OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 19 May 2011 [1]

1. Decisions on projects likely to have an impact upon the environment may be taken by an administrative procedure, in which (direct) public participation is ensured through an environmental impact assessment ('EIA') or by a legislative procedure, in which (indirect) public participation is ensured through the competent representative legislative body.

2. In that context, the present series of references for a preliminary ruling, made by the Belgian Conseil d'État (Council of State), concerns the interpretation of European Union ('EU') legislation on access to information, public participation and access to justice with regard to decision-making in environmental matters, notably Directive 85/337/EEC [2] ('the EIA Directive') as amended by Directive 2003/35/EC. [3]

3. The EIA Directive does not apply to projects the details of which are adopted by a specific act of national legislation. In the present cases, a project decision was taken by an administrative procedure and then ratified by a legislative decree. The question therefore arises whether such a course of action falls within the scope of the EIA Directive.

International law

4. On 25 June 1998, the European Community, the Member States and 19 other States signed the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'). That

1 — Original language: English.

2 — 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).

3 — Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

convention entered into force on 30 October 2001. It was ratified by Belgium on 21 January 2003, and was approved on behalf of the European Community by Council Decision 2005/370. [4]

5. Article 2 of the Aarhus Convention defines a number of terms. In particular, it excludes from the scope of the term 'public authority' any 'bodies or institutions acting in a judicial or legislative capacity'.

6. Article 6 is entitled 'Public participation in decisions on specific activities'. It requires, essentially, that provision be made to ensure timely and effective information and participation of the public concerned by proposed activities, at all relevant stages of any authorisation procedure with regard to activities specifically listed in Annex I or other activities which may have a significant effect on the environment. The activities listed in Annex I include 'Construction of lines for long-distance railway traffic and of airports with a basic runway length of 2 100 m or more'.

4 — Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1). The text of the Aarhus Convention is reproduced on p. 4 et seq. of that issue of the Official Journal.

7. Article 9 is entitled 'Access to justice'. It reads as follows:

'1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5), shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party 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.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial

review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.'

EU law

8. Before Decision 2005/370, a number of legislative measures were adopted to incorporate the provisions of the Aarhus Convention into what was then Community law, including the amendments made to the EIA Directive by Directive 2003/35.

The EIA Directive

9. The EIA Directive is intended to harmonise the assessment of effects on the environment which are likely to occur with the realisation of certain projects. The sixth recital in the preamble states that 'development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; … this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question'.

10. Article 1(2) of the EIA Directive includes the following definitions:

— 'project': 'the execution of construction works or of other installations or schemes', or 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources';

— 'developer': 'the applicant for authorisation for a private project or the public authority which initiates a project';

— 'development consent': "the decision of the competent authority or authorities which entitles the developer to proceed with the project';

— 'public': 'one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups'; and

— 'public concerned': 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2) [5]…'.

11. Article 1(5) provides: 'This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.'

12. Under Article 4(1), projects listed in Annex I to the EIA Directive are to be made subject to an assessment in accordance with Articles 5 to 10 thereof. [6] Those projects include, in point 7(a) of Annex I, 'Construction of lines for long-distance railway traffic and of airports with a basic runway length of 2 100 m or more'. [7]

13. Articles 5 to 10 then set out a number of substantive obligations relating to the conduct of an EIA. In particular: Article 5 specifies requirements concerning information to be provided by developers; Article 6 sets out rules to ensure that environmental authorities and the public are properly informed and given a proper opportunity to participate, all in a timely and effective manner; Article 7 requires other Member States to be informed and consulted where a project is likely to have significant effects on the environment in their territory; and Article 8 provides: 'The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.'

14. Article 10a, which corresponds broadly to Article 9(2), (4) and (5) of the Aarhus Convention, reads as follows:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

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

5 — Article 2(2) allows Member States to integrate EIAs into existing procedures or to establish new procedures.

6 — In exceptional cases and under strictly defined conditions, Member States may derogate from this requirement in accordance with Article 2(3) of the EIA Directive. No reliance has been placed on this exceptional procedure in the present cases.

7 — It appears to be common ground that the projects with which these cases are concerned come within the scope of Annex I.

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

15. It is clear from, in particular, recitals 6, 9, 11 and 12 in the preamble to Directive 2003/35, which introduced Article 10a into the EIA Directive, that the purpose of that and other amendments was to bring the EIA Directive into line with the Aarhus Convention, and in particular to ensure adequate public participation in decision-making procedures and a right to judicial review of all steps in those procedures.

Facts, procedure and questions referred

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

16. The Conseil d'État is the highest administrative court in Belgium, with jurisdiction to rule on the validity of administrative, but not

legislative, measures. The questions referred by that court arise from six actions, challenging a series of administrative planning consents granted between September 2003 and September 2006, relating to projects centred around the development of airports in Belgium.

17. In granting the consents, the relevant administrative authorities followed a series of procedural steps. These steps, broadly speaking, comprised: (i) an initial application by a project manager; (ii) a period of assessment; (iii) a period of consultation led by the municipality; (iv) the issuing of a number of opinions; and (v) the grant of the consent.

18. The applicants in each case are local residents or associations who brought their actions between January 2004 and April 2006.

19. On 17 July 2008, the Parliament of the Walloon Region ('the Walloon Parliament') adopted the Décret wallon relatif à quelques permis pour lesquels il existe des motifs impérieux d'intérêt general (Walloon decree on certain consents for which there are overriding reasons in the general interest; 'the Decree of 17 July 2008').

20. The Decree of 17 July 2008 contains three sets of provisions. First, in Article 1, it lists a number of works relating to Liège-Bierset and Brussels South Charleroi airports and certain other transport links, for which 'overriding reasons in the public interest' have been established. Then, in Articles 2 to 4, it sets out procedures under which, for projects falling within that list, development consent is to be granted by the Walloon Government in accordance with the applicable planning laws and ratified by the Walloon Parliament. Finally, in Articles 5 to 17, it ratifies a number of consents which had already been granted; of those, Articles 6, 7, 9 and 14 are relevant to the present proceedings.

21. Article 6 of the Decree of 17 July 2008 states as follows:

'The following consent, for which overriding reasons in the general interest have been established, is hereby ratified:

— as regards the acts and development works relating to the infrastructure and reception buildings of regional airports, the Ministerial Order of 13 September 2006 granting planning consent … for extension of the runway of Liège-Bierset airport.' [8]

8 — This forms the subject-matter of Cases C-128/09 and C-129/09.

22. The same phrasing appears, *mutatis mutandis*, in (inter alia):

— Article 7 (planning consent for vaulting the Tintia stream and altering the ground relief in the north-eastern part of the Charleroi airport zone [9]);

— Article 9 (environmental consent to operate Brussels South Charleroi Airport [10]); and

— Article 14 (overall consent for the construction and operation of the third and fourth tracks on a rail line connecting Brussels and Charleroi [11]).

23. During the course of the proceedings before the Conseil d'État, the defendant submitted that the Decree of 17 July 2008, as a legislative measure which replaced the administrative consents and could be challenged only before the Cour constitutionnelle (Constitutional Court), had deprived either the Conseil d'État of its jurisdiction or the applicants of their interest in having the administrative consents annulled. The applicants contended that the adoption of the Decree was not compatible with either the Aarhus Convention or the EIA Directive, and should be ignored.

24. In the meantime, other proceedings had been brought before the Cour constitutionnelle (in some cases, by applicants in the proceedings before the Conseil d'État) challenging the validity of the Decree of 17 July 2008 itself.

25. In those circumstances, the Conseil d'État stayed the proceedings before it and referred questions for a preliminary ruling both to the Cour constitutionnelle and to the Court of Justice.

26. Its questions to the Cour constitutionnelle sought, in summary, to ascertain whether the Walloon Parliament was entitled (a) to ratify the administrative consents without examining the applications as to their substance or the procedure as to its regularity and (b), in so doing, to preclude full judicial review of those consents by the Conseil d'État even when such review had been sought before the Decree of 17 July 2008 was adopted.

27. The questions referred to the Court of Justice read as follows:

'A. Can Article 1(5) of [the EIA Directive] be interpreted as excluding from its application legislation – such as [the Decree of 17 July 2008] – which merely states that "overriding reasons in the general interest have been established" for the grant

9 — This forms the subject-matter of Case C-134/09.

10 — This forms the subject-matter of Case C-135/09.

11 — This forms the subject-matter of Cases C-130/09 and C-131/09.

of planning consents, environmental consents and combined planning and environmental consents relating to the acts and works listed therein and which "ratifies" consents in respect of which it is stated that "overriding reasons in the general interest have been established"?

B.1. Do Articles 1, 5, 6, 7, 8 and 10a of [the EIA Directive], as amended, preclude a legal regime in which the right to implement a project subject to an environmental impact assessment is conferred by a legislative act against which no review procedure is available before a court of law or another independent and impartial body established by law which makes it possible to challenge, both in terms of the substance and the procedure followed, the decision granting the right to implement the project?

B.2. Must Article 9 of the Aarhus Convention be interpreted as requiring the Member States to provide for the possibility of seeking a review before a court of law or another independent and impartial body established by law in order to be able to challenge the legality, in relation to any issue of substance or procedure relating to the substantive or procedural rules governing the authorisation of projects subject to an impact assessment, of decisions, acts or omissions subject to the provisions of Article 6?

B.3. In the light of the Aarhus Convention, must Article 10a of [the EIA Directive], as amended, be interpreted as requiring the Member States to provide for the possibility of seeking a review before a court of law or another independent and impartial body established by law in order to be able to challenge the legality of decisions, acts or omissions in relation to any issue of substance or procedure relating to the substantive or procedural rules governing the authorisation of projects subject to an impact assessment?' [12]

28. Finally, the Conseil d'État decided that, once it had received answers to its questions from both the Cour constitutionnelle and the Court of Justice, a supplementary report

12 — Identical questions have been submitted to the Court in three further references in cases relating to Articles 15, 16 and 17 of the Decree of 17 July 2008, which have been joined by the Court and suspended pending judgment in the present proceedings (Joined Cases C-177/09, C-178/09 and C-179/09 Poumon Vert de la Hulpe and Others; OJ 2009 C 180 pp. 30-32).

would be drawn up, on which the parties would be invited to make final submissions.

29. The Cour constitutionnelle, for its part, has considered the actions brought directly before it together with the questions referred to it by the Conseil d'État, and has itself referred a number of questions to the Court of Justice on the interpretation of the Aarhus Convention and the EIA Directive. [13] Since that reference for a preliminary ruling was received slightly more than a year after those in the present proceedings, and since the subject-matter of the questions is partly the same, the Court has decided to proceed first with the present references for a preliminary ruling.

Admissibility

31. The Belgian Government contends that the requests for a preliminary ruling are inadmissible. First, it argues that (i) the factual and legal elements set out in the orders for reference are insufficient to place parties who wish to submit observations in a position to do so and (ii) the Conseil d'État fails to explain why an interpretation of EU law is required. Second, on the basis of the *CILFIT* [14] criteria, it submits that (i) the provisions in issue are clear and do not require interpretation; (ii) the questions are irrelevant and (iii) the Court's existing case-law has already decided the questions referred.

The first submission as to admissibility

30. In these proceedings, written observations have been presented by the applicants in Cases C-128/09 to C-131/09, the Belgian, Greek and Italian Governments and the Commission. The applicants in Cases C-128/09 and C-130/09, one of the applicants in Cases C-134/09 and C-135/09, the Belgian and Greek Governments and the Commission submitted oral argument at the hearing on 8 June 2010.

Sufficiency of the factual and legal elements in the orders

32. The Belgian Government submits that the orders for reference do not give interested parties all the information needed in

13 — Case C-182/10 Solvay and Others (OJ 2010 C 179, p. 18).

14 — Case 283/81 CILFIT [1982] ECR 3415.

order to submit useful observations. They do not set out in full the regime put in place by the Decree of 17 July 2008, an understanding of which is necessary in order to answer the first question; in particular, they fail to specify that the EIA Directive applies to the administrative procedures preceding legislative ratification. Nor do they explain the role and competence of the Cour constitutionnelle in relation to those of the Conseil d'État, an understanding of which is necessary in order to answer the remaining questions. Indeed, the questions are worded in such a way as to be actually misleading on both those aspects. Finally, rather than give its own account of those matters, the Conseil d'État merely indicates the positions taken by the applicants in its proceedings.

33. It is well established that the information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice. [15] It is also settled case-law that the Court will not rule on the interpretation of national provisions or decide whether the referring court's interpretation thereof is correct; rather, it will take account of the factual and legislative context as described in the order for reference. [16] It is with those considerations in mind that the Belgian Government's arguments should be assessed.

34. As regards the first of those arguments, it seems to me clear from the orders for reference that the concern of the Conseil d'État as regards the Decree of 17 July 2008 is limited to the ratification of existing administrative consents, so that the other aspects of the decree are of no particular relevance. Nor was it necessary to specify that the EIA Directive applied to the administrative procedures, since that flows from the terms of the directive itself.

35. As regards the second argument, it is true that an understanding of the relative roles and competences of the Conseil d'État and the Cour constitutionnelle is helpful in order to gauge the national procedural issues which have prompted the orders for reference. It seems to me, however, that no particularly deep or detailed understanding is required and that the essentials – namely, the risk that the Conseil d'État might be deprived of jurisdiction over actions already pending before it by a possibly merely formal move on the part

15 — See, for example, Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633, paragraph 20.

16 — See, for example, Case C-467/08 Padawan [2010] ECR I-10055, paragraph 22.

of the Walloon Parliament – are clear from the orders for reference. [17]

36. Nor does it seem to me that the questions are phrased in such a way as to cause the Court or a Member State to focus on the wrong issues, even if the Belgian Government is right in saying that they suggest a state of Belgian law with which it does not agree. The central issue of EU law is clearly that of the effect, on the right of access to justice guaranteed by the Aarhus Convention and the EIA Directive, of the ratification by legislative means of consents previously granted by an administrative procedure. Two Member States have submitted observations on that issue, without being noticeably hampered to any appreciable extent either by any lack of information in the orders for reference or by the wording of the questions. [18]

37. Finally, the fact that the Conseil d'État sets out the applicants' arguments on various matters rather than its own views does not, to my mind, vitiate the orders for reference in any way. Those arguments indicate adequately why it may be necessary to have a ruling on EU law before the Conseil d'État reaches a view on them.

Sufficiency of the explanation of the need for an interpretation of EU law

38. In contending that the Conseil d'État has not sufficiently explained the need for an interpretation of EU law, the Belgian Government relies essentially on that court's own case-law, mentioned in the orders for reference. In its judgment No 185.645 of 11 August 2008 (*Deneye*), the Conseil d'État ruled that the adoption of the Decree of 17 July 2008 deprived it of its jurisdiction to rule on the validity of the measures thereby ratified; however, if the decree (or the relevant article thereof) were to be annulled by the Cour constitutionnelle, that decision on lack of jurisdiction could be withdrawn on application by the parties. In the present case, the Belgian Government argues, the Conseil d'État should have followed the same procedure and waited for the outcome of the proceedings before the Cour constitutionnelle, particularly since it referred questions itself to that court on the jurisdictional issued raised. Consequently, the questions referred are hypothetical at the present stage. The Conseil

17 — I acknowledge that understanding of the relevant background might have been slightly hindered by a different factor, not ascribable to the orders for reference themselves: the translations of those orders sent by the Court of Justice to the Member States in their own languages omitted the sections dealing with the references for a preliminary ruling by the Cour constitutionnelle. However, the omissions were clearly indicated as such in the translations and Member States were also sent full copies of the French-language original. Moreover, even without those passages, it seems to me that the orders for reference contained sufficient information.

18 — It must also be acknowledged that the Italian Government described the first question as 'enigmatically formulated' – but considered itself none the less able to submit observations.

d'État has provided no explanation as to why, in those circumstances, it needs a ruling on the interpretation of EU law before the Cour constitutionnelle has reached a decision.

39. I can agree that the procedural situation before the national courts, as I have described it above, [19] is intricate, and that a more orderly approach might have been desirable, and perhaps more in accordance with national procedural rules. I can also acknowledge that there might have been a gain in overall procedural efficiency if, in this Court, the reference from the Cour constitutionnelle had been joined, or heard together, with the cases in the present proceedings. However, none of that seems to me to affect in any way the admissibility of the questions referred in these proceedings.

40. It is true that, in the context of the cooperation between national courts and the Court of Justice, a court referring a question for a preliminary ruling must set out the reasons for which it is uncertain as to the interpretation of EU law and considers it necessary to refer such a question. [20] It does not, however, in my view, have to go beyond setting out those reasons in an understandable manner. Nor does it have to pre-empt possible arguments from parties or Member States as to the correctness of its approach in the light of national procedural law.

41. Provided that there are clear prima facie reasons for requesting a preliminary ruling, it is not for this Court to look behind those reasons and venture into the field of national law. As the Court has consistently recalled, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [21] Moreover, it is not for the Court, given the allocation of functions between itself and the national courts, to determine whether the decision to refer has been taken in accordance with the rules of national law governing the organisation of courts and their procedure. [22]

19 — At points 23 to 29.

20 — See, for example, the Order in Case C-422/98 Colonia Versicherung [1999] ECR I-1279, paragraph 6.

21 — See, for example, Case C-393/08 Sbarigia [2010] ECR I-6337, paragraph 19.

22 — See, for example, Case C-435/97 WWF and Others [1999] ECR I-5613, paragraph 33; and Case C-238/05 Asnef-Equifax and Administración del Estado [2006] ECR I-11125, paragraph 14.

42. In the present case, the reasons for requesting a preliminary ruling are abundantly clear. The Conseil d'État is seised of actions contesting administrative consents, which it has jurisdiction to entertain. Before it can give judgment, it needs to know whether, under the relevant provisions of the Aarhus Convention and the EIA Directive, the fact that those consents have been ratified by a legislative measure deprives it of that jurisdiction. There may be doubts as to whether its previous case-law, under which it has renounced jurisdiction in such circumstances, was correct. Such an issue, it seems to me, is far from hypothetical. The Conseil d'État is therefore entitled and, as a court against whose decisions there is no judicial remedy under national law, arguably required, to seek a preliminary ruling from the Court of Justice under Article 267 TFEU.

The second submission as to admissibility

The relevance of the questions referred

43. The Belgian Government argues that the questions are irrelevant to the outcome of the proceedings before the Conseil d'État.

44. As regards Questions A and B.1, it submits that the orders for reference presuppose – incorrectly – that the Decree was adopted by the Walloon Parliament in a single-stage procedure without any environmental impact evaluation or other safeguards. A ruling on that basis would be irrelevant to the true situation, that of a two-stage procedure to which the EIA Directive applies.

45. That objection, it seems to me, is quite unfounded. The two-stage nature of the procedure is clear from the orders for reference, as is the need for guidance as to whether and, if so, to what extent EU law may allow a legal challenge to an administrative consent to be nullified when that consent is subsequently ratified by legislative means.

46. Questions B.2 and B.3, the Belgian Government contends, are irrelevant in that they concern not the Decree of 17 July 2008 but the constitutional and jurisdictional rules allocating competence between the Conseil d'État and the Cour constitutionnelle. Furthermore, as regards Question B.3, Article 9 of the Aarhus Convention, which is more complete than Article 10a of the EIA Directive, is applicable in Belgium, and the Court's interpretation cannot render the latter more extensive than the former.

47. Those objections seem to me themselves irrelevant. The Conseil d'État clearly seeks a ruling on the implications of Article 9 of the Aarhus Convention and Article 10a of the EIA Directive for the procedural situation of the challenges before it. Such a ruling will enable it to draw conclusions as to how it should proceed with those challenges. The questions are therefore relevant to the outcome of the proceedings before the Conseil d'État.

Acte clair

48. The Belgian Government argues that the texts of the Aarhus Convention and the EIA Directive are clear; and that the contested provisions do not require the Court's interpretation. The doctrine of *acte clair* should therefore have precluded the Conseil d'État from making a reference.

49. It seems to me that the present proceedings have amply demonstrated that the provisions are not totally clear in their application to the circumstances of the main proceedings. However, whether they are clear or not, the reference to the doctrine of *acte clair* is irrelevant. A national court may invoke that principle to justify its refusal to make a reference, on the ground that the answer to a particular question is already sufficiently clear. [23] It cannot be used by this Court as a ground for declining to answer questions that have been referred. If a court of last resort takes the view that pertinent provisions of EU law are unclear, it is not only permitted but required to make a reference. The Court is then, in principle, bound to give a ruling. [24] However, if the answer admits of no reasonable doubt, the Court may give its decision by reasoned order under the second subparagraph of Article 104(3) of its Rules of Procedure. In the present proceedings, the Court has, on the contrary, decided that the questions referred merit the attention of the Grand Chamber.

Existing case-law

50. The Belgian Government submits that the answers to questions A and B.1 can be deduced from the judgment in *WWF and Others*. [25]

51. However, as with the reference to the doctrine of *acte clair*, that submission is irrelevant to the admissibility of the references for a preliminary ruling. Although a national court, even one from whose decisions no appeal lies, may not be *required* to refer a

23 — *CILFIT*, cited in footnote 14 above, paragraph 16.

24 — See, for example, Case C-295/05 Asemfo [2007] ECR I-2999, paragraph 30.

25 — Cited in footnote 22 above, paragraphs 55 to 63 of the judgment.

question the answer to which can be deduced from existing case-law, nor is it *precluded* from doing so. In such an event, the Court may give its decision by reasoned order under the first subparagraph of Article 104(3) of its Rules of Procedure. As I have pointed out, it has, on the contrary, decided that the questions referred in the present proceedings merit the attention of the Grand Chamber. Furthermore, as will become clear from my examination of the questions themselves, I consider that the answers *cannot* be deduced from the judgment in *WWF and Others*.

Conclusion on admissibility

52. I therefore take the view that there is no obstacle to the admissibility of the questions raised by the Conseil d'État.

Substance

Question A

53. In accordance with Article 1(5), the EIA Directive does not apply to 'projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process'. The Conseil d'État seeks to clarify the meaning of that provision in a situation in which development consent was first granted by an administrative authority, then ratified by a decree of the competent legislative authority which states (merely) that 'overriding reasons in the general interest have been established'.

54. Within that question, there are two implicit sub-questions. First, if a decree is adopted by the legislature, as a legislative measure, does that mean, in and of itself, that it automatically falls within the scope of the exclusion in Article 1(5)? Second, and conversely, is a national court restricted to examining the wording used in such a measure in order to determine whether the exclusion in Article 1(5) applies; or may it look behind the text, and examine how the legislative process itself was conducted?

The rationale behind Article 1(5)

55. The EIA Directive, as amended in order to take account of the Aarhus Convention, seeks to improve the decision-making

processes of administrative bodies.[26] The element of public participation it introduces to the process is important to achieving this aim. In other words, the EIA Directive promotes direct public participation in administrative decision-making processes concerning the environment within a Member State.

56. Where a decision is reached by a legislative process, however, such public participation already exists. The legislature itself is composed of democratically-elected representatives of the public. When the decision-making process takes place within such a body, it benefits from indirect, but nevertheless representative, public participation.

57. With this in mind, I turn to examine Article 1(5) more closely.

The wording of Article 1(5)

58. Article 1(5) states: 'This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.'

59. The crux of the issue is the ambiguity contained in the link between the exclusion of projects the details of which are adopted by a specific act of national legislation and the achievement of the objectives of the directive through the legislative process. That ambiguity gives rise to two possible interpretations.

60. On one interpretation, there would be a presumption that the legislative process automatically ensures achievement of the objectives of the EIA Directive. Thus, wherever the details of a project were adopted by a specific act of national legislation, a national court should view that act as automatically having met those objectives.

61. On the other interpretation, the provision would be read as expressing a prior condition: the EIA Directive does not apply to projects the details of which are adopted by a specific act of national legislation *provided that* the objectives of the directive are achieved through the legislative process. Such an interpretation would mean that the legislature is required to achieve the objectives of the EIA Directive (including supplying information) during the course of its decision-making process, before the project can be excluded

26 — See the preambles to Directive 2003/35 and to the Aarhus Convention itself.

from the application of the directive by Article 1(5). That would raise the further question of what the legislature must do to ensure that those objectives are met.

62. Neither reading is without its drawbacks. The first might unduly widen the scope of the legislative exclusion from a directive which aims to ensure better decision-making in environmental matters. The consequence might be that, even where an administrative project was clothed in the flimsiest of legislative cloaks, the exclusion would none the less apply. The second interpretation might involve a degree of judicial activism which could lead to confusion as to the exact duties of the legislature in environmental cases. In its most extreme form, it might render the exclusion itself virtually meaningless by requiring the legislature to meet all the same procedural requirements as an administrative authority.

The judgments in *WWF and Others* and *Linster*

63. The Court has already had two opportunities to consider the meaning of Article 1(5) of the EIA Directive.

64. In *WWF and Others*, [27] the Court stated that Article 1(5) 'exempts projects envisaged by the Directive from the assessment procedure subject to two conditions. The first requires the details of the project to be adopted by a specific legislative act; under the second, the objectives of the Directive, including that of supplying information, must be achieved through the legislative process.' [28]

65. The Court then stated with precision, in respect of the first criterion, that 'if it is a legislative act, instead of a decision of the competent authorities, which grants the developer the rights to carry out the project, that act must be specific and display the same characteristics as the development consent specified in Article 1(2) of the Directive.' [29] For that to be the case, '*the act must lay down the project in detail*, that is to say in a sufficiently precise and definitive manner so as to include, like development consent, following their consideration by the legislature, *all the elements of the project relevant to the environmental impact assessment*.' [30]

66. The Court specified the content of the second condition (that 'the objectives of this Directive, including that of supplying information, must be achieved through the legislative process') more indirectly, stating: 'It is

27 — Cited in footnote 22 above.
28 — Paragraph 57 of the judgment.
29 — Paragraph 58 of the judgment.
30 — Paragraph 59 of the judgment, emphasis added.

only by complying with [the requirements specified for the first condition] that the objectives referred to in the second condition can be achieved through the legislative process' (thus, to some degree, conjoining the two conditions). However, the Court did indicate very clearly what would *not* be acceptable: 'If the specific legislative act by which a particular project is adopted, and therefore authorised, does not include *the elements of the specific project which may be relevant to the assessment of its impact on the environment*, the objectives of the Directive would be undermined, because *a project could be granted consent without prior assessment of its environmental effects* even though they might be significant.' [31]

67. In *Linster*, [32] the Court first confirmed that 'the terms "specific act of national legislation" and "project" used in Article 1(5) of the Directive must be given an autonomous interpretation'; [33] and that 'Article 1(5) of the Directive should be interpreted having regard to the objectives of the Directive and to the fact that, since it is a provision limiting the Directive's field of application, it must be interpreted restrictively'. [34] The Court next emphasised the justification for the Article 1(5) exception: 'where the objectives of the Directive, including that of supplying information, are achieved through a legislative process, the Directive does not apply to the project in question' [35] (that is, as I understand it, because the directive does not need to apply in such circumstances).

68. The Court then explained (rather more fully than in *WWF and Others*) the relationship between the fundamental objective of the EIA Directive and the level of information that the legislature must possess:

'As is clear from Article 2(1), the Directive's fundamental objective is that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to an assessment with regard to their effects.

According to the sixth recital in the preamble to the Directive, the assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question.

31 — Paragraph 60, emphasis added.
32 — Case C-287/98 [2000] ECR I-6917.
33 — Paragraph 44.
34 — Paragraph 49.
35 — Paragraph 51.

Thus, it is only where the legislature has available to it information equivalent to that which would be submitted to the competent authority in an ordinary procedure for authorising a project that the objectives of the Directive may be regarded as having been achieved through the legislative process.' [36]

69. The Court completed its analysis by recalling that Article 1(5) of the EIA Directive requires the legislative act in question to be 'a specific act adopting the details of the project. Its very wording must demonstrate that the objectives of the Directive have been achieved with regard to the project in question'. Moreover, 'the details of a project cannot be considered to be adopted by a Law, for the purposes of Article 1(5) of the Directive, if the Law does not include the elements necessary to assess the environmental impact of the project', it being for the national court to determine the circumstances in the particular case. [37]

70. Let us pause there to take stock.

71. In *WWF and Others* and *Linster*, the Court laid down two conditions, both of which must be satisfied before a legislative act is covered by the Article 1(5) exclusion and thus falls outwith the scope of the EIA Directive. First, the details of the project must be set out in a specific legislative act which lays down, in a sufficiently precise and definitive manner, all the elements of the project that are relevant to the environmental impact assessment. Second, in order to satisfy the environmental protection objectives of the EIA Directive, the legislature must have available to it – and must consider during the legislative process – information equivalent to that which would be submitted to the competent authority in an ordinary procedure for authorising a project, so that it can carry out the requisite environmental impact assessment. I shall refer to these two conditions together as the 'twofold test for legislative effectiveness'.

72. That twofold test appears clearly to favour construing Article 1(5) as containing a prior condition that the objectives of the EIA Directive must be achieved by the legislative process, rather than a presumption that they are so achieved. The Court has indicated that it is concerned with whether the public participation that the EIA Directive seeks to achieve has in fact been achieved through the legislative process.

36 — Paragraphs 52 to 54.
37 — Paragraphs 56 to 58.

Applying the existing case-law to the present case

73. The judgments in *WWF and Others* and *Linster* provide a framework for the assessment to be carried out by the national courts. In principle, moreover, that framework can be applied by analogy to the present cases (ex post adoption by the legislature of administrative projects, rather than ex ante authorisation of projects), notwithstanding the changes made to the EIA Directive by Directive 2003/35 (which strengthened the public participation provisions in particular by adding the requirements for judicial review in Article 10a, but which did not change the objectives of the EIA Directive).

74. Taking the dicta in *WWF and Others* and *Linster* at face value, it is relatively straightforward to answer the first question referred by the Conseil d'État. The decree of 17 July 2008 does not 'lay down the project in detail, that is to say in a sufficiently precise and definitive manner so as to include, like development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment'. [38] It does not 'include the elements necessary to assess the environmental impact of the project', nor does its 'very wording … demonstrate that the objectives of the Directive have been achieved with regard to the project in question'. [39] Rather, the relevant provisions of the Decree of 17 July 2008 indicate merely that they ratify the administrative consent already granted for a series of projects in respect of which 'overriding reasons in the general interest have been established'.

75. So far, so good – but the application of Article 1(5) of the EIA Directive cannot, I suggest, turn merely on whether the draftsman of the legislative measure at issue has been sufficiently skilful and well informed to ensure that the wording of the measure complies precisely with those dicta. If that were all that mattered, a project that had not been discussed adequately by the legislature could nevertheless be dressed up with appropriate wording to pass muster. Conversely, a project that had indeed been fully discussed might fail the test for exclusion from the EIA Directive under Article 1(5) merely because the tradition of legislative drafting in that Member State did not favour 'encumbering' the resulting legislative measure with that amount of detail.

76. Moreover, as I understand it, discussion of a project in a legislative process will often (if not invariably) be preceded by some

38 — *WWF and Others*, paragraph 59.

39 — *Linster*, paragraphs 56 and 57.

greater or lesser degree of administrative activity to prepare the ground for the ensuing debate. If I am right, it seems likely that the dossier placed before the legislature for decision may not necessarily contain precisely the same information, in the same detail, as would have been examined during a purely administrative process. It likewise may – or may not – contain 'information equivalent to that which would be submitted to the competent authority in an ordinary [i.e. administrative] procedure for authorising a project' (the second limb of the twofold test).

77. The present references afford the Grand Chamber the opportunity to re-examine and clarify the dicta in *WWF and Others* and *Linster*.

78. I take as my starting point Advocate General Léger's helpful observation in *Linster*: 'By making an exception for cases where a project is adopted by a legislative act, the Community legislature did not intend to lay down a formal criterion enabling Member States to exclude such projects from an assessment of their environmental impact and from the requirement to inform and consult the public concerned merely on the basis of the nature of the act in question and the status of the authority which adopted it. Only legislative acts which provide the same safeguards as those which would have been required under the Directive fall outside the scope of the Directive.' [40]

79. I agree. The EIA Directive is not about formalism. It is concerned with providing effective EIAs for all major projects; and, in its amended form, with ensuring adequate public participation in the decision-making process. Where the legislative process functions normally and correctly, it provides – through the operation of representative democracy – the same safeguards as those that would have been required under the EIA Directive.

80. It is evident that the process of scrutiny by the legislature may well be unlike the process set out in Articles 5 to 10 of the EIA Directive. National courts are not required to ensure that the legislature follows exactly the same process as would be required of an administrative body evaluating the same

40 — At point 114 of his Opinion.

project. Rather, they must consider whether the legislative process has functioned correctly and adequately.

81. In order for a national court to do this effectively, it clearly has to look beyond the wording of the Decree.

82. The Court has already indicated that, where a legislative act still leaves important aspects of project assessment to be completed *after* formal approval is given, in a separate process (*WWF and Others*), or where it leaves open some major aspect of the project, such as the final choice of route for a motorway (*Linster*), that legislative act is not covered by the Article 1(5) exclusion. I suggest that the underlying reasoning for both decisions is that, in such circumstances, the legislature cannot sensibly be said to have considered all the elements necessary to assess the project's likely environmental impact. Because the legislative process has not functioned adequately, the resulting measure fails to meet the rationale behind the exclusion. Conversely, where the legislative process does function adequately, the legislative exclusion must be allowed to apply in order to respect the intentions of those who drafted the Aarhus Convention and who implemented that convention in EU law through the EIA Directive, as amended.

83. If, as I suggest, it is necessary to move towards a functionality-based test in order to avoid formalism whilst giving consistent real meaning to the exclusion clause in Article 1(5), the question is then: how to decide whether the legislative process has functioned adequately?

84. In my view, in order to assess whether that has happened in any particular case, the national court will need to examine the following aspects:

(a) input: was the information placed before the legislature sufficiently detailed and informative to enable the legislature to evaluate the likely environmental impact of the proposed project?

(b) process: was the appropriate procedure respected and was the preparation time and discussion time sufficient for it to be plausible to conclude that the people's

elected representatives were able properly to examine and debate the proposed project?

(c) output: does the resulting legislative measure (read, if appropriate, in conjunction with supporting material to which it expressly refers) make clear what is being authorised and any limitations or constraints that are being imposed?

85. Such a legislative process could (as in the present cases) involve the legislature building on the work previously carried out by an administrative body.

86. In that event, the national court will then need to determine whether, in essence, the project has already been approved (during the administrative process) before it comes before the legislature; or whether it was indeed considered and approved later, by the legislative process itself. Again, I suggest that the national court needs to look at the substance, rather than the form, of what has happened in any particular case.

87. In short, provided that the legislature has the necessary material and performs its democratic function correctly and effectively, the legislative process will achieve the objectives of the EIA Directive, as amended. Allowing that legislative process to benefit from the Article 1(5) exclusion and fall outwith the scope of the EIA Directive therefore creates no lacuna in protection.

88. Conversely, a legislative process that merely provides the formal rubber-stamp for an earlier administrative process which has effectively already taken the relevant decisions will not provide the same safeguards as those required by the EIA Directive. It should therefore not benefit from the Article 1(5) exclusion.

89. Such an approach seems to me to combine respect for the teleology of the Aarhus Convention and the EIA Directive as amended with respect for the draftsman's intentions in including, in both instruments, an exclusion clause to cover environmental decisions taken by the legislature rather than by an administrative body.

Questions B.1, B.2 and B.3

90. In question B.1, the Conseil d'État asks whether Articles 1, 5, 6, 7, 8 and 10a of the EIA Directive preclude a legal regime in which the right to implement a project subject to an EIA is conferred by a legislative act against which no judicial review procedure is available to challenge the substantive or procedural legality of the relevant decision. However, in the light of the wording and tenor of the provisions cited, it seems to me that the referring court is really asking whether, having regard to Article 1 (in particular Article 1(5)), Article 10a of the EIA Directive requires a judicial review procedure to be available to verify the substantive and procedural compliance with Articles 5, 6, 7 and 8 of a legislative act conferring the right to implement a project subject to an EIA.

91. Questions B.2 and B.3 ask, essentially, whether Article 9 of the Aarhus Convention and/or Article 10a of the EIA Directive require Member States to provide for the possibility of judicial review of the legality of decisions, acts or omissions in relation to any substantive or procedural rules governing the authorisation of projects subject to an EIA.

92. Thus, whereas question A is concerned with ascertaining whether the EIA Directive applies to a procedure such as that in issue, the three questions under B concern more particularly the availability of judicial review of such a procedure and touch, implicitly, upon the difficulties which may arise if different courts would normally have jurisdiction to review the legality of different parts of that procedure.

93. Taken at face value, those questions can be answered very simply.

94. First, as regards question B.1, it is clear that the EIA Directive does not apply to 'projects the details of which are adopted by a specific act of national legislation'. Consequently, none of the substantive provisions of the directive can require any kind of judicial review of consents adopted by acts falling within that definition. Whether a specific act does fall within that definition is the subject-matter of question A, and I have addressed it in that context. If an act does not fall within

the definition, the rules on availability of judicial review are set out in Article 10a.

95. The answer to questions B.2 and B.3, which do not refer to legislative acts, is even simpler. It flows from the wording of Article 9 of the Aarhus Convention and Article 10a of the EIA Directive, and it is that those provisions do require Member States to provide for the possibility of judicial review of the legality of decisions, acts or omissions falling within the scope of those instruments, in relation to any substantive or procedural rules governing the authorisation of projects subject to an EIA.

96. It must nevertheless be noted that, as the Belgian Government and the Commission have pointed out, the wording of those provisions allows Member States not inconsiderable latitude in achieving the aims set out. Various matters are left to be determined according to national law, including the content of certain concepts, the stage at which review should be available and the nature of the body competent to carry out the review.

97. However, even read together with my analysis of question A, those simple answers do not resolve the underlying problem with which the Conseil d'État is concerned. The detailed rules on the respective competences of the Conseil d'État and the Cour constitutionnelle have not been presented to the Court in full (although the Belgian Government has provided significant information). However, in essence it seems that the Conseil d'État lacks jurisdiction to review legislative acts such as the Decree of 17 July 2008 whereas the Cour constitutionnelle, while it possesses such jurisdiction, may not necessarily be competent to review that measure's compliance with the Aarhus Convention or the EIA Directive, as opposed to compliance with constitutional norms or principles. If that is the case, or if a comparable situation pertains, is there a gap in jurisdiction which would be incompatible with either instrument?

98. In particular, if a court such as the Conseil d'État is not competent to examine a measure such as the Decree of 17 July 2008 in order to determine whether the measure is valid in the light of the Aarhus Convention or the EIA Directive, must it have jurisdiction to do so in order to determine whether the measure falls within the exclusion for legislative acts, given that the essence of the examination is in fact the same in both cases? And, if not, must

some other court, such as the Cour constitutionnelle, have jurisdiction to examine the compatibility of the measure with the Aarhus Convention and the EIA Directive?

99. Two points of principle must be borne in mind here. First, unless jurisdictional rules are imposed by EU law – and here that is clearly not the case – it is not for this Court to indicate what rules should apply in the Member States. Second, in order to ensure that the objectives of access to justice are achieved, it must be possible for at least one court to entertain a challenge to a specific act of national legislation on the ground that it does not fall within the exclusion in Article 2 of the Aarhus Convention or Article 1(5) of the EIA Directive.

100. In that light, it seems clear that, if the Cour constitutionnelle is competent, under Belgian jurisdictional rules, to determine whether the Decree of 17 July 2008 meets the definition of a 'specific act of national legislation' within the meaning of Article 1(5) of the EIA Directive as interpreted by this Court, and if it alone is competent to do so, then there is no gap in jurisdiction and the objectives of Article 10a of that directive (and of Article 9 of the Aarhus Convention) are adequately achieved – provided, in circumstances such as those of the present case, that the court hearing a challenge to the underlying administrative consents is able to obtain a ruling on that point from the Cour constitutionnelle. It is apparent from the order for reference that a preliminary ruling procedure of that kind is available.

101. However, if the jurisdiction of the Cour constitutionnelle were to be limited, for example, to verifying compliance with constitutional principles, and did not extend to considering whether a particular legislative act fell within the definition in Article 1(5) of the EIA Directive, it would be necessary for the Conseil d'État to be able to examine that question and, if appropriate, to disregard the Decree of 17 July 2008 in order to rule on the substantive or procedural legality of the administrative consents themselves. [41]

41 — For a comparable, though not identical, procedural situation, see, for example, Case 106/77 Simmenthal [1978] ECR 629 or Case C-213/89 Factortame and Others [1990] ECR I-2433.

Conclusion

102. In the light of all the foregoing considerations, I am of the opinion that, in answer to the questions referred by the Conseil d'État, the Court should rule as follows:

A. Article 1(5) 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, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, excludes from the scope of that directive only legislative acts in which the legislative body has substantively fulfilled the objectives of the directive.

When proceedings are brought before a national court challenging administrative consents granted for projects subject to Directive 85/337, and those consents are subsequently ratified by a legislative act, it is necessary to consider not merely the wording of the act concerned but also the substance of the legislative procedure – in particular the information available to the legislature and the scrutiny to which that information was subjected – in order to determine whether those objectives have been fulfilled. If they have not been fulfilled, the legislative act should be disregarded by the national court and the legality of the administrative consents should be examined as such.

B. In the context of such proceedings, Article 10a of Directive 85/337 and Article 9 of the Aarhus Convention require the court concerned to be able to ascertain, either of its own motion or by reference to another court enjoying appropriate jurisdiction, whether the legislative act is excluded from the scope of those instruments on the ground that the legislative procedure has achieved the objectives in question.