OPINION OF ADVOCATE GENERAL GULMANN
delivered on 3 May 1994 *

Mr President,
Members of the Court,

1. The Bayerischer Verwaltungsgerichtshof has referred questions to the Court for a preliminary ruling concerning 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. [1]

2. The basic rule of the directive is to be found in Article 2, which provides that certain specified construction works and other projects likely to have significant effects on the environment 'before consent is given ... are to be made subject to an assessment with regard to their effects'. In short, what will be called an environmental impact assessment is to be undertaken. An environmental impact assessment is to be undertaken in connection, *inter alia* with the construction of motorways or express roads.

Under Article 12, Member States are to 'take the measures necessary to comply with this Directive within three years of its notification.' That time-limit expired on 3 July 1988.

3. The main action concerns a dispute over development consent for two sections of express road.

Development consent was given *after* the time-limit for implementing the directive had expired and *without* an assessment of the projects' effects on the environment having taken place in compliance with the directive.

In omitting an environmental impact assessment, the planning authorities referred to a transitional provision in the German Law implementing the directive. Under that provision the environmental impact assessment is only to take place in respect of projects which were not publicly notified before the Law came into force.

* Original language: Danish.
1 — OJ 1985 L 175, p. 40.

The plaintiffs in the main proceedings have *inter alia* claimed that an environmental impact assessment should have been undertaken because development consent for the projects was given after the date by which the directive was to be implemented.

The court which has submitted the reference has doubts whether the transitional provision is in accordance with the directive and in order to decide that point has referred questions to the Court.

4. The case involves a question of principle and practical importance which is not very easy to answer.

It is indisputable that the provisions in the directive should have been implemented by 3 July 1988 at the latest, that is to say, by that date the Member States should have introduced a requirement to ensure that projects covered by the directive were made subject to an environmental impact assessment.

There is, however, some doubt whether an environmental impact assessment should be carried out for every project not yet approved by the deadline for the directive's implementation or whether such an assessment may be omitted for projects in respect of which the development consent procedure had already been initiated by that date.

5. The question is of considerable significance, because development consent procedures for the projects covered by the directive can be very prolonged and environmental impact assessments, which entail extensive obligations for the developers and authorities involved, will also normally be time-consuming.

If an environmental impact assessment need only be carried out for projects initiated after the deadline for the directive's implementation, that would presumably mean that a large number of projects will not be subjected to an environmental impact assessment.

If an environmental impact assessment should be carried out for every project which has not yet been approved by the deadline for the directive's implementation, an environmental impact assessment will, in a large number of cases, presumably entail considerable delay in executing projects, with serious consequences ensuing for the developers and for the objectives to be achieved by the execution of the projects.

6. The practical significance of the question and uncertainty as to the correct solution is

reflected in the number of observations submitted to the Court and the different views on the correct interpretation of the directive.

The Bund Naturschutz in Bayern eV and a number of the private plaintiffs in the main action, the Netherlands Government and the Commission claim that, according to the directive, an environmental impact assessment is to be undertaken for all projects not yet approved by the deadline for the directive's implementation, whereas Freistaat Bayern, the Municipality of Vilsbiburg, the German Government and the UK take the view that the directive cannot be interpreted in that way.

The directive on the assessment of the effects of certain public and private projects on the environment (the EIA Directive)

7. Directive 85/337/EEC was adopted by the Council on 27 June 1985 on the basis of Articles 100 and 235 of the EEC Treaty. According to its preamble, the aim of the directive is to promote an environmental policy whereby the creation of pollution and nuisances is prevented at source, rather than by subsequently trying to counteract their effects, so that the effects on the environment are to be taken into account at the earliest possible stage in all technical planning and decision processes.

8. The main structure of the directive is as follows:

— The basic substantive obligation on Member States is, according to Article 2, 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 an assessment with regard to their effects.

— Under Article 3, the environmental impact assessment is to identify, describe and assess in an appropriate manner, the direct and indirect effects of the project concerned on a long list of factors, namely human beings, fauna and flora; soil, water, air, climate and the landscape, the inter-action between those factors, material assets and the cultural heritage.

— The type of projects which are to be made subject to an environmental impact assessment are laid down in Article 4, in conjunction with Annex I and II, and cover, on the one hand, projects where an assessment is always to be carried out (*inter alia* motorways and express roads) and, on the other hand, where it is left to the Member States to decide whether an assessment should be carried out.

— The environmental impact assessment is to be carried out on the basis of a whole range of information:

In the first place, principally on the basis of information provided by the developer, whose duties in this respect are laid down in Article 5, from which it follows that it is left to the national authorities to lay down detailed provisions in connection with that information (content, form and when it must be submitted), [2] but from which it also follows that the developer must in any case give certain expressly specified information.

Secondly, the environmental impact assessment must, under Article 6, be carried out on the basis of information gathered from the relevant environmental authorities and from the public concerned in accordance with rules on consultation to be laid down by the Member States. [3]

— Under Article 8, the information thus gathered 'must be taken into consideration in the development consent procedure'.

Implementation of the directive in Germany

9. On 12 February 1990 the Bundestag adopted a Law transposing Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. The Law came into force on 1 August 1990.

Article 1 of that transposition law sets out the Gesetz über die Umweltverträglichkeitsprüfung (Law on the Environmental Impact Assessment), hereinafter referred to as the 'UVPG'. Paragraph 22 contains the abovementioned transitional rules, under which

2 — Article 5(1) and (2) is worded as follows:
'1.In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:
(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;
(b) the Member States consider that a developer may reasonably be required to compile this information having regard *inter alia* to current knowledge and methods of assessment.
2.The information to be provided by the developer in accordance with paragraph 1 shall include at least:
— a description of the project comprising information on the site, design and size of the project,
— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,
— the data required to identify and assess the main effects which the project is likely to have on the environment,
— a non-technical summary of the information mentioned in indents 1 to 3.'

3 — Article 6(1) and (2) is worded as follows:
1.Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or in each case when the request for consent is made ...
2. Member States shall ensure that:
— any request for development consent and any information gathered pursuant to Article 5 are made available to the public,
— the public concerned is given the opportunity to express an opinion before the project is initiated.

procedures already initiated are to be completed in accordance with the provisions of the UVPG if public notice of the project has not yet been given when the law came into force. [4]

The transposition law contains in addition, in Articles 2 to 12, provisions on the amendment of various special laws, including Article 7 on the amendment of Paragraphs 16 and 17 of the Bundesfernstrassengesetz (Federal Law on Trunk-Roads). Under that amendment, an environmental impact assessment is to be undertaken both before the Minister for Transport adopts provisions on the routes of trunk-roads and before an individual trunk-road project is authorized.

The facts of the case

10. In an application of September 1988, which was amplified in November 1989, the Autobahndirektion Südbayern (Motorways Directorate of South Bavaria) sought consent from the Government of Lower Bavaria to carry out two projects concerning new sections of express road, a 6.9 km long road between Geisenhausen and Haarbach and an approximately 3 km long road between Bundesstrasse 15 and Bundesstrasse 388 at Haarbach/Wolferding (the so-called Vistal-link).

The two roads were to relieve the municipality of Vilsbiburg of through traffic on Bundesstrasse 299. The first-mentioned project constitutes, moreover, a section of a planned 130 km long new motorway link between Rosenheim and Regensburg, hereinafter referred to as 'the new B 15'. It is to be separate from the existing B 15 and serve as a supplementary north-south link for through traffic. Planning for the new B 15 had already begun in the early 1970s. In 1977 and 1978 the necessary planning and route decisions were adopted in respect of the section from Landshut to Rosenheim, which is where the disputed section of road is situated. In 1985 the Bundestag presented the link in the annex to the Law on Trunk-roads and stated that traffic requirements made the building of the new B 15 between Rosenheim and Regensburg necessary.

The section between Geisenhausen and Haarbach is the first of the sections to be constructed for the new B 15.

4 — Paragraph 22(1) is worded as follows: 'Transitional provision: (1) Procedures already initiated are to be completed in accordance with this Law, and the legal and administrative provisions laid down pursuant hereto, if public notice of the project has not yet been given when the law comes into force or when the Law first becomes applicable to the projects referred to in Points 1 and 2 of the annex to Paragraph 3; the same applies when, in connection with a procedure, a preliminary decision is to be adopted or a first part-consent or equivalent first part-authorization granted. If, in a procedure in which the public is to be consulted, a decision is to adopted concerning further part-consent or equivalent part-authorization, these rules shall apply subject to the proviso that assessment of the effects on the environment in the subsequent procedures should be confined to additional or other significant effects on the environment.'

The two projects were publicly notified in connection with the submission of an application for development consent by the Autobahndirektion Südbayern.

On 16 December 1991 the Government of Lower Bavaria decided to give consent for the two projects.

In the consent decisions it was stated that, in the case of the two projects, under Paragraph 22 of the UVPG relating to projects which had already been publicly notified, it had not been necessary to carry out an environmental impact assessment.

11. It is thus clear that no environmental impact assessment was carried out and that with regard to the projects

— the consent procedures were initiated *after* the expiry of the deadline for implementing the directive, and

— consent was granted *after* the German transposition law came into force, but in circumstances where, under the UVPG's transitional rules, it was not necessary to subject the projects to an environmental impact assessment.

The case before the Bayerischer Verwaltungsgerichtshof

12. The plaintiffs are, for the most part, farmers who will have to relinquish land if the projects are implemented. The other plaintiffs are contesting the projects because of the nuisance that will be caused by through traffic in the future and so forth.

As stated, the plaintiffs seek to have consent for the two projects withdrawn, *inter alia* because no environmental impact assessment was carried out before consent was given.

13. The Bayerischer Verwaltungsgerichtshof has doubts whether the transitional provision in Paragraph 22 of the UVPG complies with the EIA Directive and assumes that consent for the projects was unlawful if Paragraph 22 is in breach of the directive. In order to reach a decision on the plaintiffs'

claim in the main action, it has referred three questions to the Court.

The first question asks whether the directive obliges the Member States, from the expiry of the deadline for transposition, to make all non-approved projects subject to an environmental impact assessment, or whether the Member States can limit the obligation to undertake an environmental impact assessment so that it applies only to projects in respect of which the consent procedure was initiated after the deadline for transposition of the directive.

The second question asks whether — if the directive allows for an environmental impact assessment to be omitted for projects in respect of which the consent procedure has been initiated — the Member States can, as the relevant date for the initiation of the consent procedure, choose a date later than the date on which the transition of the directive should have been completed.

The third question, which is only raised in the event that the second question is answered in the affirmative, concerns the concept of 'project' in connection with roads (whether an environmental impact assessment should be carried out for the entire road link planned or only for the sections in respect of which consent is sought).

14. The facts in the main action show that first and foremost it is the second of the three questions which is pertinent to a decision in the case. As stated, it is clear that the main action concerns projects for which consent applications were submitted after the deadline for transposing the directive and which should have been subject to an environmental impact assessment, had they not been covered by the transitional rules in the UVPG.

15. It would thus be justifiable for the Court to confine its reply to that question since, strictly speaking, the first question is hypothetical in connection with the present case.

It is, however, indisputable that it makes sense to reply to the first question as well. If it is answered to the effect that an environmental impact assessment should be carried out for all projects which were not yet approved by the deadline for transposition, a reply to the second question is superfluous. In addition, the first question in any case raises a question of practical importance, as is clear not least from the observations of the United Kingdom.

Question 1

16. The first question is worded as follows:

'Is Article 12 of the directive to be interpreted as meaning that

(a) the Member States were under an obligation to take by 3 July 1988 the measures necessary to ensure that all public projects which fell within the ambit of the directive and for which development consent was granted for the first time after that date were in accordance with the requirements of the directive,

or

(b) the Member States had to adopt the necessary measures by 3 July 1988 but were not prevented from enacting transitional provisions for development consent procedures already initiated?'

17. Article 12 of the directive provides that 'Member States shall take the measures necessary to comply with this Directive within three years of its notification'.

The unconditional obligation of the Member States to comply with the periods laid down for transposition in directives has consistently been emphasized by the Court, which in this connection has stated *inter alia* that national implementing arrangements may not lead to an extension of the period prescribed for implementation in a directive. [5]

If a directive is not implemented in due time by the adoption of the necessary national measures, the Member States are in breach of their obligations under the Treaty.

18. The present question does not concern the Member States' obligation to implement directives in due time, but rather the question of the content of the 'necessary measures' to be adopted by the Member States.

5 — See in the judgment in Case C-157/91 *Commission* v *Netherlands* [1992] ECR I-5899.

That question cannot be answered on the basis of an interpretation of Article 12, but must depend on an interpretation of the directive's other provisions.

19. Despite the question's practical importance, there is nothing in the directive to say whether an environmental impact assessment should be undertaken for all projects not yet approved or only for projects in respect of which the consent procedure has not yet been initiated.

20. The answer to the question must therefore be sought in the specific provisions of the directive concerning the content of the obligation to carry out an environmental impact assessment in the light of the directive's purpose.

21. In that respect it appears most appropriate to start with Article 2 of the directive, according to which the Member States are to adopt the 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 an assessment with regard to their effects.'

22. The Commission, the Netherlands Government and the plaintiffs in the main action who have submitted observations, claim that the directive — in the absence of an express transitional rule — can only be interpreted to the effect that the obligation to undertake an environmental impact assessment must apply to all projects not yet approved at the time when the deadline for implementation expired.

23. Reference is made to the fact that it is expressly laid down that an environmental impact assessment is to be undertaken for every project *before* consent is given for its execution; furthermore, the purpose of the directive points towards the obligation extending to all projects which have not been approved by the date when the deadline for implementation of the directive expired. Moreover, the three-year implementation period, which is longer than normal in environmental matters, is sufficient to enable the Member States to resolve any transitional problems and it appears from other environment directives that the Council is expressly giving the Member States the opportunity to resolve transitional problems if there is such a need.

24. May I say right away that those arguments are not strong enough to convince me that that interpretation is correct. That is not primarily because some of the arguments are less than convincing, but because there are important practical grounds and grounds of legal certainty which — when the nature of

the obligation is examined — militate against such an interpretation.

25. Quite apart from the fact that it is more than doubtful that the Member States can be under an obligation to resolve, in the period prescribed, transitional problems to which implementation of the directive might give rise with regard to private individuals, there is the question whether the claim that the three-year implementation period is sufficiently long to enable possible transitional problems to be resolved is correct.

26. Grounds for raising that question are to be found in the Report from the Commission on the implementation of Directive 85/337/EEC which, under Article 11(3) thereof, the Commission was to send to the European Parliament and the Council. [6] The Report, which is dated November 1992, emphasizes the fact that the directive is a framework directive. The Report sets out the many questions of detail which under the directive are left to the Member States to decide, and it states that the broad scope of the directive means that the directive affects many different governmental bodies, public authorities and consent procedures. The Report contains, for instance, the following statement:

'The initial preparatory studies relating to the proposal for an EIA Directive were undertaken in 1975/76 and it was formally adopted as a Commission proposal in 1980. However, it was not until 1985 that it was finally approved by the Council of Ministers. This, however, did not signal the end of the process of adoption, but rather the beginning of gaining acceptance for the details of its transposition into national legislation and, ultimately of far greater importance, its satisfactory application in practice. Compliance, in both these aspects, was bound to take some time, given the nature and breadth of the changes which the directive required, and this has to be taken into consideration in evaluating the progress made since 1985. Also, whilst the "framework" nature of the directive has, from one perspective, made the task of implementation easier — by giving Member States more flexibility in adjusting their existing procedures — its broad nature has, perhaps inevitably, entailed some uncertainty over the precise interpretation to be placed upon the basic assessment principles and procedural requirements which have to be satisfied. This also needs to be taken into account when reviewing progress.' [7]

27. It further appears from the Report that at least in the majority of Member States

6 — See COM(93) 28.

7 — See Paragraph 2.1 of the Report.

great difficulty was experienced in implementing the directive. The Report states in this connection:

'It shows that, whilst some measures were approved during the transitional period 1985-88 ..., the main period of formal implementation has been in the post-July 1988 period and, particularly, during 1990-1. As will become apparent, the degree of formal compliance with the EIA Directive by the end of the transitional period was, for most Member States, very limited.

Despite substantially greater progress, between mid-1988 and mid-1991, the process of achieving formal compliance was not complete by July 1991. As ... illustrates, there were a considerable number of additional legal measures still in the process of formulation and approval at that date. Additionally, there are some differences

in interpretation ... about the extent to which the combination of existing and proposed measures are likely to be sufficient to achieve satisfactory formal compliance.

Failures to achieve satisfactory compliance, six years after the directive was approved, are an obvious major source of concern.' [8]

8 — See Paragraph 3.2 of the Report.

28. In that light it seems scarcely convincing for the Commission to mention the three-year period for implementation as an argument that the obligation to carry out an environmental impact assessment should apply in respect of every non-approved project — even when the consent procedure must have been initiated a long time previously — because the Member States could have used the implementation period for resolving possible transitional problems in respect of such projects.

29. Nor can much weight be attached to the Commission's conclusion *a contrario* from the express transitional provisions in other directives. The directives in question contain provisions which in certain specified circumstances enable the Member States to postpone compliance with the directives' requirements with regard to the quality of water, air, etc. The requirements of the EIA Directive are different in character and, as already stated, in the present case the issue is not whether the Member States are entitled to postpone compliance with the requirement of an environmental impact assessment, but rather of the extent to which the requirement is applicable to projects where the consent procedure was under way when the deadline for implementing the directive expired.

30. The purpose of the EIA Directive is to ensure that the consent procedure for projects which might have a significant effect on the environment is supplemented by

another procedure which, in the Commission's Report, is called the *EIA process*. [9]

31. In the preamble to the directive it is stressed that the EIA process should be initiated as early in the planning of the project as possible, and under the directive's rules it is clear that the environmental impact assessment is a *process* which is to be undertaken *in parallel with* and as an *integral part of* the project consent procedure. It is undoubtedly a central element of correct compliance with the purposes which the directive seeks to achieve.

That is also mentioned in the Commission's Report and is illustrated most clearly in a diagram in the Report (2.1) illustrating the EIA process and its relationship to the appraisal, authorization and implementation of projects. The diagram is included as an annex to this Opinion. It shows *inter alia* that an environmental impact assessment places certain significant obligations on the developer and that in order for the purpose of the directive to be achieved it is important that the developer initiates the EIA before he submits an application for consent to the project.

32. In that connection it might also be worth mentioning that Article 8 of the directive provides only that the environmental impact assessment must 'be taken into consideration *in the development consent procedure*' (my emphasis) and that the directive thus leaves it to the Member States to decide how and at which stages in the development consent procedure the environmental impact assessment should be carried out. [10]

33. In that light it seems to me wrong to interpret the directive to the effect that the obligation to carry out the *EIA process* should apply to *all development consent procedures* which have not been completed by a specific date, namely 3 July 1988.

34. Such an interpretation would lead to arbitrary results, in particular to results which could considerably delay the execution of projects beneficial to the community and result in major inconveniences for developers and the community.

35. That interpretation would mean that the EIA process would potentially also have to be carried out in full for projects which perhaps needed merely formal consent, having already undergone a long, thorough and complicated consent procedure (in which the

9 — That is emphasized in the Commission's Report, where the term EIA describes the total *environmental impact assessment process* (see Footnote 1 to the Report).

10 — See the Commission's Report, Point 2.2, third paragraph.

environmental aspects had already, presumably, to a large extent been taken into consideration).

36. That interpretation would, according to the information available, entail the risk of many years' delay in construction work useful to the community, for instance installations for the permanent storage of radioactive waste and waste-disposal installations for the incineration, chemical treatment or land fill of toxic or dangerous waste. [11] No further evidence is necessary to show that such delays in respect of projects that are ready to be implemented for installations of that kind would cause considerable loss to the private and public developers and potentially to the community.

37. Freistaat Bayern, the German Government and the United Kingdom are, in my view, right in maintaining that such an interpretation would lead to results that would be hard to reconcile with the principle of legal certainty and the principles of protection of legitimate expectations and proportionality.

38. It would not necessarily mean that those principles would entail the *invalidity of an express provision* in the directive to the effect that all projects not approved by 3 July 1988 should be subject to an environmental impact assessment. The principles can, however, without difficulty be cited as significant support for an *interpretation* of the directive to the effect that the Member States may omit the environmental impact assessment for projects in respect of which the consent procedure was initiated before 3 July 1988.

39. It cannot reasonably be argued against such an interpretation that it would conflict with the principle of the uniform application of Community law. The interpretation establishes what obligations all Member States are required, at the very minimum, to fulfil. Under Article 13 of the directive there is nothing to prevent the individual Member States from laying down stricter rules. Consequently there is nothing to prevent the Member States from having implemented the requirement of an environmental impact assessment for their developers and authorities before 3 July 1988 (even though according to the information available it might be considered doubtful whether many have made use of that possibility in order to protect the environment as well and as early as possible).

40. There are thus good grounds for, and only weak grounds against, interpreting the EIA Directive as meaning that the Member States were not bound to make the projects covered by the directive which were not approved by 3 July 1988 subject to an environmental impact assessment, but could restrict the obligation to projects for which the consent procedure had not yet been initiated.

11 — See Annex I to the EIA Directive.

41. It is evident that that interpretation takes the initiation of the consent procedure as the determinant date. It is that date too which is mentioned as one of the two possible determinant dates in the question referred to the Court. It is at that point that projects come to the attention of the authorities and at that point that the directive enables the authorities to lay down requirements to be fulfilled by the developer with regard to the content and so forth of the information to be provided.

That interpretation has the disadvantage of using a concept — the 'initiation' of the consent procedure — which in a specific case could well be difficult to apply in practice.

It will normally be the case that the consent procedure is initiated by the developer applying for authorization to carry out the project. It cannot, however, be excluded, in particular as regards public developers, that it might be doubtful when such an application is submitted or even whether a formal application is made at all by such a developer (on which see the definition in Article 1 of a developer: 'the applicant for authorization for a private project or the public authority which initiates a project').

42. Nor can it be excluded that there might be cases where such significant changes are made to the project, or the consent procedure for the project is postponed for such long periods, that it might be right, in order to ensure compliance with the directive, to hold that a new consent procedure should be initiated, accompanied by an obligation to carry out an environmental impact assessment.

43. There is no reason in the present case to examine those questions in detail. The issue will possibly have to be clarified in a later case.

Question 2

44. The second question is worded as follows:

'If Question 1 is to be answered as indicated under (b) above:

Is Article 12 of the directive to be interpreted as meaning that

(a) the relevant date for transitional provisions must be 3 July 1988,

or

(b) the Member States may in the case of transitional provisions take as the relevant date that of the later entry into force of their national measures for the transposition of the directive?'

45. It follows from answer to the first question that a position must be taken on the second question.

46. It appears from the above that:

— Under Article 12 of the directive the Member States were to have adopted the necessary transposition measures by 3 July 1988.

— There is an unconditional obligation to transpose directives under the case-law of the Court.

— The obligation to carry out an environmental impact assessment applies to all projects for which a consent application is submitted or consent procedure is initiated in any other way after expiry of the period prescribed for implementation.

Nothing in the directive can be adduced in support of the Member States' being allowed, when implementing directives, to *exempt from the environmental impact assessment obligation* projects in respect of which the consent procedure is initiated *after* expiry of the deadline for transposition.

47. It makes no difference that projects are involved which, like the one in point, have

reached a point in the planning procedure where the necessary decisions on traffic requirements, federal and Land regional planning and routing have been adopted. As mentioned above, the determinant date must, in view of the directive's purpose and content, necessarily be the date on which the consent procedure for the project in question was initiated.

48. It is correct, as the German Government and Freistaat Bayern have pointed out, that the transitional provisions in the UVPG arose from the same considerations as those supporting the suggested interpretation of the directive in answer to the first question, namely consideration for the interests of the developers and the community purposes underlying the execution of the projects.

Undoubtedly the delay in Germany's transposition of the directive may well create serious problems, but that circumstance cannot justify and make lawful a transitional rule which does not take account of the fact that the directive should have been transposed by 3 July 1988 at the latest, and an obligation should therefore have been laid down that all projects covered by consent procedures initiated after that date were to be subject to an environmental impact assessment.

The UVPG's transitional rule is in breach of the directive inasmuch as it exempts from the obligatory environmental impact assessment projects in respect of which the consent procedure was initiated after 3 July 1988.

49. It is worth mentioning, not least in connection with the present case, that in Article 2(3) of the directive Member States are given the opportunity in exceptional cases and under certain conditions to 'exempt a specific project in whole or in part from' the directive. [12]

50. That provision, which certainly cannot be relied upon either to support the lawfulness of a transitional provision such as that in point or the application of the requirement of an environmental impact assessment to every project not yet approved by 3 July 1988, shows that the Community legislature was aware that there could be cases where there were such pressing reasons that exemption from the environmental impact assessment as prescribed in the directive was necessary and justifiable. The possibility of exemption applies to all projects and is thus

12 — Article 2(3) provides:
'Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.
In this event, the Member States shall:
(a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;
(b) make available to the public concerned the information relating to the exemption and the reasons for granting it;
(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.
The Commission shall immediately forward the documents received to the other Member States.
The Commission shall report annually to the Council on the application of this paragraph.'

not restricted to projects where special problems of a transitional character arise. It is, however, natural to assume that there might be special cause to apply the provision in connection with the last-mentioned problems. It therefore also seems natural to assume that the provision might well be applied in order to resolve the serious problems which a delay in the construction of the ring road around Vilsbiburg would create, the case for which was put strongly and convincingly before the Court by the Mayor of Vilsbiburg.

Direct effect of the directive

51. Freistaat Bayern, the UK and the German Government have claimed that the directive does not have direct effect because its provisions do not appear unconditional and sufficiently precise and that the plaintiffs in the main action cannot therefore rely on it before the national court.

52. The different views concerning the directive's direct effect expressed in the present case demonstrate that it is not a simple question to answer.

53. The Commission and the Netherlands Government state that there is a sufficiently precise and unconditional core of provisions in the directive. Reference is made to the fact that the actual obligation to carry out an environmental impact assessment is clearly expressed in Article 2, that the content of the environmental impact assessment is laid down with sufficient precision in Article 3, that the content of the information which the developer must in all cases provide appears in Article 5(2) and that the obligation of the planning authority to take account of the environmental impact assessment is laid down in Article 8.

54. It is not excluded that the Commission and the Netherlands Government are right in saying that the Court, if necessary, could hold that the obligation under the directive to carry out an environmental impact assessment may be relied on in an action brought by members of the public before a national court for a declaration that a planning authority has not complied with its obligation to carry out an environmental impact assessment of projects where the public authority is itself the developer. It is possible, on the basis of sufficiently precise and unconditional provisions in the directive, to hold that an environmental impact assessment should be undertaken and to determine the content of the assessment, and on that basis to decide whether that obligation has been complied with by the Member State in question.

55. Having regard to the nature of the claim in reliance upon the directive, it can scarcely be a conclusive argument against direct effect in the context of the present case that the directive — as Freistaat Bayern, the German

Government and the UK Government rightly point out — on many important points leaves it to the Member States to lay down the detailed rules governing the carrying out of the environmental impact assessment. *Inter alia* it may be noted that under Article 2(2) it is left to the Member States to decide whether the environmental impact assessment should be integrated into the existing procedures or those established to comply with the aims of the directive, that under Article 5 the Member States are to adopt the necessary measures to ensure that the developer supplies information at the right time and with the appropriate content and that under Article 6 detailed arrangements for consultation with the appropriate environmental authorities and the public concerned are to be laid down. That circumstance will, of course, be of decisive significance in other connections, where members of the public rely on the directive before national courts, for instance in relation to claims that the environmental impact assessment has not been carried out properly. [13]

56. It is, however, questionable whether in the present case there is cause for the Court to decide the issue of the directive's direct effect. [14]

57. The Bayerischer Verwaltungsgerichtshof did not raise a question on that point. It confined itself to requesting an interpretation of the directive with regard to whether the disputed transitional provisions in the UVPG are in breach of the directive.

In the order for reference, the Verwaltungsgerichtshof points out that the UVPG came into force before the consent procedure was completed and it states in that connection:

'Should the first sentence of Paragraph 22(1) of the UVPG be in breach of the directive and therefore invalid, this would not have the effect of rendering the UVPG invalid in its entirety (concept underlying Paragraph 139 of the Civil Code). By means of the Law of 12 February 1990 the legislature plainly intended to comply with its duty to transpose the directive into national law, quite regardless of the question whether the directive gives the Member States (also) the possibility to enact transitional provisions; there is nothing whatever to suggest that the legislature intended anything to the contrary.' [15]

The Verwaltungsgerichtshof goes on to state:

13 — As mentioned above, in its Report on the directive's implementation, the Commission referred to the directive's character as a framework directive and in addition listed the important points on which the Member States must necessarily comply with the directive in order to enable an environmental impact assessment to be fully implemented in cases covered by the directive.

14 — The Court will to some extent have cause to examine that question in the action for breach of the Treaty brought by the Commission against Germany, in which the Commission claims that Germany has infringed certain provisions of the directive in connection with consent for extension of a power station (Case C-431/92 *Grosskrotzenburg*).

15 — See Point II, 2(d) of the order for reference.

— first, that 'in the absence of — valid — transitional provisions the planning authority would accordingly, by virtue of Paragraphs 2 and 3(1) of the UVPG, read in conjunction with Point 8 of the Annex (on Paragraph 3), have been obliged to assess the environmental impact of both roadworks projects when considering the question of planning approval (Paragraph 17(1), second sentence, of the Fernstrassengesetz, new version)';

— secondly, that it is clear that no assessment was carried out (it is expressly pointed out in the order that the assessment actually undertaken of the projects' effects on the environment fell well short, even in the defendant's view, of the UPVG 's requirements of an environmental impact assessment);

— thirdly, that in any event the plaintiffs, for whom implementation of the projects will have an expropriatory effect, are entitled under German law to rely on the omission of an environmental impact assessment as a basis for a claim that consent given without a prior environmental impact assessment is unlawful.

58. On the basis of German law, the Verwaltungsgerichtshof is already in a position to rule on the consequences of a declaration of possible conflict between the UVPG's transitional rules and the directive, and therefore simply needs the Court's interpretation of the directive in order to be able to decide whether the transitional rules are in breach of the directive.

In my view there is nothing in the directive or, moreover, in Community law to prevent the Verwaltungsgerichtshof from giving the said legal effect to a finding of objective conflict between the directive and the German transitional rules.

In particular it should be mentioned that the directive is also aimed at protecting the interests of members of the public in guarding against environmental nuisances by means of an environmental impact assessment, at all events to the extent that it is shown that the members of the public in question will be directly affected by execution of the projects (on which see Article 6(2)).

59. In the light of the foregoing I do not consider that there are grounds for the Court to express its view on the direct effect of the directive in the present case.

Question 3

60. The third question is worded as follows:

'If Question 2 is to be answered as indicated under 2(b) above:

Is the concept of "project" in Articles 1, 3 and 4 of and Annex I, point 7, to the directive to be understood as meaning, in its application to motorways and express roads, that the environmental impact

(a) is to be assessed solely for the section of a road link for which development consent has been sought,

or

(b) in addition to the area covered by that section, for the road link as a whole?'

The Verwaltungsgerichtshof gives the following reasons for the question:

— One of the disputed planning consents relates to the 6.9 km long section between Geisenhausen and Haarbach, which is only the part of the road link planned by the legislature between Regensburg and Rosenheim (the new B 15).

— In Article 1(2) the directive defines the term 'project' [16] but does not thereby resolve the particular problem that arises in connection with linear projects such as roads, where it is not certain whether the project whose effects on the environment is to be assessed is the entire road link or the section which is actually to be constructed.

— On the basis of the directive arguments can be advanced for each of those possibilities, just as it cannot be excluded that the task of defining the concept of a project is left to the individual Member State.

16 — The definition is worded as follows:
'the execution of construction works or of other installations or schemes' and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

With reference to the above the Verwaltungsgerichtshof states that:

'In so far as the directive is to be interpreted as meaning that the Member States may, in the context of transitional provisions, also exempt sections of a motorway or express road from an environmental impact assessment, it should finally be asked what are the consequences of this for the project in its entirety. In such a case is the project in its entirety exempted from the requirements of the directive or is it, in the case of subsequent partial consents, to be subjected to the requirements of the directive at least in so far as consents for sections do not already stand in the way of this?'

61. Since the express precondition for the question — namely, that it should be lawful to exempt the disputed 'part project' from the requirement of an environmental impact assessment — is not satisfied, there is no reason for the Court to give a reply. The Commission also declined to discuss the question in its observations.

62. The question is, however, discussed in most of the other observations, when its practical importance for the future application of the directive to motorways and express ways is stressed.

63. Even though, given the fact that the precondition for the question is not satisfied, I would suggest that the Court should not give a reply, I nevertheless believe that this is the place to make some comments on the problems it raises.

64. The plaintiffs in the main action who have submitted observations, first and foremost Bund Naturschutz in Bayern eV, have argued that the environmental impact assessment must be carried out for the entire road link planned. That is necessary in order that the directive's goal of prevention can be fully achieved. The most important decision from an environmental point of view in connection with the construction of roads is the route it will take. The planning for long road links such as the one in point takes place in stages — assessment of need, regional planning, route — whereby the decision concerning the overall linear route, although not binding for the final decision on the route for specific project sections, will nevertheless invariably limit the options of the project developer. To limit the obligation to carry out an environmental impact assessment to specifically planned sections carries the risk of a significant restriction of the environmental impact assessment's practical importance. Projects which have already been executed in respect of parts of longer road links — which perhaps in isolation appear not to have given rise to significant environmental problems — may mean that later, in connection with planning approval for other sections, on practical grounds sufficient account will not be taken of serious environmental problems revealed by the environmental impact assessments undertaken for those sections. If, for example, sections A and C

which have already been constructed are to be linked up by section B, the planning approval for the construction of sections A and C will mean that the feasibility of the planning authority's selecting an alternative route for section B is severely restricted.

65. The view put forward by the plaintiffs in the main proceedings has much to recommend it.

66. The optimal solution is presumably for an environmental impact assessment to be carried out both in connection with decisions on the routing of the entire length of road and on decisions for the specific construction projects for sections. That is also the solution chosen by the Bundestag when it transposed the EIA Directive, in connection with which, as mentioned, when amending the Law on Trunk-Roads it imposed an obligation to carry out an environmental impact assessment in both respects.

67. That is, however, not a solution that the Member States are bound to choose under the EIA Directive. As stated by Freistaat Bayern and the three governments which have submitted observations, it is not possible to interpret the directive to the effect that it makes an environmental impact assessment mandatory for anything other than the specific projects submitted by developers to the competent authorities in order to obtain authorization to carry out construction or other works — even if the actual application relates to only one part of a longer road link which, as normally happens in practice, is to be constructed in stages.

68. The principle underlying the directive is unambiguous: an environmental impact assessment is to be carried out for projects in respect of which the public or private developer is seeking development consent (see on this point Article 1(2), Article 2(1) and (2), Articles 5, 6 and 8 in particular, which all assume that applications have been submitted for consent to a project).

69. That result is confirmed by the difficulties which could arise in laying down what comprises an 'entire project' when that concept is not the same as 'a specific project in respect of which an application has been submitted'. In addition, there might be difficulties in carrying out an environmental impact assessment as provided for in the directive for projects which have not yet been worked out in detail. It must be self-evident that the directive cannot indirectly have the effect of forcing the Member States to depart from the normal practice according to which long road links are executed by constructing sections over staggered periods.

70. It is, however, undoubtedly correct that, as the United Kingdom points out, the purpose of the directive should not be lost by the projects which should be subject to an environmental impact assessment being given a form which renders an environmental impact assessment meaningless. The Member States must ensure that the obligation to carry out an environmental impact assessment is not circumvented by a definition that is over-strict or otherwise inappropriate, in the light of the purpose of the directive, of the projects in respect of which application must be made.

71. The important question in the present connection is not, however, which projects are to be subject to an environmental impact assessment.

It is whether, in connection with the environmental impact assessment of the specific project, there is an obligation to take account of the fact that the project forms part of a larger project, which is to be carried out subsequently, and in the affirmative, the extent to which account is to be taken of that fact.

The subject-matter and content of the environmental impact assessment must be established in the light of the purpose of the directive, which is, at the earliest possible stage in all the technical planning and decision-making processes, to obtain an overview of the effects of the projects on the environment and to have projects designed in such a way that they have the least possible effect on the environment, That purpose entails that as far as practically possible account should also be taken in the environmental impact assessment of any current plans to extend the specific project in hand.

72. For instance, the environmental impact assessment of a project concerning the construction of the first part of a power station should, accordingly, involve the plans to extend the station's capacity fourfold, when the question of whether the power station's site is appropriate is being assessed.

Similarly, when sections of a planned road link are being constructed, account must be taken, in connection with the environmental impact assessment of the specific projects of the significance of those sections in the linear route to be taken by the rest of the planned road link.

73. There is neither reason nor basis for a more specific determination of the scope of that obligation in the present case.

Conclusion

74. On the above grounds I consider that the questions referred to the Court by the Bayerischer Verwaltungsgerichtshof should be answered as follows:

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment should be interpreted as meaning that national rules exempting projects in respect of which the consent procedure has been initiated after 3 July 1988 from the obligation to undergo an assessment of their effects on the environment are in breach of the directive.

Annexe to the Opinion in Case C-396/92

Figure 2.1. A simplifield flow chart of the EIA process and its relationship to project appraisal, authorization and implementation

