 March 2015, *Fipa Group and Others* (C-534/13, EU:C:2015:140, paragraph 44).

7 — Judgments of 9 March 2010, *ERG and Others* (C-378/08, EU:C:2010:126, paragraph 43); and of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 36).

27. The first indent of Article 17 of the ELD only excludes events or incidents that happened before the transposition date. By contrast, it does not cover new events or incidents arising out of an activity that had started before that date but continues thereafter. I therefore agree with the view expressed by Advocate General Kokott in her Opinion in *ERG and Others*: the ELD must apply where a *continued* activity that had already begun before the entry into force of the directive results in *new* environmental damage after 30 April 2007.[8]

28. A systematic reading of various articles of the ELD also confirms that the notion of 'incident' or 'event' cannot be equated with the notion of 'activity'. The concept of 'occupational activity' is independently defined in Article 2(7) as 'any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character'. Article 3 defines the material scope of the ELD by reference to the 'occupational activities' listed in its Annex III, regardless of when those activities commenced.

29. Article 17 determines the temporal scope of the ELD with the aim to protect legal certainty by precluding the retroactive application of the directive. By its second indent, it excludes the damage caused by an emission, event or incident happening subsequent to the transposition date only when the activity they derive from had taken place and finished before that date. As the Commission notes, if the bringing into operation of the hydroelectric power plant — that is to say, the beginning of the 'activity' — were to be equated to the 'event' or 'incident', the second indent of Article 17 of the ELD would be deprived of any meaning.

30. As a result of the foregoing, it is my view that the first question should be answered as follows: the ELD applies to environmental water damage caused in the course of the continuing operation of a facility by an event or incident taking place after the date specified in Article 19(1) of that directive, even if that facility was authorised and brought into operation prior to that date.

B – *Third question — the definition of 'water damage' in the ELD*

31. Paragraph 4(1)(a) of the B-UHG provides that environmental damage with regard to water is constituted by any damage that has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential, as defined in the WRG, and 'that is not covered by an authorisation granted pursuant to the [WRG]'.

32. According to the referring court, that exclusion means that as the hydroelectric power plant has operated in accordance with an authorisation granted pursuant to the WRG, the damage at issue cannot constitute environmental damage. The referring court asks whether the exclusion of the damage covered by an authorisation granted under national law from the definition of environmental water damage is in line with Article 2(1)(b) of the ELD.

33. As I will explain further below, I am of the opinion that such automatic and indiscriminate exclusion is indeed not permissible. However, it also ought to be stressed at the outset that the answer provided in this Opinion concerns only the specific question asked by the national court. It does not concern, and thus in no way pre-empts, other elements of the definition of environmental damage, such as the issue of when and whether the adverse effects are 'significant'.

8 — C-378/08, EU:C:2009:650, points 67 and 68.

34. The Austrian Government affirms that Paragraph 4(1)(a) of the B-UHG is in line with Article 2(1)(b) of ELD. It advocates an interpretation of that provision of the ELD in the light of the WFD. It claims that, according to the WRG, an authorisation can only be delivered if it is guaranteed that the general interest is respected by the project, namely, if it is ensured that the project will not have significant adverse effects on the quality of water or on its ecological state. For that reason, according to the Austrian Government, an activity, to the extent that it has been authorised, should not give rise to liability.

35. The Commission and the Applicant hold a different view. They have submitted that the exclusion provided for in Paragraph 4(1)(a) of the B-UHG does not comply with Article 2(1)(b) of the ELD. The latter does not contain any exclusion regarding the damage covered by an authorisation.

36. I agree with the Applicant and the Commission. The position of the Austrian Government cannot be upheld.

37. Article 2(1)(b) of the ELD does not provide for the general exclusion of damage covered by authorisation from the concept of 'environmental damage'. That provision only allows for the exclusion from the definition of water damage of the adverse effects where Article 4(7) of the WFD applies.

38. The general exclusion of damage covered by an authorisation laid down in Paragraph 4(1)(a) of the B-UHG cannot be subsumed under the exclusion regarding the adverse effects covered by Article 4(7) of the WFD. The scope of the exclusion provided for in Austrian law is much wider than and conceptually quite different from the exclusion provided for in the WFD.

39. Article 4(7) of the WFD establishes that the Member States will not be in breach of that directive when their failure to achieve good groundwater status, good ecological status or potential, or to prevent deterioration in the status of a body of surface water or groundwater is the result of *new modifications* to the physical characteristics of a surface water body or to the level of bodies of groundwater; or when failure to prevent deterioration from high to good status of a body of surface water is the result of *new* sustainable human development activities.

40. In order for this derogation to be applicable, the conditions set out in Article 4(7)(a) to (d) of the WFD, reproduced above at point 7 of this Opinion, have to be satisfied.[9] Admittedly, Member States are required to refuse authorisation for projects which can result in deterioration of the status of the body of water concerned unless the view is taken that the project is covered by the derogation of Article 4(7) of the WFD.[10] However, the mere existence of an authorisation does not necessarily entail that all the criteria of Article 4(7) of the WFD have been fulfilled. Indeed, nothing ensures that all the criteria listed in Article 4(7) of the WFD are always and automatically complied with where an authorisation has been granted. That is particularly the case where the authorisations at issue predate the WFD. For all these reasons, the general exclusion of damage covered by an authorisation provided for in Paragraph 4(1)(a) of the B-UHG cannot fit within the exception contained in Article 2(1)(b) of the ELD by reference to Article 4(7) of the WFD.

41. The Austrian Government adds, however, that the abovementioned exclusion does not amount to a total exclusion of liability. First, according to the legislative history of the B-UHG, damage resulting from malfunctioning (incidents) would not be considered to be covered by an authorisation. Second, Paragraph 21a of the WRG allows the authorities to intervene in the public interest after an authorisation has been granted, prescribing additional requirements, adaptations, temporary restrictions and even prohibitions.

9 — See judgments of 4 May 2016, *Commission* v *Austria* (C-346/14, EU:C:2016:322, paragraphs 65 and 66), and of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 67).

10 — Judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraph 50).

42. In my view, those arguments do not bring the 'authorisation exception' of Paragraph 4(1)(a) of the B-UHG in line with Article 2(1)(b) of the ELD.

43. First, even if damage resulting from incidents caused by the malfunctioning were not to be considered as 'covered' by an authorisation, there is nothing to prevent damage arising from the 'normal' operation of a facility. Such normal operation may have consequences that were unforeseen or unexpected at the time of the authorisation.

44. Second, the fact that, according to the national provisions regarding water, authorisations can be adjusted or other corrective measures can be taken, does not ensure that the mechanisms and obligations established by the ELD are applied and complied with. The existence of a procedure for the modification and monitoring of existing authorisations under Paragraph 21a of the WRG does not change the fact that the damages covered by authorisation, whether or not subjected to that procedure, are excluded from the notion of damage, and therefore from the scope of application of the national rules transposing the ELD. In any case, the Austrian Government has not indicated that the abovementioned provision is meant to comply with the requirements of Article 4(7) of the WFD.

45. Moreover, to presuppose that the existence of an authorisation automatically complies with the standards of the WFD so as to prevent the possibility of any significant adverse effects emerging would render the ELD largely redundant. Indeed, the material scope of application of the ELD is determined by its Article 3. That article states the directive is applicable, with regard to water damage and land damage, to the occupational activities listed in Annex III, regardless of fault or negligence. According to recital 8 of the ELD those occupational activities, identified by reference to relevant Union legislation, present a risk for human health or the environment. It results from the nature of the activities listed that many, if not all of them, are likely to be subject to authorisation. That is particularly the case for the activities covered by point 6 of Annex III to the ELD, which refers to 'water abstraction and impoundment of water subject to prior authorisation in pursuance of [the WFD]'.

46. A systematic interpretation confirms that the role of authorisations in the framework of the ELD cannot be that of generally excluding damage covered by them from the overall definition of water damage. As the Commission has submitted, Article 8(4)(a) of the ELD supports this conclusion.

47. Article 8(1) of the ELD establishes that, in principle, the operator shall bear the costs for the preventive and remedial actions. However, Article 8(4) of the ELD provides that Member States may allow the operator not to bear the costs of remedial actions where the operator can demonstrate that he was not at fault or negligent in two situations: (a) where the event was expressly authorised; and (b) where the activity was not considered likely to cause damage according to the state of scientific and technical knowledge at the time when it took place.

48. Admittedly, Article 8(4)(a) of the ELD gives Member States the possibility to introduce a 'defence' for the operators so that they do not have to bear the costs of prevention and remedial action.

49. However, Paragraph 4(1)(a) of the B-UHG cannot be considered as an implementation of Article 8(4)(a) of the ELD.

50. First, as the Commission has rightly suggested, there is nothing in the documents submitted to the Court that would indicate that Austria has chosen to adopt this option in its national law.

51. Second, even if that would be the case, Paragraph 4(1)(a) of the B-UHG appears to have much wider scope and applicability than a mere 'defence' in the hands of operators allowing them not to bear the burden of remedial costs. It excludes from the notion of damage all water damage covered by authorisation under the WRG, thus preventing the obligations of the ELD concerning preventive and remedial costs from being triggered at all. By contrast, Article 8(4)(a) of the ELD does not eliminate

the obligations concerning preventive costs. Moreover, the rules concerning preventive action and remedial action provided for in Articles 5 and 6 of the ELD foresee that the competent authorities may choose to take action themselves. [11]

52. Third, two specific elements of Article 8(4)(a) of the ELD are worth highlighting: (i) the proof of absence of fault or negligence; and (ii) the fact that an emission or event has been expressly authorised and fully in accordance with the conditions of the authorisation conferred. The wording of Article 8(4)(a) of the ELD clearly requires that both of these are to be 'demonstrated' by the operator. This in turn clearly necessitates individual case-by-case analysis, in the course of which the state of mind of the operator and the fact of the 'emission or event' remaining fully within the scope of authorisation have to be assessed. Paragraph 4(1)(a) of the B-UHG, which appears to apply notwithstanding the existence of fault or negligence, seems to be at odds with those requirements.

53. As a result, I propose that the response to the third question should be that Article 2(1)(b) of the ELD precludes a national provision which generally and automatically excludes damage that has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential of the waters concerned from the concept of environmental damage, where that damage is covered by an authorisation granted in accordance with national law.

C – *Fourth question — the cross-reference to Article 4(7) of the WFD*

54. In case the 'exception' provided for in Paragraph 4(1)(a) of the B-UHG were to be declared incompatible with Article 2(1)(b) of the ELD (as I have proposed at point 53 of the present Opinion), the referring court asks whether Article 4(7) of the WFD is to be applied directly. Contained in that question is, by implication, the issue whether it is for a national court to determine whether the criteria laid down by that provision are satisfied, in order to determine whether environmental damage within the meaning of Article 2(1)(b) of the ELD has occurred.

55. My concise answer to the two specific questions asked by the national court is 'no'.

56. First, I agree with the Commission that Article 4(7) of the WFD is not directly applicable. Leaving aside the rather elusive assessment of what is clear and precise, that provision is certainly not unconditional. Its application is subordinated to a number of further implementing steps, a series of qualitative verifications, in which the Member States arguably enjoy considerable discretion. The cross-reference to Article 4(7) of the WFD contained in Article 2(1)(b) of the ELD does not alter anything with regard to that assessment.

57. The absence of direct effect of Article 4(7) of the WFD, both on its own or if integrated by a cross-reference in Article 2(1)(b) of the ELD, foreshadows the negative answer to the second part of the fourth question posed by the referring judge. In my opinion, the national judge is not obliged to carry out an independent assessment of the criteria under Article 4(7) of the WFD, even if there is a cross-reference to it in Article 2(1)(b) of the ELD. [12]

11 — See Article 5(3)(d) and (4) and Article 6(2)(e) and (3) of the ELD. See judgment of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 88).

12 — There is an underlying definitional issue that is perhaps worth acknowledging here: should the integration by the fiat of a cross-reference of a provision of a directive into a definitional section of a different directive and its potential consideration by the national judge be in fact called 'direct effect'? Or is it rather an instance of interpretation of indeterminate legal notions in one directive by a cross-reference to the provision of another directive? Intriguing as such an academic discussion might be, it is of limited relevance for the specific question asked by the national judge, the useful answer to which appears the same to me, irrespective of the taxonomic box this phenomenon would be eventually put into.

58. The ELD operates in close connection with other EU environmental instruments. Its recital 5 expresses the objective of ensuring coherence and a proper systematic functioning of the ELD with regard to other relevant environmental legislation, and points to the need to use common criteria in the definition of the concepts deriving from other instruments of EU environmental law. That objective for coherence is mirrored by Article 2(5) of the ELD, according to which 'waters' means 'all waters covered by [the WFD]'. The definition of water damage further reflects this by referring to the specific definitions of the WFD, for example, 'quantitative status' and 'ecological status'. The definition of 'water damage' in Article 2(1)(b) of the ELD also excludes 'adverse effects where Article 4(7) of [the WFD] applies'. The legislative history shows that the aim of the reference to this exception in Article 2(1)(b) of the ELD is precisely to take account of the specific derogations allowed for by the WFD.[13] Where violation of the WFD by a Member State is excluded because the strict criteria of Article 4(7) have been met, Article 2(1)(b) of the ELD establishes that the mechanisms of environmental liability of the ELD should not be triggered either.

59. The derogation laid down in Article 4(7) of the WFD applies to new modifications or alterations or new sustainable development activities, if a number criteria and conditions are fulfilled.[14] Compliance with those requirements can only be ensured through the assessment of different and rather technical parameters established by the WFD.[15] This includes, inter alia, the existence of a river basin management plan, which specifically sets out the reasons for the modifications or alterations.[16]

60. From an institutional perspective, Article 3(2) of the WFD states that Member States shall ensure the appropriate administrative arrangements for the application of the rules of the directive within each river basin district, including the identification of the competent authorities.[17] The WFD does not determine the specific authorities in charge of ensuring compliance with the criteria of Article 4(7). Thus, it is the role of the implementing national legal framework to define the specific procedures and the competent authorities entrusted with the task of ensuring whether the conditions of the applicability of Article 4(7) of the WFD are complied with.

61. There is nothing in the file before the Court to indicate that Austria has failed to implement Article 4(7) of the WFD in domestic law or that it has failed to implement it correctly.[18] In those circumstances, established case-law prescribes that whenever a directive has been implemented, its effect should reach individuals primarily through the intermediary of the implementing measures adopted by the corresponding Member State.[19]

13 — Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, COM(2002) 17 final, (OJ 2002 C 151 E, p. 132).

14 — See point 7 of the present Opinion.

15 — See Common Implementation Strategy for the Water Framework Directive — Guidance Document No 20 on Exemptions to the Environmental Directives, Technical Report 2009/027. The technical difficulties associated with the implementation and application of Article 4(7) of the WFD have resulted in the mandating of an Ad hoc Task Group to draft a Guidance on implementation of that provision, in the framework of the work programme 2016-2018 of the Common Implementation Strategy for the Water Framework Directive and the Floods Directive.

16 — Article 4(7)(b) of the WFD.

17 — According to Article 3(8) of the WFD, Member States provide the Commission with a list of their competent authorities and the information set out in Annex I to that directive.

18 — Quite to the contrary, the Commission has submitted that this provision has been implemented into national law, without being contradicted on that point by any of the parties. It would appear that the implementing provision is in Paragraph 104a (1) of the WRG after its 2003 modification (BGBl. 2003 I, No 82 of 29 August 2003). It might be added that the judgment of 4 May 2016, *Commission* v *Austria*, (C-346/14, EU:C:2016:322, paragraph 81) gives an example of the application of such rules under Austrian law. In that case, the Court dismissed the infringement action brought by the Commission on the basis of Article 4(1) and (7) of Directive 2000/60. The infringement proceedings in 2007 originated from a decision of the Governor of the *Land* of Styria granting the authorisation for the construction of a hydroelectric power plant in the Schwarze Sulm. The Court found that the decision had taken account of all the conditions laid down in Article 4(7) of Directive 2000/60 and could rightly consider them to be met.

19 — See, for example, judgment of 15 July 1982, *Felicitas Rickmers-Linie* (C-270/81, EU:C:1982:281, paragraph 24).

62. The possibility to resort to the exclusion contained in Article 2(1)(b) of the ELD rests upon the basis that Article 4(7) of the WFD applies. Such application, however, is carried out according to the pertinent national implementing provisions and following the procedures determined by national provisions implementing Article 4(7) of the WFD. The definition of Article 2(1)(b) of the ELD, by way of cross-reference to Article 4(7) of the WFD, cannot therefore be understood as obliging national courts to disregard the existing national procedural and institutional arrangements laid down in order to comply with the obligations established by the WFD. This is without prejudice to the possibility of the decisions adopted by those authorities being amenable to judicial review.

63. Consequently, I propose that the answer to the fourth question should be as follows: Article 2(1)(b) of the ELD is to be interpreted in the sense that, in order to determine the existence of 'environmental damage', a national court is not obliged to apply the criteria of Article 4(7) of the WFD directly in the absence of assessment thereof by the competent authorities under the WFD.

D – *Second question — fishing rights holders and standing*

64. The referring court's second question is: do Articles 12 and 13 of the ELD preclude a national provision which does not allow persons holding fishing rights to initiate a review procedure ('the Article 13 review procedure') in relation to environmental damage as defined in Article 2(1)(b) of that directive?

65. According to the referring court, Paragraph 11(1) of the B-UHG provides that natural or legal persons whose rights may be breached by environmental damage may lodge an environmental complaint. Paragraph 11(2) of the B-UHG specifies the rights that may be invoked: in relation to water, point 2 of this provision includes 'existing rights within the meaning of Paragraph 12(2) of the WRG'. However, Paragraph 12(2) of the WRG does not mention the rights of persons holding fishing rights. The referring court explains that a literal interpretation of those provisions prevents holders of fishing rights from lodging an environmental complaint in respect of damage relating to their fishing rights.

66. The Austrian Government submits that the national provisions at issue are in compliance with Articles 12 and 13 of the ELD. The fact that holders of fishing rights are not explicitly mentioned in Paragraph 12(2) of the WRG, to which Paragraph 11(1) of the B-UHG makes reference, is covered by the margin of appreciation granted to Member States under that directive.

67. The Applicant and the Commission hold the contrary view. Articles 12 and 13 of the ELD preclude a national provision which excludes holders of fishing rights from engaging in an Article 13 review procedure. This category of rights holders is covered by Article 12(1)(a) because it is 'affected or likely to be affected' in the sense of that provision. The Commission argues, in the alternative, that holders of fishing rights are covered by Article 12(1)(c) of the ELD.

68. I agree with the Applicant and the Commission. I am of the opinion that Article 12(1) contains three independent categories of individuals who have to be granted standing under national law (1). In my view, holders of fishing rights are 'affected or likely to be affected' in the sense of Article 12(1)(a) of the ELD (2). In the alternative, holders of fishing rights could be considered to be covered by Article 12(1)(c) of the ELD, as long as an impairment of their rights is alleged (3).

1. The relationship between the individual categories of Article 12(1) of the ELD

69. Article 13(1) of the ELD provides for access to review procedures by reference to Article 12(1) of that directive. Article 13(2) states that that directive is without prejudice to the provisions of national law regulating access to justice. Article 12 of the ELD lists the categories of natural or legal persons entitled to submit observations relating to environmental damage. Those three categories are persons: (a) affected or likely to be affected by environmental damage; or (b) having a sufficient interest in environmental decision-making relating to the damage; or, alternatively, (c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.

70. What is the logical relationship between these three categories? In particular, is a Member State obliged to grant standing under national law to all three categories, or may it choose just one of them?

71. The Commission and the Applicant have argued that persons in all the abovementioned categories benefit from the rights set out in Articles 12 and 13 of the ELD. The use of 'or' and 'alternatively' in Article 12(1) does not give the Member States the option to exclude any of the categories.

72. I agree. The wording of Article 12(1) of the ELD enumerates three categories of natural or legal persons, which, alternatively and autonomously considered, have standing. It establishes three independent paths to the procedures referred to in Articles 12 and 13 of the ELD. [20]

73. It should be stressed that Article 12(1) of the ELD differs from other provisions relating to the right to access to justice contained in other EU environmental directives. [21] Modelled on the Aarhus Convention, [22] the wording of those provisions generally requests that the Member States provide access to specific review procedures, according to their national legal systems, to members of the public concerned (generally defined as persons affected or likely to be affected) if: (i) they have sufficient interest; or (ii) they maintain the impairment of a right.

74. Those provisions have been interpreted by the Court as containing alternative options regarding the admissibility of actions. The Member States are then entitled to choose from those options when implementing the respective EU directives. [23]

75. By contrast, and using different wording, Article 12(1) of the ELD sets out the three categories of persons: (a), (b) and (c). Persons in those categories 'shall be entitled' to submit observations and to request that action be taken by the competent authorities. Article 12(1) of the ELD therefore does not lay down different implementing possibilities for the Member States. Instead, it lays down three alternatives in terms of individual situations, all of which shall be implemented by national law. If the factual situation exists, persons in any of those three categories shall have standing at the national level, independently of each other.

20 — See in this regard also, Goldsmith, B. J., and Lockhart-Mummery, E., 'The ELD's National Transposition', in Bergkamp, L., and Goldsmith B. J., *The EU Environmental Liability Directive. A Commentary*, Oxford University Press, 2013, pp. 139 to 159, p. 157; Gouritin, A., *EU Environmental Law, International Environmental Law, and Human Rights Law. The Case of Environmental Responsibility*, Brill, Nijhoff, Leiden, Boston, 2016, p. 242; Eliantonio, M., 'The Proceduralisation of EU environmental Legislation: International Pressures, Some Victories and Some Way to Go', *Review of European Administrative Law* 2015 (1), Vol. 8, pp. 99 to 123.

21 — For example, Article 16 of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8); repealed by Directive 2010/75; Article 25 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (OJ 2010 L 334, p. 17); Article 11 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 (OJ 2012 L 26, p. 1).

22 — See Article 9(2) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), ('the Aarhus Convention').

23 — Judgments of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289, paragraph 38); of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraph 38); and of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraphs 33 and 35).

76. Thus, in contrast to the wording of the abovementioned directives, the category provided for in Article 12(1)(a) does not represent a '*chapeau*' common to the other two alternatives. It constitutes a self-standing category of individuals entitled to request that action be taken and have access to review procedures.

77. In a nutshell, the wording of Article 12(1) of the ELD is alternative as to its application, but cumulative in terms of its implementation.

78. Finally, the fact that the categories of entitled persons under Article 12(1)(b) and (c) of the ELD may in certain circumstances overlap with those under Article 12(1)(a) does not change that conclusion. From the point of view of scope, it is true that Article 12(1)(a) is likely to constitute the broadest category. However, as long as each of the three categories can be given independent meaning and scope, they can represent three logically distinct sets. The requirement is certainly not that they must be hermetically sealed from one another.

2. Article 12(1)(a) of the ELD

79. In the absence of any reference to national law, the notion of persons 'affected or likely to be affected' should be given an autonomous and uniform interpretation at the EU level, taking into account the context of the provision and the objective pursued.[24] In this regard, as rightly pointed out by the Commission, the common meaning of the words in this notion leads to the conclusion that 'affect(ed)' is defined, by contrast with the situations of Article 12(1)(b) and (c), with reference to a factual situation. Under point (b) or (c), standing arises out of a legal situation (impairment of a right) or a sufficient interest in decision-making. The application of point (a) depends on the existence of a factual concern with regard to the specific situation of a natural or legal person.[25]

80. The Austrian Government maintains that the national provisions at issue are covered by the margin of appreciation granted to the Member States by Article 12(1) of the ELD.

81. I disagree. Admittedly, the second indent of Article 12(1) of the ELD states that 'what constitutes a "sufficient interest" and "impairment of a right" shall be determined by the Member States'. However, as rightly submitted by the Applicant, although under Article 12(1)(b) and (c) Member States retain a greater margin of appreciation, this is not the case under Article 12(1)(a), which is not subject to any similar qualification.

82. Article 13(2) of the ELD, according to which that directive shall be without prejudice to any provisions of national law regulating access to justice, does not alter this conclusion. National provisions regulating access to justice cannot deprive access to review procedures from those persons who have been granted standing under the criteria autonomously laid down in Article 12(1), to which Article 13(1) refers. This is in the light of the need to preserve the effectiveness of the provisions of the directive related to legal remedies.

24 — See, for example, judgment of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 29 and the case-law cited).

25 — The Court has declared that in case of EU environmental law provisions that are sufficiently precise and unconditional, natural or legal persons directly concerned by certain risks must be in a position to bring an action before the competent courts. See, by analogy, judgments of 25 July 2008, *Janecek* (C-237/07, EU:C:2008:447, paragraphs 39 and 42), and of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraph 100).

83. This suggestion is supported by three further arguments. First, Article 12(1)(a) is drafted in broad terms. As confirmed by recital 25, persons adversely affected or likely to be affected should be entitled to ask authorities to take action. The same relevant persons concerned should have access to procedures for the review of the competent authority's decisions, acts or failure to act (Article 13(1) and recital 26 of the ELD). One of the major achievements of the ELD is in fact the broad possibilities it grants to natural and legal persons to request action and invoke legal review of inaction by the authorities. [26]

84. Second, the provisions of the ELD governing access to justice must be read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union and with the principle of effectiveness. Procedural rules governing actions for safeguarding an individual's rights under EU law must not make it impossible or excessively difficult to exercise those rights in practice. [27]

85. Third, Article 13 of the ELD should also be read in the light of Article 9(3) of the Aarhus Convention, according to which the parties to the Convention: 'shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'. [28]

86. The Court has declared that national courts shall interpret, 'to the fullest extent possible the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law…'. [29] Even if that provision allows for a broad margin of discretion, [30] the Aarhus Convention's Compliance Committee has declared that access to review procedures should be the presumption, not the exception. [31] I consider that the need to interpret procedural rules in accordance with the objectives of Article 9(3) of the Aarhus Convention is also called for with regard to rules of EU law which, like Article 13(1) in conjunction with Article 12(1) of the ELD, regulate the standing of natural and legal persons in review procedures.

87. Against that background, a holder of fishing rights does, prima facie, and subject to the findings of fact by the national court in each particular case, seem to fall within the category of persons affected or likely to be affected by water damage in the sense of Article 12(1)(a) of the ELD.

26 — See in this regard, Winter, G., Jans, J.H., Macrory, R., and Krämer, L., 'Weighing up the EC Environmental Liability Directive', *Journal of Environmental Law* 20(2), 2008, p. 163-191, p. 171.

27 — See, to that effect, judgments of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraph 49), and of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 33).

28 — The Aarhus Convention is not mentioned in the Directive. However, the fact that Articles 12 and 13 were intended to be drafted in line with the Aarhus Convention is apparent from different documents relating to the legislative history (see, for example, the White Paper on environmental liability COM(2000) 66 final; Council Documents 14289/02 and 7606/03; Commission Communication pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the Common Position of the Council on the adoption of a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage SEC(2003) 1027 final; Report on the proposal for a directive on environmental liability with regard to the prevention and remedying of environmental damage — European Parliament Committee on Legal Affairs and the Internal Market A5-0145/2003). Article 13 of the ELD is regarded as an implementation of Article 9(3) of the Aarhus Convention in its Implementing Guide, p. 197.

29 — See judgment of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraph 51).

30 — See judgment of 13 January 2015, *Council and Commission* v *Stichting Natuur en Milieu and Pesticide Action Network Europe* (C-404/12 P and C-405/12 P, EU:C:2015:5, paragraph 51).

31 — The Aarhus Convention, An Implementation Guide, United Nations, 2nd ed., 2014, p. 198, referring to communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, paragraph 35). Even though that document does not have binding force, it 'can be taken into consideration'. See, for example, judgment of 16 February 2012, *Solvay and Others* (C-182/10, EU:C:2012:82, paragraph 28).

88. Lacking any indication that the transposition of that provision would have been effected through another national provision, which it is for the national court to verify, it would appear that the transposition of Articles 12 and 13 of the ELD through Paragraph 11(1) of the B-UHG is incomplete. This is to the extent that it only grants access to review procedures to natural or legal persons whose rights — defined by national law — may be breached by environmental damage, without granting that access to persons affected or likely to be affected by environmental water damage, in the sense of Article 12(1)(a) — such as holders of fishing rights.

89. In conclusion, the second question posed by the referring court should be answered, in my view, as follows: Article 12(1)(a) and Article 13 of the ELD preclude a national provision which does not allow holders of fishing rights to initiate a review procedure within the meaning of Article 13 of that directive in relation to environmental damage as defined in Article 2(1)(b) of the ELD.

3. Article 12(1)(c) of the ELD

90. If the Court were to consider, however, either that holders of fishing rights are not covered by Article 12(1)(a) of the ELD, or that the category of 'persons affected or likely to be affected' does not constitute a self-standing category, I am of the opinion that even under Article 12(1)(c) of the ELD the conclusion would the same. The rest of this section therefore concisely outlines an alternative analysis under Article 12(1)(c) of the ELD.

91. Article 12(1)(c) of the ELD refers to natural or legal persons 'alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition'.

92. Admittedly, Article 12(1) of the ELD leaves to the Member States the responsibility to determine what constitutes the 'impairment of a right'. This reference to national law constitutes, no doubt, the acknowledgement of the margin of appreciation enjoyed by Member States. [32]

93. However, it shall be recalled that, according to the case-law of the Court interpreting provisions which refer to the concept of 'impairment of a right', which mirrors the concepts used by Article 9(2) of the Aarhus Convention, that discretion is not absolute. [33] Indeed, Article 9(2) of the Aarhus Convention limits the discretion of the Member States when determining the rules for legal actions in so far as that provision pursues the objective of granting 'wide access to justice'. [34] As a consequence, the Court has held that the provisions related to access to justice should not be interpreted restrictively. [35]

94. The fact that the reference to the objective of granting 'wide access to justice' has not been reproduced verbatim in Article 12(1) of the ELD does not lead, in my opinion, to a different conclusion. Indeed, the considerations made at points 84 to 86 of the present Opinion are also applicable with regard to the interpretation of Article 12(1)(c) of the ELD.

32 — See, by analogy, judgments of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289, paragraph 55); of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraph 50); and of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraph 38). See also, to that effect, judgment of 15 October 2015, *Commission* v *Germany* (C-137/14, EU:C:2015:683, paragraphs 32 and 33).

33 — Judgment of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraph 39).

34 — See to that effect, judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 58).

35 — See, by analogy, judgment of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraph 40).

95. I therefore agree with the Commission: the margin of appreciation left to the Member States with regard to Article 12(1)(c) cannot be interpreted as allowing for the block exclusion of entire groups of right holders from exercising the rights granted by Articles 12 and 13 of the ELD. The reference to national law to determine what constitutes the 'impairment of a right' entitles Member States to introduce procedural and material conditions to define that concept.[36] But defining conditions is quite different to introducing block exclusions of large groups of persons whose rights are particularly likely to be impaired.[37]

96. The aforementioned reasoning appears to apply to holders of fishing rights with regard to environmental water damage. This is all the more so in the present case, as the Applicant clarified at the hearing that he is the holder of an exclusive fishing right in the area to which his application refers.

V – **Conclusion**

97. In the light of the foregoing considerations, I propose that the Court answer the questions posed by the Verwaltungsgerichtshof (Administrative Court, Austria) as follows:

(1) Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage applies to environmental water damage caused in the course of the continuing operation of a facility by an event or incident taking place after the date specified in Article 19(1) of that directive, even if that facility was authorised and brought into operation prior to that date.

(2) Article 2(1)(b) of Directive 2004/35 precludes a national provision which generally and automatically excludes damage that has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential of the waters concerned from the concept of environmental damage, where that damage is covered by an authorisation granted in accordance with national law.

(3) Article 2(1)(b) of Directive 2004/35 is to be interpreted in the sense that, in order to determine the existence of 'environmental damage', a national court is not obliged to apply the criteria of Article 4(7) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy directly in the absence of assessment thereof by the competent authorities under Directive 2000/60.

(4) Article 12(1)(a) and Article 13 of Directive 2004/35 preclude a national provision which does not allow holders of fishing rights to initiate a review procedure within the meaning of Article 13 of that directive in relation to environmental damage as defined in Article 2(1)(b) of Directive 2004/35.

36 — See, for example, judgments of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraph 50 et seq.), and of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289, paragraph 45), interpreting the concept of 'impairment of a right' in Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) (now Article 11 of Directive 2011/92). See also judgment of 15 October 2015, *Commission* v *Germany* (C-137/14, EU:C:2015:683, paragraphs 30 to 35).

37 — See, to that effect, judgment of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231, paragraph 42 et seq.).