OPINION OF ADVOCATE GENERAL LÉGER

delivered on 25 September 2003 [1]

1. In the present case, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), has referred for a preliminary ruling five questions on the interpretation of Council Directive 85/337/EEC. [2] Those questions were raised in proceedings between Delena Wells and the United Kingdom authorities concerning resumption of the working of Conygar Quarry, a site for the extraction of construction materials which is located near Mrs Wells' dwelling-house.

2. Conygar Quarry, consent for the working of which was granted in 1947, had not been operational for a number of years when Mrs Wells purchased her house in 1984. In 1997 and 1999 the competent authorities established the conditions under which the quarry could be worked again. However, they did not first carry out an environmental impact assessment in respect of the proposed operations, as provided for in Directive 85/337.

3. By its questions, the national court seeks to ascertain, first, whether the provisions of Directive 85/337 must be applied in the present case and, second, whether Mrs Wells may bring proceedings against the State because the directive has not been applied.

I — Legal context

A — *Community law*

4. Directive 85/337 falls within the framework of the action programmes of the European Communities on the environment, according to which the correct approach is to prevent the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects. [3] It has the objective of ensuring that development consent for public and private projects which are likely to have significant effects on the environment is

1 — Original language: French.

2 — Directive 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 — First recital in the preamble.

granted only after prior assessment of those effects. [4] A further aim is that the assessment be conducted on the basis of information supplied by the developer and by the authorities and the people concerned by the project. [5]

5. 'Development consent' is defined in Article 1(2) of Directive 85/337 as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. In accordance with the same provision, the term 'project' covers, *inter alia*, 'interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

6. Article 2(1) of Directive 85/337 provides that '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 an assessment with regard to their effects'.

7. Article 4(1) provides that the projects specified in Annex I must systematically be the subject of an environmental impact assessment. [6] Article 4(2) states that projects referred to in Annex II are to be assessed only 'where Member States consider that their characteristics so require'. The extraction of construction materials is included in Annex II.

8. Directive 85/337 sets out in Articles 5 to 10 and Annex III the information necessary for the assessment and the procedure to be followed. In accordance with those provisions, the assessment is to be carried out on the basis of information supplied by the developer. That information must be communicated to the authorities concerned and made available to the public. Those authorities and the public are given an opportunity to express their opinion. The authorities empowered to grant consent for the project must take into consideration all the information gathered in the course of the assessment procedure. Finally, the public must be informed of the decision adopted and of any conditions attached thereto.

4 — Sixth recital in the preamble.

5 — Idem.

6 — Examples of such projects are oil refineries, thermal and nuclear power stations, chemical installations and motorway construction.

B — *National law*

9. In order to meet construction needs after the Second World War, Interim Development Orders (IDOs) were adopted in the United Kingdom from 1946 expressly authorising mineral extraction operations. [7]

10. In 1991 the Planning and Compensation Act 1991 [8] entered into force. Section 22 of the Act laid down a special set of rules for old mining permissions granted under an IDO.

11. According to those rules, any person with an interest in the land or minerals benefiting from an old mining permission has to apply for its registration with the mineral planning authority (MPA) [9] before 25 March 1992. If this is not done, the old mining permission definitively ceases to have effect. [10] Then, in the 12 months following registration, such a person must apply to the MPA for determination, on the basis of the conditions set out in his application, of the conditions to which that permission is subject. The permission likewise definitively ceases to have effect if this requirement is not observed.

12. The 1991 Act draws a distinction between what are termed 'active' and 'dormant' permissions. Permissions are dormant if no development was carried out to any substantial extent in the period of two years ending on 1 May 1991. In the case of active permissions, operations may continue and are subject to new conditions once they have been approved. In the case of dormant permissions, no operations may resume until the conditions have been finally determined.

13. The MPA must determine the conditions to which the permission is to be subject within a period of three months, failing which the conditions set out in the application are deemed to be approved. If the MPA defines the conditions within the prescribed period, they may include 'any conditions which may be imposed on a grant of planning permission for development consisting of the winning and working of minerals or involving the depositing of mineral waste'. [11]

7 — Order for reference, footnote 2.

8 — Hereinafter 'the 1991 Act'.

9 — Hereinafter 'the MPA'.

10 — Order for reference, paragraphs 16 and 42.

11 — Order for reference, paragraph 46.

14. If the conditions differ from those set out in the application, the applicant may appeal to the Secretary of State for Transport, Local Government and the Regions. [12] The decision of the Secretary of State may be challenged within a time-limit of six weeks. [13] Also, permissions granted under an IDO for which new conditions have been determined pursuant to the 1991 Act may be modified or revoked before the operations authorised by the permission have been completed. [14]

II — Facts

A — *Background to the dispute*

15. In 1947 permission to work Conygar Quarry was granted under an IDO. In 1991 quarrying works, which had stopped many years earlier, resumed for a short period. The resumption resulted in blasting operations, movements of heavy goods vehicles on the lane running past Mrs Wells' house and crushing operations. Those workings caused cracking to Mrs Wells' house and forced her to keep her windows shut. [15]

16. In accordance with the 1991 Act, the operators of Conygar Quarry had their old mining permission registered on 24 August 1992. The permission was classified as dormant, because no operations had taken place in the two years preceding 1 May 1991. The operators also applied to the MPA for it to determine the conditions of the permission. By determination made on 22 December 1994, the MPA imposed on them conditions more stringent than those proposed in their application. [16]

17. The operators exercised their right of appeal to the Secretary of State. On 25 June 1997 he issued his decision letter in which he imposed 54 conditions on the planning permission. He also left some issues to be decided by the MPA, such as the monitoring of noise and of blasting on the site. Those matters were approved by the MPA on 8 July 1999. [17]

18. No environmental impact assessment within the meaning of Directive 85/337 was carried out prior to adoption of the decision of the Secretary of State of 25 June 1997 and that of the MPA of 8 July 1999. At that time the United Kingdom authorities took the view that the directive did not apply to the determination of new

12 — Hereinafter 'the Secretary of State'.
13 — Order for reference, paragraph 50.
14 — Order for reference, paragraph 52.
15 — Order for reference, paragraph 12.
16 — Order for reference, paragraph 17.
17 — Order for reference, paragraphs 27 and 29.

planning conditions under the 1991 Act.[18] However, on 11 February 1999 the House of Lords held, in *R v North Yorkshire County Council ex parte Brown* [2000] 1 A.C. 397, that the determination of such conditions was a grant of development consent for the purposes of Article 1(2) of Directive 85/337.[19] As a result of that decision, United Kingdom legislation was amended in order to make the determination of new planning conditions under the 1991 Act subject to environmental impact assessment in accordance with the directive. That amendment entered into force on 15 December 2000.

B — *The main proceedings*

19. By letter of 10 June 1999, Mrs Wells requested the Secretary of State to take action to remedy the lack of an environmental impact assessment in respect of the resumption of operations at Conygar Quarry. Mrs Wells received no reply to her request. She then brought proceedings in the High Court.

20. Pursuant to an undertaking given to the High Court, the Secretary of State responded to the letter of 10 June 1999 by letter of 28 March 2001. He declined to revoke or modify the planning permission in question or to order discontinuance of any mineral operations. The reasons given by him for that decision included that Community law did not allow him to take action directly against the quarry operators and to remove their development rights. He also stated that the appropriate procedure would have been for Mrs Wells to contest the new planning conditions in 1997. He added that, given the time that had passed, it would run counter to the principle of legal certainty and be disproportionate to call those conditions into question.

21. Mrs Wells requested the High Court to quash that decision.

III — **The questions referred for a preliminary ruling**

22. The High Court decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Whether an approval of a new set of conditions on an existing permission granted by an [IDO] pursuant to section 22 and Schedule 2 of the [1991 Act] is a "development consent" for the purposes of the EIA [Environmental Impact Assessment] Directive.

18 — Order for reference, paragraph 20.

19 — Order for reference, footnote 6.

(2) Whether, following the approval of a new scheme of conditions on an IDO "old mining permission" under the [1991 Act], the approval of further matters required under the new scheme of conditions is itself capable of being a "development consent" for the purposes of the EIA Directive.

(3) If the answer to [(1)] is "yes" but [(2)] is "no", is the Member State nevertheless under a continuing duty to remedy its failure to require EIA, and if so, how?

(4) Whether (i) it is open to individual citizens to challenge the State's failure to require EIA, or whether (ii) that may be prohibited under the limitations imposed by the Court on the doctrine of direct effect e.g. by "horizontal direct effect" or by the imposition of burdens or obligations on individuals by an emanation of the State.

(5) If the answer to [(4)](ii) is "yes" what are the limits of such prohibitions on direct effect in the present circumstances and what steps may the UK lawfully take consistent with the EIA Directive?'

IV — Appraisal

A — *Preliminary observations*

23. Before considering the questions referred for a preliminary ruling, it appears to me that it is necessary to make two observations. The first relates to whether the working of Conygar Quarry constitutes a project subject to prior assessment of its environmental effects under Directive 85/337. As indicated above, under Article 4(2) of the directive and Annex II thereto projects for the extraction of construction materials are subject to prior assessment of their environmental effects only where Member States consider that their characteristics so require. Accordingly, Member States have a discretion as to whether such projects must be assessed. [20]

20 — Their discretion is not unlimited. In Case C-435/97 *WWF and Others* [1999] ECR I-5613, the Court held that the limits of that discretion are to be found in the obligation, set out in Article 2(1) of Directive 85/337, that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment. It also indicated that it is for the national court to assess whether, having regard to the project in question, the competent authorities exceeded their discretion by excluding the project from the assessment procedure.

24. Here, the Secretary of State did not indicate in the decision to which the main proceedings relate that the project comprising the working of Conygar Quarry had to be excluded from the assessment procedure in question pursuant to Article 4 of Directive 85/337. Nor is the significance of the effects of such a project on the environment contested by the United Kingdom Government in its observations submitted to the Court. I will therefore proceed on the premiss, implicitly accepted by the parties and the national court, that the resumption of extraction of construction materials at Conygar Quarry is likely to have significant effects on the environment.

25. The second observation relates to the admissibility of the first two questions referred for a preliminary ruling. The Commission calls their admissibility into question on the ground that they are not relevant for disposing of the main proceedings. It states, first, that the main proceedings relate to the Secretary of State's refusal to revoke or modify the planning permission for Conygar Quarry, which implies that development consent has indeed been granted at some point or another. Second, those questions are posited on the assumption that identifying the precise stage at which development consent has been granted is a question of Community law whereas the Court stated in *Gedeputeerde Staten van Noord-Holland*,[21] at paragraphs 20 and 21, that it is a question of national law.

26. I consider that those arguments are not well founded. First of all, it is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, 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. The Court has taken that to mean that a request from a national court may be dismissed only where it is obvious that the interpretation of Community law requested by that court has no bearing on the real situation or on the subject-matter of the case.[22]

27. That is not so here. It is apparent from the grounds of the order for reference that the first question referred for a preliminary ruling is intended to enable it to be established whether the determination of the planning conditions for Conygar Quarry pursuant to the 1991 Act is to be regarded as a development consent within the meaning of Article 1(2) of Directive 85/337. The answer to that question determines whether the directive is applicable in the main proceedings and, consequently, whether the competent authorities in the

21 — Case C-81/96 [1998] ECR I-3923.

22 — For a recent application, see Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 20 and the case-law cited.

United Kingdom were required to carry out a prior assessment of the environmental effects.

28. The second question submitted for a preliminary ruling refers to the fact that the planning conditions for Conygar Quarry were determined in two stages, first in the Secretary of State's decision of 25 June 1997 and then when, on 8 July 1999, the MPA approved the matters which had been reserved for subsequent approval. By this question, the national court seeks to ascertain which of those decisions constitutes the development consent envisaged by Article 1(2) of Directive 85/337. The answer to this question determines whether, prior to the second decision, the competent authorities in the United Kingdom should have carried out an environmental impact assessment.

29. Both the questions at issue thus appear to me to be entirely relevant for the purpose of disposing of the main proceedings.

30. As to the argument that the concept of development consent as defined in Directive 85/337 has already been interpreted by the Court to be a matter for national law, it is difficult to see how that argument could result in the two questions being inadmissible. Those questions concern the interpretation of a provision of Community law and, as we have seen, they are relevant for the purpose of disposing of the main proceedings. Accordingly, the interpretation previously provided by the Court could possibly result in the questions at issue being answered under the simplified procedure laid down by Article 104(3) of the Rules of Procedure, but not in their being dismissed as inadmissible.

31. For those reasons, I suggest that the Court should find the first two questions referred for a preliminary ruling to be admissible and answer them.

B — *The first question referred for a preliminary ruling*

32. By its first question, the national court essentially asks whether Article 1(2) of Directive 85/337 is to be interpreted as meaning that the determination of planning

conditions attaching to an old mining permission constitutes a development consent within the meaning of that provision where the old mining permission was deprived of effect in 1991 and operations cannot resume until those planning conditions have been finally determined.

33. It is to be remembered that the term 'development consent' is defined in Article 1(2) of Directive 85/337 as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project' in question.

34. The Commission's primary submission is that that term is purely national in nature. It bases that view on paragraphs 20 and 21 of the judgment in *Gedeputeerde Staten van Noord-Holland*, cited above, and on the wording of the definition of the term. The United Kingdom Government and Mrs Wells do not agree with that view. Neither do I.

35. It is admittedly apparent from the wording of the definition of development consent that it is the national law of each Member State that establishes the moment from which the developer is granted the right to proceed with the project in question. It is thus national law that determines the procedural rules and the conditions for obtaining development consent. However, that *renvoi* to national law cannot, in my view, be interpreted as requiring that the scope of 'development consent' also be left to the discretion of each Member State. Directive 85/337 is designed to remove the disparities between the laws in force in the various Member States with regard to the assessment of the environmental effects of public and private projects. [23] The directive also explains that it is necessary to harmonise 'the principles of the assessment of environmental effects... in particular with reference to the projects which should be subject to assessment'. [24] It would therefore be clearly contrary to the objectives of Directive 85/337 and to the principle of uniform application of Community law to accept that the Member States may, by defining the concept of development consent very restrictively, take outside the directive projects likely to have significant effects on the environment.

36. This analysis does not appear to me to be inconsistent with the view taken by the Court in *Gedeputeerde Staten van Noord-Holland*. In that case, the Court was asked whether Directive 85/337 is to be interpreted as permitting Member States to waive the obligations concerning environ-

23 — Second recital in the preamble.

24 — Seventh recital in the preamble.

mental impact assessments in the case of projects listed in Annex I where (i) the projects have already been the subject of a consent granted prior to 3 July 1988, the date by which the directive was to have been transposed into national law; (ii) the consent was not preceded by an environmental assessment in accordance with the requirements of the directive; and (iii) a fresh consent procedure was formally initiated after 3 July 1988.

37. As the Court mentioned in paragraph 21 of the judgment, the national court considered it established that the project at issue had been the subject of a new consent for the purposes of Article 1(2) of the directive. It was in that context that, in paragraph 20, the Court noted as a preliminary point that 'it is for the national court to determine in each case and on the basis of the applicable national law whether approval of the development plan constitutes consent within the meaning of Article 1(2)'. That statement does not in my view preclude the concept of consent from being characterised as autonomous. In other words, it is for the national court to determine, on the basis of the applicable national law and taking account of the criteria supplied by the Court, whether a development consent has been issued for the purposes of Article 1(2) of Directive 85/337.

38. Moreover, the Court has already provided criteria for interpreting the concept of development consent, thereby confirming indirectly that it must have a Community meaning. Thus, in *WWF and Others*, cited above, the Court found it necessary to specify the conditions that had to be met in order to fall within the derogation provided for in Article 1(5) of the directive, according to which the directive does not 'apply to projects the details of which are adopted by a specific act of national legislation'. The Court held, in particular, that the legislative act in question must display the same characteristics as a development consent as defined by Article 1(2) of Directive 85/337. It specified that the act must lay down the project in detail, that is to say in a sufficiently precise and detailed 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'. [25]

39. The term 'development consent' in Directive 85/337 must therefore also have an autonomous dimension.

40. So far as concerns the substance of the answer to be given to the first question submitted for a preliminary ruling, there are two opposing propositions. The United

25 — Paragraph 59.

Kingdom submits that the approval of new conditions attaching to an existing consent granted under an IDO does not constitute a development consent for the purposes of Directive 85/337. It contends that the situation in the present case may be equated to that of 'pipeline' projects, that is to say projects in respect of which the consent procedure was initiated before 3 July 1988, the date by which the directive was to have been transposed into national law, and was still in progress on that date. It points out that the Court has accepted that the directive does not apply to such projects.

41. Mrs Wells and the Commission argue that the situation in the present case cannot be equated to that of 'pipeline' projects and that a new development consent within the meaning of Directive 85/337 has indeed been issued. I agree with that analysis.

42. The case-law relating to 'pipeline' projects emerged in the Court's judgment in *Commission* v *Germany* [26] and was then set out in more precise terms in *Gedeputeerde Staten van Noord-Holland*. Under that case-law, the principle stated in Article 2(1) of Directive 85/337, according to which projects likely to have significant effects on the environment are to be subject to environmental assessment, does not apply to projects in respect of which the consent procedure was initiated before 3 July 1988 and was still in progress on that date. That solution was adopted because the directive does not lay down transitional provisions for such projects. In addition, the directive is primarily designed to cover large-scale projects which will most often require a long time to complete. The Court held that it would therefore not be appropriate for procedures which were already complex at national level and which were formally initiated prior to 3 July 1988 to be made more cumbersome and time-consuming by reason of the specific requirements of the directive, and for situations already established to be affected. [27]

43. In the present case, the resumption of the working of Conygar Quarry following the decisions of the Secretary of State and the MPA in 1997 and 1999 cannot be regarded as a project in respect of which the consent procedure had been initiated before 3 July 1988 and was still in progress on that date. It is clear from the order for reference that the operators of Conygar Quarry obtained an actual planning permission in 1947, under an IDO, and that that permission was still valid on 3 July 1988. However, the permission was deprived of effect pursuant to the 1991 Act because, under that Act, the fact that there had been no operations to any substantial extent in the two years preceding 1 May 1991 meant that there could be no resumption of operations until the new

26 — Case C-431/92 [1995] ECR I-2189, paragraph 32.

27 — *Gedeputeerde Staten van Noord-Holland*, paragraphs 23 and 24.

conditions governing them had been finally determined. [28]

44. Also, it is apparent from the facts and law at issue in the main proceedings that after 3 July 1988 the operators of Conygar Quarry engaged in the necessary procedures with the competent national authorities in order to be permitted once again to extract materials from that site. It is also apparent that it was the decisions made by the Secretary of State on 25 June 1997 and by the MPA on 8 July 1999 that allowed them to resume operations and that those decisions set out in a precise and detailed manner the conditions under which the operations could be carried out. Furthermore, those decisions could be challenged. I deduce therefrom that the operators of Conygar Quarry did obtain a fresh decision from the competent authorities entitling them to proceed with their project for the extraction of materials, as envisaged by the definition of development consent set out in Article 1(2) of Directive 85/337. [29]

45. This analysis appears to me to be consistent with the objectives of the directive which, according to the sixth recital in its preamble and as provided in Article 2, seeks to subject to prior assessment any project likely to have significant effects on the environment. The analysis is also consonant with the Court's case-law seeking to give the directive a broad scope. Thus, in *Kraaijeveld and Others* [30] the Court held that the mere fact that Directive 85/337 does not expressly refer to modifications to projects included in Annex II, as opposed to modifications to projects included in Annex I, does not justify the conclusion that they are not covered by the directive. It stated that the concept of modifications to projects is covered by the directive, even in relation to projects included in Annex II, on the ground that the directive's purpose would be undermined if 'modifications to development projects' were so construed as to enable certain works to escape the requirement of an impact assessment although, by reason of their nature, size or location, such works were likely to have significant effects on the environment. [31]

46. In view of all of the foregoing, I suggest that the Court's answer to the first question referred for a preliminary ruling should be that Article 1(2) of Directive 85/337 is to be interpreted as meaning that the determination of planning conditions attaching to an old mining permission constitutes a development consent within the meaning of that provision where the old mining per-

28 — See point 12 of this Opinion.

29 — That is also the conclusion reached by the House of Lords in *R v North Yorkshire County Council ex parte Brown*, cited above.

30 — Case C-72/95 [1996] ECR I-5403.

31 — Paragraph 39.

mission was deprived of effect in 1991 and operations cannot resume until those planning conditions have been finally determined.

C — *The second question referred for a preliminary ruling*

47. In its second question, the national court seeks to ascertain, should the first question be answered in the affirmative, whether, if the planning conditions attaching to an old mining permission have been imposed in two stages, determination of the detailed conditions at the second stage is capable of constituting development consent within the meaning of Article 1(2) of Directive 85/337.

48. The national court states that the problem arises because, in accordance with domestic law, the principle of permitting operations to resume was established when the principal conditions were determined by the Secretary of State on 25 June 1997. This means that the determination by the MPA of the matters reserved for its approval could not extend beyond the parameters established by the Secretary of State. However, operations were unable to resume without the MPA's approval on 8 July 1999 of those matters. [32]

49. It is apparent from the Court's case-law that the fact that the working of Conygar Quarry could not resume without the MPA's determining the matters reserved for its approval is not the decisive criterion for deciding whether or not the determination of those matters constitutes development consent within the meaning of Directive 85/337. The decisive factor, where the administrative procedure applicable to the implementation of a project covered by Directive 85/337 involves several stages, concerns when, in the course of that procedure, the objectives of the directive may be regarded as having been achieved.

50. In *Linster*, [33] the Court was asked to interpret the concept of a specific act of national legislation in Article 1(5) of Directive 85/337, the effects of which are comparable to those of a development consent within the meaning of the directive. The case involved deciding whether the term 'specific act of national legislation' covers a law, adopted by a parliament after public debate, which authorises construction of a motorway but without laying down its

32 — Order for reference, paragraph 8.

33 — Case C-287/98 [2000] ECR I-6917.

route. The Court ruled that that term covers such a law 'where the legislative process has enabled the objectives pursued by Directive 85/337, including that of supplying information, to be achieved, and the information available to the parliament at the time when the details of the project were adopted was equivalent to that which would have been submitted to the competent authority in an ordinary procedure for granting consent for a project'. [34] The Court considered that, even if the route of the planned motorway was not laid down by the legislative act in question, it was possible, for example where several alternative routes were studied in detail on the basis of information supplied by the developer and by the authorities and members of the public concerned, for those alternatives to have been recognised by the legislature as having an equivalent environmental impact. [35]

51. In addition, according to the first recital in its preamble, Directive 85/337 has the objective that the competent authority should take account of the environmental impact of the project in question at the earliest possible stage in the decision-making process.

52. I deduce from those factors that where, as in the present case, the consent procedure is in two stages, one involving determination of the principal planning conditions and the other involving determination of some detailed conditions, the environmental impact assessment is to take place at the first stage. In light of the view taken by the Court in *Linster*, cited above, it is also possible to accept that development consent within the meaning of Article 1(2) of Directive 85/337 is granted on determination of the principal conditions if the directive's objectives have been achieved. That implies that all the elements of the project in question which are likely to have environmental effects must have been subject to prior assessment under the conditions laid down by the directive. [36]

53. It is to be remembered in this regard that, according to the sixth recital in the preamble to Directive 85/337, that assessment must be conducted on the basis of the information supplied by the developer and the opinions of the authorities and people concerned. Under Article 5(2) of the directive and Annex III thereto, the minimum information to be supplied by the developer is to consist of 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

34 — Paragraph 3 of the operative part.

35 — *Linster*, paragraph 58.

36 — See, to this effect, *WWF and Others*, paragraph 60.

identify and assess the main effects which the project is likely to have on the environment. [37] It is also apparent from Articles 6 and 8 that that information must be made available to the public concerned, that the public concerned must have been given the opportunity to express an opinion and that all those matters must be taken into account by the competent authority in the consent procedure for the project.

54. It is therefore only if the environmental impact of the conditions remaining to be determined has already been assessed by the competent authority, in accordance with the abovementioned detailed rules, in the course of adoption of the decision determining the principal conditions that that decision may be regarded as the development consent envisaged by Article 1(2) of Directive 85/337. If that is not the case, the assessment will have to be supplemented in order to settle the remaining conditions and it is the decision determining those conditions that will have to be regarded as the development consent within the meaning of the directive.

55. It is for national courts to decide, in the particular circumstances of the case, at what stage of the administrative procedure the objectives of Directive 85/337 were achieved. [38] In the present case, as no environmental impact assessment was carried out, it is difficult to see how the national court could take the view that the objectives of the directive were achieved on the adoption by the Secretary of State of the decision of 25 June 1997. Consequently, if the conditions determined by the MPA in its decision of 8 July 1999 were likely to have significant effects on the environment, [39] the MPA, pursuant to the directive, was required to have a prior assessment of those effects carried out. It will be for the national court to appraise whether the conditions determined by the MPA on 8 July 1999 were likely to have significant effects on the environment.

56. In view of the foregoing, I suggest that the Court's answer to the second question referred for a preliminary ruling should be that Article 1(2) of Directive 85/337 is to be interpreted as meaning that, if the planning conditions attaching to an old mining permission have been imposed in two stages, determination of the detailed conditions at the second stage constitutes development consent within the meaning of that provision where those latter conditions are likely to have effects on the environment and those effects were not assessed by the competent authority in accordance with the detailed rules prescribed by the directive in the course of adoption of the decision determining the principal conditions.

37 — *Linster*, paragraph 55.

38 — *Linster*, paragraph 58.

39 — It is indicated in the order for reference (paragraph 27) that the operators of Conygar Quarry had to submit to the MPA, *inter alia*, proposed improvements to access, a detailed scheme of working, a scheme for monitoring of blasting and a scheme of noise monitoring.

D — *The third question referred for a preliminary ruling*

57. The national court has asked the third question referred for a preliminary ruling only in the event that the first question is answered in the affirmative and the second question is answered in the negative. In view of the answer which I propose to give to the second question, I consider that there is no need to answer the third question.

E — *The fourth question referred for a preliminary ruling*

58. By this question, the national court asks, in essence, whether Articles 1(2) and 2(1) of Directive 85/337 are to be interpreted as meaning that, where their provisions have not been complied with, individuals may rely on them before the court of a Member State against national authorities or whether the limits imposed by the Court on the direct effect of directives preclude decisions incompatible with those provisions from being set aside or modified.

59. As is apparent from the order for reference, this question arises because the Secretary of State contends that adoption of the measures sought by the claimant, such as revocation of the planning permission or modification of the conditions governing it, would oblige the United Kingdom Government to take measures having adverse consequences for the operators of Conygar Quarry. According to the Secretary of State, that would run counter to the limits laid down by the Court on the direct effect of directives. He points out that the Court stated in *Marshall*[40] that a directive may not of itself impose obligations on an individual. He also observes that it held in *Kolpinghuis Nijmegen*[41] that a national authority may not rely, as against an individual, upon a provision of a directive whose necessary implementation in national law has not yet taken place.

60. Like the claimant and the Commission, I consider that the Secretary of State's line of argument cannot be followed and that the first part of the fourth question should be answered in the affirmative. I found that assessment on the following matters.

61. It is settled case-law that where a Member State has failed to implement a directive by the end of the period prescribed or to implement it correctly, the provisions of the directive which, so far as their subject-matter is concerned, are unconditional and sufficiently precise may be relied upon by individuals against that

40 — Case 152/84 [1986] ECR 723.
41 — Case 80/86 [1987] ECR 3969.

Member State before national courts. [42] It is also settled case-law that where the directive in question confers a genuine discretion on the Member States, individuals may request the national courts to review whether the Member States have exceeded it. That last possibility has been recognised by the Court, in particular, in the context of interpretation of Directive 85/337, in its judgments in *Kraaijeveld and Others*, *WWF and Others* and *Linster*, all cited above.

62. In the present case, it is not in dispute that Mrs Wells is entitled to invoke the provisions of Directive 85/337. Mrs Wells' ability to do so may be deduced from the abovementioned judgments in that she, like the applicants in the cases which gave rise to those judgments, is asking the national court to review whether a measure of domestic law is consistent with Directive 85/337, a review which is capable of resulting in that measure being declared invalid. Such an ability could also follow, in my view, from the fact that the provisions of Directive 85/337 requiring the Member States to make consent for projects likely to have significant effects on the environment subject to a prior assessment of those effects in the context of which the persons concerned must have the opportunity to express their opinion are sufficiently precise.

63. The corollary of that entitlement conferred on individuals is the duty of the Member States, laid down by Article 10 EC, to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations on them under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law. [43] That law is binding on all the authorities of the Member States, including judicial authorities. It has been consistently held that the national courts, whose task it is to apply the provisions of Community law in areas within their jurisdiction, must ensure that those rules take full effect and must protect the rights which they confer on individuals. [44] The national court must therefore set aside any measure of national law preventing Community rules from having full force and effect. [45] That obligation is owed in light of the principles of direct effect and of precedence of Community law. [46]

64. It follows that, where the provisions of Directive 85/337 have not been complied with, the national courts and national administrative authorities have the task, as the Court held in *Kraaijeveld and Others* and *WWF and Others*, of taking all the

42 — Case 8/81 *Becker* [1982] ECR 53 and Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-6907, paragraph 37. For a recent example, see Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 38.

43 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36.

44 — Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 16, and *Francovich and Others*, cited above, paragraph 32.

45 — *Simmenthal*, cited above, paragraph 22, and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 20.

46 — *Simmenthal*, paragraphs 14 to 18, and *Factortame and Others*, paragraph 18.

measures, whether general or particular, necessary in order for an environmental impact assessment to be carried out in respect of the project in question.

65. In my view, the limits on the direct effect of directives imposed by the Court's case-law cannot, in any event, prevent that obligation from being performed. It is appropriate to recall those limits.

66. In *Marshall*, cited above, the Court indicated that a directive's binding nature, apparent from Article 249 EC, exists only in relation to each Member State to which the directive is addressed. It deduced therefrom that 'a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person'. [47] The case-law has drawn two inferences from this statement that a directive can have only 'ascending' vertical effect. First, directives do not have 'horizontal' direct effect, that is to say they cannot be invoked as such by an individual in proceedings against another individual. According to the Court, the effect of extending the case-law on the possibility of relying on directives against public authorities to the sphere of relations between individuals 'would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations'. [48] Second, directives cannot have 'descending' vertical direct effect, which means that a national authority may not rely, as against an individual, upon a provision of a directive whose implementation in national law has not yet taken place. [49]

67. In my view, neither of those principles in the case-law constitutes an obstacle to the adoption by the competent national authorities of the measures sought by Mrs Wells such as revocation of the planning permission or modification of the conditions established in 1997 and 1999.

68. First, the principle that directives do not have horizontal direct effect does not amount to an obstacle because the main proceedings are not between Mrs Wells and the operators of Conygar Quarry but

47 — Paragraph 48.

48 — Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 24. See also Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, paragraph 20, and Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 20.

49 — Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 19, and *Kolpinghuis Nijmegen*, cited above, paragraph 10.

between her and a State entity. [50] A classic case of 'vertical' direct effect of directives is therefore involved. In such a case, it is perfectly conceivable that the judicial decision which, following the judgment interpreting Community law pronounced by the Court of Justice, must be delivered by the court having jurisdiction, and then any decision adopted pursuant to the national judgment by the competent administrative authorities, will have repercussions on the rights of individuals. In light of the Court's case-law, even certainty that that will be so is no justification for denying the applicant the right to rely on provisions of a directive which has not been transposed into national law or has been transposed incorrectly. Thus, in *Fratelli Costanzo* [51] the Court accepted the right of a tenderer for a public works contract to plead the provisions of a directive in proceedings with a municipality challenging the latter's decision to award the contract to a competitor. [52] Likewise, in *Smith & Nephew and Primecrown* [53] it considered that a business could plead the provisions of a directive in order to challenge the validity of a marketing authorisation for a medicinal product granted to a competitor.

69. Nor, second, can the principle that directives do not have descending vertical direct effect constitute an obstacle to adoption of the measures sought. It is to be remembered that this principle is intended to prevent a Member State from relying on a directive's provisions when, contrary to its obligations pursuant to the directive itself and Article 10 EC, it has not taken the measures necessary for transposition of the directive into national law. The principle is thus intended to prevent the State in question from deriving an advantage from its own failure to act. [54] However, it cannot constitute an obstacle to performance, by the national authorities, of their obligation to nullify the consequences of breach of a directive's provisions, first, by setting aside the national measures incompatible with those provisions and, second, by taking the measures necessary in order for the requirements contained therein to be implemented. In such a case the State does not impose obligations on an individual to its own advantage on the basis of an untransposed directive, but adopts all the measures necessary for implementing that directive.

50 — The Court has extended the scope of the 'vertical' direct effect of directives by holding that their provisions are enforceable not only against the Member State as such, but also against organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals, such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility, by the public authorities and under their supervision, for providing a public service (*Kampelmann and Others*, cited above, paragraph 46).

51 — Case 103/88 [1989] ECR 1839.

52 — The national court asked the Court of Justice whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of the directive in question and to refrain from applying provisions of national law which conflict with them. Very logically, the Court held that 'it would... be contradictory to rule that an individual may rely upon the provisions of a directive... in proceedings... seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them' (paragraph 31).

53 — Case C-201/94 [1996] ECR I-5819.

54 — The Court has inferred therefrom, in particular, that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (*Pretore di Salò*, cited above, paragraph 20, *Kolpinghuis Nijmegen*, cited above, paragraph 13, and Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 37).

70. Acceptance of the converse proposition would mean that a Member State which has not transposed a directive into national law within the prescribed period or has transposed it incorrectly would then be precluded from making good its failure wherever implementation of Community law would have the effect of imposing obligations on individuals or compromising their rights. The consequence of such an interpretation of the principle that directives do not have descending vertical direct effect would, without a doubt, be to undermine the principle of primacy of Community law enshrined by the Court, in its fundamental judgment in *Costa*, [55] as a condition of the Community's very existence.

71. It follows that the limits laid down by the Court on the direct effect of directives do not constitute obstacles preventing Mrs Wells from relying on the provisions of Directive 85/337 before national courts or the State judicial and administrative authorities from taking all appropriate measures to nullify the unlawful consequences of the breach of that directive and to ensure that its requirements are observed so far as concerns the working of Conygar Quarry. In the absence of Community rules concerning the conditions under which that obligation is to be performed, it will be for those authorities to fulfil it in accordance with the rules of national law, within the limits, resulting from the principles of equivalence and effectiveness, which circumscribe the procedural autonomy of the national systems. [56]

72. In view of the foregoing, I suggest that the Court's answer to the fourth question referred for a preliminary ruling should be that Articles 1(2) and 2(1) of Directive 85/337 are to be interpreted as meaning that, where their provisions have not been complied with, individuals may rely on them before the court of a Member State against the national authorities and the limits laid down by the Court on the direct effect of directives do not preclude decisions incompatible with those provisions from being set aside or modified.

F — *The fifth question referred for a preliminary ruling*

73. The national court has asked this question only if the answer to the preceding question were to be that the limits imposed by the Court on the direct effect of directives preclude decisions incompatible with the provisions of Directive 85/337 from being set aside or modified. In view of the answer which I have proposed that the Court give to that question, I consider it unnecessary to answer the fifth question.

55 — Case 6/64 [1964] ECR 585, at p. 594.

56 — Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31.

V — Conclusion

74. In view of the foregoing considerations, I propose that the Court should answer as follows the questions asked by the national court:

(1) Article 1(2) 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 is to be interpreted as meaning that the determination of planning conditions attaching to an old mining permission constitutes a development consent within the meaning of that provision where the old mining permission was deprived of effect in 1991 and operations cannot resume until those planning conditions have been finally determined.

(2) If the planning conditions have been imposed in two stages, determination of the detailed conditions at the second stage constitutes development consent within the meaning of Article 1(2) of Directive 85/337 where those latter conditions are likely to have significant effects on the environment and those effects were not assessed by the competent authority in accordance with the detailed rules prescribed by the directive in the course of adoption of the decision determining the principal conditions.

(3) Articles 1(2) and 2(1) of Directive 85/337 are to be interpreted as meaning that, where their provisions have not been complied with, individuals may rely on them before the court of a Member State against national authorities and the limits laid down by the Court on the direct effect of directives do not preclude decisions incompatible with those provisions from being set aside or modified.