Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

16 February 2012 *

(Assessment of the effects of projects on the environment — Concept of legislative act — Force and effect of the guidance in the Aarhus Convention Implementation Guide — Consent for a project given without an appropriate assessment of its effects on the environment — Access to justice in environmental matters — Extent of the right to a review procedure — Habitats Directive — Plan or project affecting the integrity of the site — Imperative reason of overriding public interest)

In Case C-182/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Belgium), made by decision of 30 March 2010, received at the Court on 9 April 2010, in the proceedings

Marie-Noëlle Solvay and Others

v

Région wallonne,

intervening parties:

Infrabel SA,

Codic Belgique SA,

Federal Express European Services Inc. (FEDEX),

Société wallonne des aéroports (Sowaer),

Société régionale wallonne du transport (SRWT),

Société Intercommunale du Brabant wallon (IBW),

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 24 November 2011,

after considering the observations submitted on behalf of:

— Ms Solvay and Others, by T. Vandenput and M.-L. Giovannelli, avocats,

— Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), by A. Lebrun, avocat,

— Association Inter-Environnement Wallonie and Others, by J. Sambon, avocat,

— Association Charleroi South Air Pur and Others, by D. Brusselmans, avocat,

— Mr Boxus and Others, by L. Misson and A. Kettels, avocats,

— Ms Laloux and Others, by L. Dehin, avocat,

— Région wallonne, by F. Haumont, avocat,

— the European Commission, by O. Beynet, J.-B. Laignelot and D. Recchia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 3, 6 and 9 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention'), Articles 1, 9 and 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337'), and Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive').

2 The reference has been made in proceedings brought by persons residing near Liège-Bierset and Brussels South Charleroi airports and the Brussels-Charleroi railway against the Région wallonne (Region of Wallonia) concerning development consents for works relating to those airports and railway.

Legal context

International law

3 Under Article 2(2) of the Aarhus Convention, the definition of 'public authority' 'does not include bodies or institutions acting in a … legislative capacity'.

4 Article 3(9) of the Aarhus Convention provides:

'Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.'

5 Article 6(9) of the Aarhus Convention provides:

'Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.'

6 Under Article 9(2) to (4) of the Aarhus Convention:

'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.'

European Union law

Directive 85/337

7 In Article 1(2) of Directive 85/337 the term 'project' is defined as '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'. The term 'development consent' is defined as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. The terms 'public' and 'public concerned' are defined as follows:

'"public" means:

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

"public concerned" means:

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

8 Article 1(5) of Directive 85/337 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.'

9 Article 2(1) of Directive 85/337 provides:

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

10 Article 5(4) of Directive 85/337 provides:

'Member States shall, if necessary, ensure that any authorities holding relevant information … shall make this information available to the developer.'

11 Article 9(1) of Directive 85/337 states:

'When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

— the content of the decision and any conditions attached thereto,

— having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

— a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.'

12 Article 10a of Directive 85/337 provides:

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

(a) having a sufficient interest, or alternatively,

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

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

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

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 nongovernmental 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.

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.

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

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.'

The Habitats Directive

13 In accordance with Article 6(3) and (4) of the Habitats Directive:

'3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

National law

14 Articles 1 to 4 of the Decree of the Walloon Parliament of 17 July 2008 on certain consents for which there are overriding reasons in the public interest (Décret du Parlement wallon du 17 juillet 2008 relatif à quelques permis pour lesquels il existe des motifs impérieux d'intérêt général) (*Moniteur belge*, 25 July 2008, p. 38900), in their original version, provide:

'Article 1. Overriding reasons in the public interest have been established for the grant of town-planning consents, environmental consents and combined consents relating to the following acts and works:

1. Acts and works for the improvement of the infrastructure and public buildings of the regional airports of Liège-Bierset and Brussels South Charleroi, as follows:

(a) as regards Liège-Bierset airport:

— the extension of the north freight zone for aircraft parking positions and future freight buildings;

— the orbital road and the south taxiway;

— the installation of a fourth tank for the fuel storage area;

— the TGV freight station;

— the extension of the car park south of the motorway;

— the future office building;

(b) as regards Brussels South Charleroi airport:

— the extension of the runway, including the construction of access ways and the extension of the north taxiway between the access ways;

— the control tower and radar;

— the extension of aircraft parking positions;

— the installation of de-icing areas;

— the R3-airport road link;

— the perimeter road and the south taxiway;

— the extension of the terminal;

— the extension of the car parks;

— the railway station and infrastructure;

2. Pursuant to the cooperation agreement of 11 October 2001 between the Federal State and the Flemish, Walloon and Brussels Capital Regions relating to the Belgian Railways investment plan for the years 2001-2012, the acts and works in the Region of Wallonia relating to the RER rail network;

3. In connection with the implementation of the regional development scheme (Part 3, point 1.4) adopted by the Walloon Government on 27 May 1999, the acts and works relating to structural modes of public transport for Charleroi, Liège, Namur and Mons;

4. The missing road and waterway links in the Region of Wallonia of the trans-European transport network referred to in Decision No 884/2004/EC of the European Parliament and of the Council of 29 April 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network.

Article 2. Where the acts and works listed in Article 1 are referred to in Article 84 of the Walloon Code of rural planning, urban planning, heritage and energy (Code wallon de l'Aménagement du Territoire, de l'Urbanisme, du Patrimoine et de l'Énergie), the consent shall be granted by the Government or the person designated by it in accordance with the detailed conditions laid down in Article 127 of that code, including those in Article 127(3).

Where the acts and works listed in Article 1 concern an establishment within the meaning of the Decree of 11 March 1999 on environment consents (Décret du 11 mars 1999 relatif au permis d'environnement), Article 13(2) of that decree shall be applied.

By way of exception to the first and second paragraphs, an application for consent whose receipt was acknowledged or which was lodged before the entry into force of this decree shall continue to be examined in accordance with the provisions in force at that date.

Article 3. Within 45 days of their being granted the Government shall submit planning consents, environmental consents and combined consents relating to the acts and works referred to in Article 1 to the Walloon Parliament. The consents referred to in the third paragraph of Article 2 shall be submitted to the Parliament within 45 days of their receipt by the Government.

The Walloon Parliament shall ratify the consents submitted to it within 60 days of the lodging of the file relating to the consents at its Bureau. Where no ratifying decree is approved within that time-limit, the consent shall be deemed not to have been granted.

The time-limits referred to in the first and second paragraphs are suspended between 16 July and 15 August.

A consent ratified by the Walloon Parliament shall be enforceable from the publication of the decree in the *Moniteur belge* and the consent shall be sent by the Government in accordance with the provisions of the code or the decree of 11 March 1999.

Article 4. Where an application for a consent relates to a minor alteration to a consent ratified by the Walloon Parliament, the application shall follow the general rules of the code or the decree.'

15 Articles 5 to 9 of the Decree of the Walloon Parliament of 17 July 2008 provide:

‘Article 5. The following consent, for which overriding reasons in the public interest have been established, is ratified:

— as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 25 August 2005 on the environmental consent granted to SAB SA for Liège-Bierset airport.

Article 6. The following consent, for which overriding reasons in the public interest have been established, is ratified:

— as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 13 September 2006 granting planning consent to Société régionale wallonne des Transports for the extension of the runway of Liège-Bierset airport.

Article 7. The following consent, for which overriding reasons in the public interest have been established, is ratified:

— as regards acts and works for development of the infrastructure and public buildings of regional airports, the planning consent of 16 September 2003 issued by the designated official of the Charleroi Directorate General for Town and Country Planning, Housing and Heritage to SOWAER SA for the implementation of works to culvert the Tintia stream and alteration of the ground relief in the north-eastern part of the airport area.

Article 8. The following consent, for which overriding reasons in the public interest have been established, is ratified:

— as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 25 July 2005 on the combined consent issued to SOWAER SA for Brussels South Charleroi Airport (terminal: 3 000 000 passengers per year), car parks (1 600 spaces at ground level and 1 000 in multi-storey car parks), car park access roads, aircraft traffic surfaces, aircraft parking positions linked to the terminal, water treatment plant, technical buildings, fuel storage area (storage of 2 420m3 of kerosene and 30m3 of motor vehicle fuel) and opening of new local roads.

Article 9. The following consent, for which overriding reasons in the public interest have been established, is ratified:

— as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 27 July 2005 relating to the environmental consent issued to SOWAER SA for the operation of Brussels South Charleroi Airport.’

16 Article 14 to 17 of the decree provide:

‘Article 14. The following consent, for which overriding reasons in the public interest have been established, is ratified:

— as regards the RER network and the associated structures, access ways and connecting ways, the Ministerial Order of 9 February 2006 relating to the combined consent issued to SNCB (Belgian National Railways) for the construction and operation of the third and fourth tracks on Infrabel line 124 Brussels-Charleroi in the municipalities of Waterloo, Braine-l’Alleud and Nivelles.

Article 15. The following consent, for which overriding reasons in the public interest have been established, is ratified:

— the Ministerial Order of 19 June 2008 relating to the combined consent issued to IBW for the construction and operation of the Hain treatment plant of 92 000 population equivalent in the municipality of Braine-le-Château.

Article 16. The following consent, for which overriding reasons in the public interest have been established, is ratified:

— the Ministerial Order of 7 July 2008 relating to the environmental consent issued to Codic Belgique SA for the operation of a management and training centre consisting of various technical installations on land situated at Chaussée de Bruxelles 135, La Hulpe.

Article 17. The following consent, for which overriding reasons in the public interest have been established, is ratified:

— the Ministerial Order of 4 June 2008 relating to the planning consent issued to Codic Belgique SA for the construction of a management and training centre consisting of various technical installations on land situated at Chaussée de Bruxelles 135, La Hulpe.'

17 According to the documents submitted to the Court, the Conseil d'État (Council of State) essentially has jurisdiction to rule on actions for annulment brought against administrative acts and regulations of the administrative authorities and against administrative acts of the legislative assemblies or their organs.

18 It does not, on the other hand, have jurisdiction to hear actions brought against acts of a legislative character.

19 The ratification by decree of the Walloon Parliament of building consents and consents for works gives those acts legislative status. The Conseil d'État consequently ceases to have jurisdiction to hear actions for annulment brought against the acts thus ratified, which can now be challenged only before the Cour constitutionnelle (Constitutional Court), before which, however, only certain grounds may be pleaded.

The actions in the main proceedings and the questions referred for a preliminary ruling

20 The Cour constitutionelle has before it a number of actions seeking annulment of the decree of the Walloon Parliament of 17 July 2008 which 'ratified' the building consents for various works relating to Liège-Bierset airport, Brussels South Charleroi airport and the Brussels-Charleroi railway, that is to say, authorised them in view of 'overriding reasons in the public interest'.

21 The Cour constitutionelle further has before it questions referred by the Conseil d'État for a ruling on the lawfulness of that decree. The Conseil d'État had previously itself raised the question of the compatibility of the decree with European Union law and the Aarhus Convention and referred questions on that point to the Court for a preliminary ruling, on which the Court gave judgment on 18 October 2011 in Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others* [2011] ECR I-9711.

22 The effect of that legislative act is that those building consents may no longer be contested before the Conseil d'État, but only before the Cour constitutionelle, and only on grounds of their failure to comply with the rules whose observance it is for the Cour constitutionelle to review.

23 Thus in each of the cases in the main proceedings, the referring court is asked inter alia to rule on whether it was possible for the contested decree to withdraw the consents in question from review by the Conseil d'État and subject them to review by the Cour constitutionelle, even though the possibilities of review before that court are less extensive than before the Conseil d'État. By so doing, the legislature is said to have infringed the Belgian Constitution, read in conjunction with Article 9(2) to (4) of the Aarhus Convention and Article 10a of Directive 85/337.

24 In those circumstances, the Constitutional Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Articles 2(2) and 9(4) of the Aarhus Convention … be interpreted in accordance with the guidance provided in the Aarhus Convention Implementation Guide?

2. (a) Must Article 2(2) of the Aarhus Convention be interpreted as excluding from the scope of the convention legislative acts such as the planning or environmental consents granted in accordance with the procedure established by Articles 1 to 4 of the Decree of the Walloon [Parliament] of 17 July 2008 …?

(b) Must Article 2(2) of the Aarhus Convention be interpreted as excluding from the scope of the convention legislative acts such as the ratifications of planning or environmental consents contained in Articles 5 to 9 and 14 to 17 of that decree?

(c) Must Article 1(5) of Directive 85/337 … be interpreted as excluding from the scope of the directive legislative acts such as the planning or environmental consents granted in accordance with the procedure established by Articles 1 to 4 of that decree?

(d) Must Article 1(5) of Directive 85/337 … be interpreted as excluding from the scope of the directive legislative acts such as the ratifications of planning or environmental consents contained in Articles 5 to 9 and 14 to 17 of that decree?

3. (a) Must Articles 3(9) and 9(2), (3) and (4) of the Aarhus Convention and Article 10a of Directive 85/337 … be interpreted as precluding a procedure such as that established by Articles 1 to 4 of that decree, under which the legislature adopting the decree grants planning and environmental consents which have been prepared by an administrative authority and which can be contested only by the actions mentioned in [the order for reference] before the Constitutional Court and the ordinary courts?

(b) Must Articles 3(9) and 9(2), (3) and (4) of the Aarhus Convention and Article 10a of Directive 85/337 … be interpreted as precluding the adoption of legislative acts such as the retroactive ratifications contained in Articles 5 to 9 and 14 to 17 of that decree, which can be contested only by the actions mentioned in [the order for reference] before the Constitutional Court and the ordinary courts?

4. (a) Must Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 … be interpreted as precluding a procedure such as that established by Articles 1 to 4 of that decree, under which a decree granting planning or environmental consents need not itself contain all the information necessary to establish whether those consents are based on an adequate prior evaluation carried out in accordance with the requirements of the Aarhus Convention and Directive 85/337 …?

(b) Must Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 … be interpreted as precluding the adoption of legislative acts such as the ratifications contained in Articles 5 to 9 and 14 to 17 of that decree, which do not themselves contain all the

information necessary to establish whether those consents are based on an adequate prior evaluation carried out in accordance with the requirements of the Aarhus Convention and Directive 85/337 …?

5. Must Article 6(3) of [the Habitats] Directive … be interpreted as permitting a legislative authority to authorise projects such as those referred to in Articles 16 and 17 of that decree, even though the impact assessment carried out in that connection has been held by the Conseil d'État, in a judgment given under the emergency procedure, to be incomplete and has been contradicted in an opinion of the authority of the Walloon Region responsible for the ecological management of the natural environment?

6. In the event of a negative reply to Question 5, must Article 6(4) of [the Habitats] Directive … be interpreted as permitting the creation of infrastructure designed to accommodate the management centre of a private company and a large number of employees to be regarded as an imperative reason of overriding public interest?'

Consideration of the questions referred

Question 1

25 By its first question the referring court asks whether Articles 2(2) and 9(4) of the Aarhus Convention must be interpreted in accordance with the guidance in the Aarhus Convention Implementation Guide.

26 It is apparent from the wording of that Guide, in particular the observations in the section headed 'How to use this Guide', that the aim of the document, drawn up by international experts, is solely to provide an analysis of the Aarhus Convention which 'introduces the reader to the Convention and to what it can mean in practice'.

27 While the Aarhus Convention Implementation Guide may thus be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention.

28 The answer to Question 1 is therefore that, for the interpretation of Articles 2(2) and 9(4) of the Aarhus Convention, it is permissible to take the Aarhus Convention Implementation Guide into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of the Aarhus Convention.

Question 2

29 By its second question, the various subdivisions of which should be examined together, the referring court asks essentially whether Article 2(2) of the Aarhus Convention and Article 1(5) of Directive 85/337 must be interpreted as meaning that an act such as the Decree of the Walloon Parliament of 17 July 2008 which 'ratifies', by giving them legislative status, planning, environmental or works consents previously granted by the administrative authorities, in respect of which it is declared that 'overriding reasons in the public interest have been established', is excluded from the scope of that convention and that directive.

30 It follows from Article 1(5) of Directive 85/337 that, where the objectives of that directive, including that of supplying information, are achieved through a legislative process, the directive does not apply to the project in question (see Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 51, and *Boxus and Others*, paragraph 36).

31 That provision lays down two conditions for the exclusion of a project from the scope of Directive 85/337. The first requires the details of the project to be adopted by a specific act of legislation. Under the second, the objectives of the directive, including that of supplying information, must be achieved through the legislative process (see Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 57, and *Boxus and Others*, paragraph 37).

32 As regards the first condition, it entails, first, the adoption of the project by a specific act of legislation. It should be observed here that the terms 'project' and 'consent' are defined in Article 1(2) of Directive 85/337. A legislative act adopting a project must therefore, if it is to come within the scope of Article 1(5) of the directive, be specific and display the same characteristics as a consent of that kind. In particular, it must grant the developer the right to carry out the project (see *WWF and Others*, paragraph 58, and *Boxus and Others*, paragraph 38).

33 The project must also be adopted in detail, that is to say, in a sufficiently precise and definitive manner, so that the legislative act adopting the project must include, like a development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment (see *WWF and Others*, paragraph 59, and *Boxus and Others*, paragraph 39). The legislative act must therefore demonstrate that the objectives of Directive 85/337 have been achieved as regards the project in question (see *Linster*, paragraph 56, and *Boxus and Others*, paragraph 39).

34 It follows that the details of a project cannot be considered to be adopted by a legislative act within the meaning of Article 1(5) of Directive 85/337 if that act does not include the elements necessary to assess the environmental impact of the project or if the adoption of other measures is needed in order for the developer to be entitled to carry out the project (see *WWF and Others*, paragraph 62; *Linster*, paragraph 57; and *Boxus and Others*, paragraph 41).

35 As regards the second condition, Article 2(1) of Directive 85/337 shows that the essential objective of the directive is to ensure that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment of their effects on the environment before consent is given (see *Linster*, paragraph 52, and *Boxus and Others*, paragraph 41).

36 In addition, the sixth recital in the preamble to Directive 85/337 states that 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 (see *WWF and Others*, paragraph 61; *Linster*, paragraph 53; and *Boxus and Others*, paragraph 42).

37 Consequently, the legislature must have sufficient information at its disposal at the time when the project is adopted. It is apparent from Article 5(3) of and Annex IV to Directive 85/337 that the minimum information to be supplied by the developer is to include 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, and the data required to identify and assess the main effects which the project is likely to have on the environment (see *Linster*, paragraph 55, and *Boxus and Others*, paragraph 43).

38 Having regard to the characteristics of procedures for the approval of a plan in more than one phase, Directive 85/337 does not preclude a single project from being approved by two acts of national law which are considered, as a whole, to be a development consent within the meaning of Article 1(2) of the directive (see, to that effect, Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969,

paragraph 102). Consequently, the legislature can, when adopting the final act authorising a project, take advantage of the information gathered during a prior administrative procedure (see *Boxus and Others*, paragraph 44).

39 The existence of such an administrative procedure cannot, however, have the effect of enabling a project to be regarded as a project the details of which are adopted by a specific legislative act in accordance with Article 1(5) of Directive 85/337 if that legislative act does not fulfil the two conditions set out in paragraph 31 above. As the Court held in *Boxus and Others*, paragraph 45, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act within the meaning of that provision and is not therefore sufficient to exclude a project from the scope of Directive 85/337.

40 In particular, a legislative act adopted without the members of the legislative body having had available to them the information mentioned in paragraph 37 above cannot fall within the scope of Article 1(5) of Directive 85/337 (see *Boxus and Others*, paragraph 46).

41 It is for the national court to determine whether those conditions have been satisfied. For that purpose, it must take account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates (see *Boxus and Others*, paragraph 47).

42 That interpretation arrived at in *Boxus and Others* in relation to Article 1(5) of Directive 85/337 may be applied in the case of Article 2(2) of the Aarhus Convention. First, Article 2(2) of the Convention has substantially the same content as Article 1(5) of the directive. Secondly, there is nothing that could be deduced from the object or scope of the Aarhus Convention that would preclude the Court from applying, for the interpretation of the provisions of that convention, its interpretation of the similar provisions of Directive 85/337.

43 The answer to Question 2 is therefore that Article 2(2) of the Aarhus Convention and Article 1(5) of Directive 85/337 must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of the Convention and the directive.

Question 3

44 By its third question, the various subdivisions of which should be examined together, the referring court asks essentially whether Article 9(2) and (4) of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as precluding the right to implement a project which falls within their scope from being granted by a legislative act against which, under national law, no review procedure is available before a court of law or another independent and impartial body established by law that enables that act to be challenged as to the substance and the procedure.

45 It follows from Article 2(2) of the Aarhus Convention, read together with Articles 6 and 9 of the Convention, and from Article 1(5) of Directive 85/337 that neither the Convention nor the directive applies to projects adopted by a legislative act satisfying the conditions set out in paragraph 31 above (see *Boxus and Others*, paragraph 50).

46 For other projects, that is to say, those adopted either by an act which is not legislative in nature or by a legislative act which does not fulfil those conditions, it follows from the very terms of Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337 that the Member States must provide for a review procedure before a court of law or another independent and impartial body established by law for challenging the substantive or procedural lawfulness of decisions, acts or omissions subject respectively to Article 6 of the Aarhus Convention or to Directive 85/337 (see *Boxus and Others*, paragraph 51).

47 The Member States, by virtue of their procedural autonomy and subject to compliance with the principles of equivalence and effectiveness, have a discretion in implementing Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedures referred to in those provisions and what procedural rules are applicable (see *Boxus and Others*, paragraph 52).

48 Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 would lose all effectiveness, however, if the mere fact that a project is adopted by a legislative act which does not satisfy the conditions set out in paragraph 31 above were to make it immune to any review procedure for challenging its substantive or procedural lawfulness within the meaning of those provisions (see *Boxus and Others*, paragraph 53).

49 The requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 presuppose in this regard that, when a project falling within the scope of Article 6 of the Aarhus Convention or of Directive 85/337 is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive and set out in paragraph 31 above must be amenable to review, under the national procedural rules, by a court of law or an independent and impartial body established by law (see *Boxus and Others*, paragraph 54).

50 If no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous paragraph and, as the case may be, drawing the necessary conclusions by disapplying that legislative act (see *Boxus and Others*, paragraph 55).

51 In the present case, if the referring court finds that the Decree of the Walloon Parliament of 17 July 2008 does not satisfy the conditions laid down in Article 1(5) of Directive 85/337 and set out in paragraph 31 above, and if it turns out that, under the applicable national rules, no court of law or independent and impartial body established by law has jurisdiction to review the substantive or procedural validity of that decree, the decree must then be regarded as incompatible with the requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337. The referring court must then disapply it (see *Boxus and Others*, paragraph 56).

52 The answer to Question 3 is therefore that Article 9(2) to (4) of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as meaning that:

— when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and

— if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.

Question 4

53 By its fourth question, the various subdivisions of which should be examined together, the referring court asks essentially whether Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 must be interpreted as precluding the adoption of legislative acts which do not themselves contain all the reasons for their adoption, reasons which make it possible to review whether the acts were adopted after an adequate prior evaluation carried out in accordance with the requirements of the Convention and the directive.

54 It has been held that Article 4 of Directive 85/337 must be interpreted as not requiring that a decision not to subject a project falling within Annex II to that directive to an assessment should itself contain the reasons for the competent authority's decision that an assessment was unnecessary; if, however, an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the decision or the relevant information and documents in response to the request made (see Case C-75/08 *Mellor* [2009] ECR I-3799, paragraph 61).

55 That interpretation can be applied to Article 9(1) of Directive 85/337.

56 Thus, although Article 9(1) of Directive 85/337 requires that the public must be informed, in accordance with the appropriate procedures, of the decision taken by the competent authority and the reasons on which the decision is based, it does not follow that the decision must itself contain the competent authority's reasons for deciding that it was necessary (see, by analogy, *Mellor*, paragraph 56).

57 It follows from that provision, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority was aware, in accordance with the rules laid down by national law, that an adequate prior evaluation had been carried out in accordance with the requirements of Directive 85/337 (see *Mellor*, paragraph 57).

58 Moreover, interested parties, as well as the other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with that obligation of the competent authority as to an evaluation (see *Mellor*, paragraph 58).

59 In that regard, effective judicial review, which must be able to extend to the lawfulness of the reasons for the decision being challenged, presupposes in general that the court before which the matter is brought may require the competent authority to communicate those reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by European Union law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its decision is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and *Mellor*, paragraph 59).

60 That subsequent communication may take the form not only of an express statement of the reasons but also of the making available of relevant information and documents in response to the request made (see *Mellor*, paragraph 60).

61 While the reasons need not necessarily be contained in the decision itself, the competent authority may none the less, pursuant to the applicable national legislation or of its own motion, indicate in the decision the reasons on which it is based (see *Mellor*, paragraph 63).

62 In that case, the decision must enable interested parties to decide whether to make use of a review procedure to contest it, taking into account any factors which might subsequently be brought to their attention (see *Mellor*, paragraph 64).

63 That interpretation may be applied in the case of Article 6(9) of the Aarhus Convention. First, that provision has substantially the same content as Article 9(1) of Directive 85/337. Secondly, there is nothing that could be deduced from the object or scope of the Aarhus Convention that would preclude the Court from applying, for the interpretation of the provisions of that convention, its interpretation of the similar provisions of Directive 85/337.

64 The answer to Question 4 is therefore that Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made.

Question 5

65 By its fifth question, the referring court asks essentially whether Article 6(3) of the Habitats Directive must be interpreted as allowing a legislative authority to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.

66 Article 6(3) of the Habitats Directive establishes an evaluation procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary for the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (see Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 34).

67 A plan or project may be authorised only on condition that the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such effects (see Case C-239/04 *Commission* v *Portugal* [2006] ECR I-10183, paragraph 20). Moreover, it is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see *Commission* v *Portugal*, paragraph 24).

68 Furthermore, in the case of sites eligible for identification as sites of Community importance, in particular sites hosting priority natural habitat types, the Member States are, by virtue of the Habitats Directive, required to take protective measures that are appropriate, from the point of view of that directive's objective of conservation, for safeguarding the ecological interest which those sites have at national level (see Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 30, and Case C-491/08 *Commission* v *Italy*, paragraph 30).

69 Those obligations are incumbent on the Member States by virtue of the Habitats Directive regardless of the nature of the national authority with competence to authorise the plan or project concerned. Article 6(3) of the Habitats Directive, which refers to the 'competent national authorities', does not lay down any special rule for plans or projects approved by a legislative authority. That status consequently has no effect on the extent or scope of the obligations imposed on the Member States by Article 6(3) of the Habitats Directive.

70 The answer to Question 5 is therefore that Article 6(3) of the Habitats Directive must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.

Question 6

71 By its sixth question, the referring court essentially asks whether Article 6(4) of the Habitats Directive must be interpreted as meaning that the creation of infrastructure intended to accommodate the management centre of a private company may be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.

72 Article 6(4) of the Habitats Directive provides that if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, paragraph 81).

73 Article 6(4) of that directive must, as an exception to the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly (see Case C-304/05 *Commission* v *Italy*, paragraph 82).

74 Moreover, it can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of the Habitats Directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for the application of Article 6(4), since, in the absence of those elements, no condition for the application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (see Case C-304/05 *Commission* v *Italy*, paragraph 83).

75 An interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, the implementation of a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora.

76 Works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances.

77 It cannot be ruled out that that is the case where a project, although of a private character, in fact by its very nature and by its economic and social context presents an overriding public interest and it has been shown that there are no alternative solutions.

78 In the light of those criteria, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive.

79 The answer to Question 6 is therefore that Article 6(4) of the Habitats Directive must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **For the interpretation of Articles 2(2) and 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, it is permissible to take the Implementation Guide for that Convention into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of that Convention.**

2. **Article 2(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and 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, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of that Convention and that directive as amended.**

3. **Articles 3(9) and 9(2) to (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:**

   — **when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive as amended must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and**

   — **if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.**

4. **Article 6(9) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 9(1) of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made.**

5. **Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.**

6. **Article 6(4) of Directive 92/43 must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.**

[Signatures]