

OPINION OF ADVOCATE GENERAL ELMER

delivered on 26 March 1996 \*

1. In this case the Netherlands Raad van State (Council of State), Administrative Appeal Section, has referred to the Court for a preliminary ruling a number of questions on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment<sup>1</sup> ('the directive') in connection with a decision of the authorities to execute a dyke-reinforcement plan affecting various parts of Sliedrecht in the Netherlands.

It may further be seen from the second recital that the directive also has the purpose of approximating national laws in so far as disparities between the laws in force in the various Member States with regard to environmental impact assessment may create unfavourable competitive conditions and thereby directly affect the functioning of the common market.

**The EIA directive**

2. The directive was issued in pursuance of Articles 100 and 235 of the Treaty and according to the first recital in the preamble thereto its purpose is to promote an environmental policy consisting in preventing the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects. It therefore provides for the implementation of procedures to evaluate the effects on the environment at the earliest possible stage of all the technical planning and decision-making processes.

3. Furthermore the sixth recital states that consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects.

In this respect a distinction is made according to the eighth and ninth recitals between projects belonging to certain types which have significant effects on the environment and which must therefore as a rule be subject to systematic assessment, and projects of other types which do not necessarily have such an effect in all cases and should therefore be assessed where the Member States consider that their characteristics so require.

\* Original language: Danish.

1 — OJ 1985 L 175, p. 40.

4. The directive contains the following provisions of significance for this case: *Article 2*

*Article 1*

1. This directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

1. 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.

2. For the purposes of this directive:

These projects are defined in Article 4.

“project” means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

3. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;

...

- (b) make available to the public concerned the information relating to the exemption and the reasons for granting it;
  - the inter-action between the factors mentioned in the first and second indents,
- (c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.
  - material assets and the cultural heritage.

*Article 4*

...

1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

*Article 3*

The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

- human beings, fauna and flora,
- soil, water, air, climate and the landscape,

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.

*Article 6*

(f) Dams and other installations designed to hold water or store it on a long-term basis.

...

...

2. Member States shall ensure that:

— any request for development consent and any information gathered pursuant to Article 5 are made available to the public,

12. *Modifications to development projects included in Annex I...*

**Relevant national provisions**

6. In the Netherlands the directive was implemented partly by the Wet Algemene Bepalingen Milieuhygiëne (Law laying down general provisions on environmental health, hereinafter referred to as 'the Environment Law') and partly by the Besluit Milieu-Effectrapportage (Decision on environmental impact assessment, hereinafter referred to as 'the Decision') of 20 May 1987.<sup>2</sup>

5. Annexes I and II to the directive list the categories of project which fall within the scope of the directive. Annex II, which is headed 'Projects subject to Article 4(2)', includes the following relevant provisions:

*'10. Infrastructure projects*

...

(c) Canalization and flood-relief works.

7. Article 41(b)(1) of the Environmental Law provides: 'Activities which are likely to have significant adverse effects on the environment shall be designated by a general administrative measure. In that connection,

<sup>2</sup> — Staatsblad 1987, p. 278.

one or more decisions of public bodies with regard to activities in the course of whose preparation an environmental impact assessment must be made shall be indicated.'

8. In Article 2 of the Decision and Section A, point 1, of the Annex thereto, 'dyke' is defined as 'a raised embankment'.

According to point 2, 'construction' is to be understood as including *inter alia* bringing back into use, reconstruction, extension or otherwise altering.

According to Section C, point 12.1, of the Annex, the construction of a dyke is an activity covered by Article 41(b) where the dyke is 5 km or more in length and has a cross-section of 250 square metres or more.<sup>3</sup>

<sup>3</sup> — By a decision of 4 July 1994 on the assessment of the environmental impact of projects, which replaced the aforesaid Decision, such thresholds for effecting environmental assessments concerning river dykes are deleted. The new decision does not however apply to this case since the decision of the authorities which was the subject of the proceedings before the court of reference was adopted on 18 May 1993.

## The facts

9. According to Article 1(II)(d) of the Deltawet<sup>4</sup> (Delta Law) works are to be carried out to strengthen the high-water embankments along the Rotterdam Waterway and the waters directly connected therewith in order to protect the land against high water.

10. By decision of 26 April 1990 the Minister van Verkeer en Waterstaat (Minister for Transport and Water Resources) adopted a dyke reinforcement plan for Sliedrecht-West, Sliedrecht-Centre and Sliedrecht-East. The plan covered *inter alia* the construction of a new dyke to replace the existing Molendijk in an area owned by the appellants in the main proceedings, namely Aannemersbedrijf P. K. Kraaijeveld BV, Kraaijeveld Brothers, J. A. Kraaijeveld, J. Kraaijeveld senior, J. Kraaijeveld junior, W. Kraaijeveld and P. K. Kraaijeveld (hereinafter jointly referred to as 'Kraaijeveld').

11. At its public meeting on 23 November 1992 the Sliedrecht local authority adopted the zoning plan 'Partial modification of zoning plans in connection with dyke reinforcement'. The purpose of the modification plan is to make possible reinforcement work on

<sup>4</sup> — Staatsblad 1958, p. 246.

dykes bordering the Merwede in the municipality of Sliedrecht. The modifications cover *inter alia* Kraaijveld's business sites and deprive Kraaijveld's undertaking of access to the waterway.

12. On 18 May 1993 the Zuid-Holland Provincial Executive approved the local authority's zoning plan.

13. The approvals in question were given without any consideration of the environmental effects of the constructional work covered by the zoning plan.

The order for reference

14. On 20 July 1993 Kraaijveld appealed against the Provincial Executive's decision to the Netherlands Raad van State on the ground that the decision to adopt the new line of the dyke had not been prepared with the necessary care.

15. The Administrative Appeal Section of the Netherlands Raad van State, by order of 8 March 1995, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the Treaty:

'1. Must the expression "canalization and flood-relief works" in Annex II to Directive 85/337/EEC be interpreted as also covering certain types of work on a dyke running alongside waterways?

2. Regard being had in particular to the expressions "projects" and "modifications to projects" employed in the directive, does it make any difference to the answer to Question 1 whether what is involved is:

(a) the construction of a new dyke;

(b) the relocation of an existing dyke;

(c) the reinforcement and/or widening of an existing dyke;

(d) the replacement *in situ* of a dyke, whether or not the new dyke is stronger and/or wider than the old one; or

court even though it was not in fact invoked in the matter pending before that court?’

### The first question

(e) a combination of two or more of (a) to (d) above?

3. Must Article 2(1) and Article 4(2) of the directive be interpreted as meaning that — if a Member State lays down in its national implementing legislation wrong specifications or criteria and/or thresholds within the meaning of Article 4(2) of the directive for a project listed in Annex II — an obligation exists by virtue of Article 2(1) of the directive to subject the project to an environmental impact assessment if the project is likely to have “significant effects on the environment by virtue *inter alia* of [its] nature, size or location” within the meaning of Article 2(1)?

16. By the first question the court of reference is asking the Court of Justice to decide whether paragraph 10(e) of Annex II to the directive must be interpreted as meaning that dykes such as those at issue constitute ‘canalization and flood-relief works’.

4. If Question 3 is answered in the affirmative, does that obligation have direct effect, that is to say, can it be invoked by an individual before a national court and must it be applied by the national

17. The court of reference has stated in its order that projects which, as dykes along waterways, have the purpose of containing waterways within determined limits or bringing them within such limits and then containing them there, must be regarded as being covered by paragraph 10(e) of Annex II to the directive. What is decisive is not the purpose of the project but its effect on the environment.

18. The Netherlands Government, supported by the Italian Government, has claimed that the construction of a dyke along a waterway is not covered by the concept of ‘canalization and flood-relief works’. That expression alludes only to works of construction which change the character of a waterway as such, including the quantity or

quality of the water, for example by changing the river bed or the depth or flow of water. Such changes may significantly affect the flora and fauna of the waterway. Works relating to dykes along waterways on the other hand do not in themselves affect the river along which the work is executed and thus have no influence on the flora and fauna of the waterway.

19. Kraaijveld and the Commission have associated themselves with the view of the court of reference. Kraaijveld has further pointed out that by laying down in the Decision implementing the directive thresholds beyond which dyke works must be made subject to an environmental assessment, the Netherlands authorities have indirectly acknowledged that dyke projects do come within the categories of projects listed in Annex II.

20. I must emphasize that according to the Court's consistent case-law it is necessary to seek a common and uniform interpretation of Community legal measures and that an individual provision must be interpreted on the basis of its wording and of its purpose and the context in which it occurs.<sup>5</sup>

5 — See for example Case 173/88 *Henriksen* [1989] ECR 2763, paragraph 11, Case 300/86 *Van Landschoot* [1988] ECR 3443, paragraph 18, and Case 13/83 *Parliament v Council* [1985] ECR 1513, paragraph 34.

21. The purpose of the directive, as appears from the sixth recital in the preamble thereto, is to ensure that there is a prior assessment of the likely significant environmental effects of projects. According to Article 3, Member States are to assess the direct and indirect effects of a project on human beings, fauna, flora, soil, water, air, climate, the landscape, material assets and the cultural heritage. That purpose, together with the broad range of factors to be taken into consideration, means in my opinion that in the interpretation of Annex II significant importance must in cases of doubt be attached to the actual effects on the environment which may be regarded as being bound up with certain categories of projects.

22. The content of paragraph 10(e) in Annex II to the directive is largely identical in the various language versions. Reference may be made to the French, Italian and German versions, the common feature of which is that the works must concern canalization or flood-relief. The Dutch version, the wording of which is 'Werken inzake kanalisering en regulering van waterwegen', seems fully to correspond to that.

23. The expression 'canalization' seems linguistically to denote works in which there is some intervention in the natural bed of the waterway, for example by the digging of a channel by which the river water is wholly

or partially diverted from its natural bed. Interventions involving straightening or deepening a waterway so as to make it navigable may also in some circumstances amount to a canalization. The construction of a dyke along a waterway on the other hand does not necessarily in itself entail intervention in the waterway's natural bed and in certain circumstances cannot be described as canalization work.

24. It is more difficult to give a precise definition of the expression 'flood-relief works'. A certain negative delimitation may however be deduced from paragraph 10(f), which concerns 'dams and other installations designed to hold water or store it on a long-term basis'. The expression 'flood-relief works' must therefore cover something other and more than such installations. 'To hold water' seems to presuppose that, where the installation is constructed in connection with a waterway, there is permanent intervention in the flow of water. That will presumably take place in general by erecting a barrier across the watercourse, typically with the consequence that there is a difference in the water-levels before and behind the barrier. The river water is held back before the barrier and can subsequently be drawn off in controlled quantities, for example for the production of electricity, to make the waterway navigable (by means of locks) or to protect lower-lying areas from flooding. But paragraph 10(f) may also be regarded as covering installations which, without blocking the flow of water, involve narrowing the flow since such installations may also have the effect of holding back the water.

25. The word 'flood-relief' indicates works which in one way or another affect the natural course of the water. Works by which a watercourse is made straighter or deeper will clearly be covered. However, in my view the provision cannot be restricted to that.

26. The purpose and function of a dyke is to hold the river-water back<sup>6</sup> and thus to prevent the waterway, in periods when the water level is high, from flooding areas of land behind the dyke. A dyke beside a watercourse, if it fulfils its purpose, thus prevents a watercourse from flowing naturally. The dyke thereby affects the natural flow of the water and hence involves controlling the watercourse for the purpose of flood-relief.

27. The rest of the wording and the purpose of the directive also indicate that dykes along watercourses are included within the scope of the directive. The characteristic of such dykes is that a large pile of sand and other materials is heaped up along the waterway. A dyke beside a waterway may therefore in itself affect the natural landscape. It must be remembered that the term 'project' in Article 1(2) covers *inter alia* an intervention in the natural surroundings and landscape. Dykes along watercourses may moreover affect both the fauna and the flora, for

6 — In *Petit Robert*, 1987, p. 542, 'digue' is defined as a 'longue construction destinée à contenir les eaux'.

example by causing wetlands associated with the riverside to dry out to the detriment of animal and plant life. That applies irrespective of whether the dyke fulfils its function several times a year or only at an interval of years, since the supply of liquid and organic and other material brought by flooding after an interval of years is significant — it might even be regarded as of vital importance — for flora and fauna in the place affected. It can therefore by no means be excluded that dykes along waterways may have a significant effect on the environment. Such projects must therefore be regarded, in accordance with the purpose of the directive, as coming within its scope.

28. In those circumstances my view is that the answer to the first question must be that the expression 'canalization and flood-relief works' in paragraph 10(c) of Annex II to the directive must be interpreted as including dykes along waterways.

#### The second question

29. By the second question the court of reference asks the Court of Justice essentially to

decide whether the term 'project' in Article 1(1) of the directive must be interpreted as including:

- (a) the construction of a new dyke;
- (b) the relocation of an existing dyke;
- (c) the reinforcement and/or widening of an existing dyke;
- (d) the replacement *in situ* of a dyke whether or not the new dyke is stronger and/or wider than the old one; or

30. The court of reference has stated in its order for reference its view that the expression 'canalization and flood-relief works'

should cover all work which is intended to bring waterways within determined limits and then contain them there and which may have significant effects on the environment, whether or not involving building on or replacing existing works. The directive therefore covers for example the construction of a long new dyke extending a small existing dyke and the relocation of an existing dyke some kilometres inland. Kraaijeveld agrees with the view of the court of reference.

necessary to extend the directive's field of application to modifications of Annex I projects, which typically have the greatest effect.

32. The Commission's opinion also is that a modification of canalization and flood-relief works or other Annex II projects is not covered by the directive. A subsequent modification may however be so significant that it constitutes in reality a new project, which must always be considered. If that is not the case, a subsequent modification to an existing installation need not be considered in accordance with Article 4(2).

31. The Netherlands and Italian Governments take the view that in this case only a modification of an existing dyke is involved. That must in certain circumstances be regarded as involving a modification of a project and the directive does not apply to modifications of Annex II projects, as may be seen from paragraph 12, which mentions only modifications to Annex I projects. Article 4 of the directive makes a distinction between Annex I projects, which must always be the subject of an environmental impact assessment, and Annex II projects, for which Member States are allowed a discretion. That distinction is based on the fact that Annex I projects normally affect the environment much more than Annex II projects. Correspondingly the execution of the existing project would typically affect the environment more than a subsequent modification thereof. For example the construction of a dyke may have greater effect than a subsequent relocation, strengthening or renewal of the dyke in question. The Community legislature has only considered it

33. The United Kingdom Government's opinion is that the concept 'project' also covers modification of projects executed, and it has further mentioned that the purpose of paragraph 12 of Annex II is to transfer projects which would otherwise have been covered by Article 4(1) and Annex I for consideration under Article 4(2). Paragraph 12 must not therefore be taken to mean that modification of projects is excluded from the field of application of the directive. The directive's definition of 'project' is broad enough to include also modifications to existing installations. Furthermore such an interpretation is necessary in the interests of the effective operation of the directive inasmuch as subsequent modifications may in themselves have significant effects on the environment.

34. The term 'project' indicates in my view, purely linguistically, that it must involve something not yet completed.<sup>7</sup> In Article 1(2) also 'project' is defined as 'the execution of construction works or of other installations or schemes' (my emphasis). The directive must therefore be understood as meaning that when works have been executed there is no longer any project. It would also be artificial to describe projected works concerning an existing dyke, the foundations of which were laid just after the Viking age, as a modification of a project.<sup>8</sup> It must also be immaterial whether or not a project which is now complete was originally the subject of an environmental impact assessment according to the directive.

36. That interpretation is, I think, borne out by the Court's judgment in Case C-431/92 *Commission v Germany*.<sup>9</sup> The case concerned the building of a new power-station block with a heat output of 500 megawatts in Großkrotzenburg and raised *inter alia* the question to what extent it constituted a constructional project covered by Annex I, which *inter alia* relates to power-stations with a heat output of at least 300 megawatts, or a modification to a project in Annex I which, as mentioned, is covered by Annex II.

In paragraph 35 the Court declared:

35. 'Projects' must therefore in my view be considered to be planned works of construction or other not yet executed interventions in the environment which will bring about a modification of the *status quo* irrespective of whether they are connected in one way or another with something already man-made. The expression 'modification to a project' can therefore concern only cases in which modifications are made to a project before it is completed.

7 — In *Petit Robert*, 1987, p. 1542, the French word 'projet' is defined as 'image d'une situation, d'un état que l'on pense atteindre' and in *The Shorter Oxford English Dictionary*, 1977, the corresponding English word 'project' is defined as 'a plan, draft, scheme, or table of something; a mental conception or idea'.

8 — According to the available information the majority of the Netherlands dykes were laid in the twelfth century.

'By virtue of paragraph 2 of Annex I to the directive, projects for thermal power stations with a heat output of 300 megawatts or more must undergo a systematic assessment. For the purposes of that provision, such projects must be assessed irrespective of whether they are separate constructions, are added to a pre-existing construction or even have close functional links with a pre-existing construction. Links with an existing construction do not prevent the project from being a "thermal power station with a heat output of 300 megawatts or more" so as to bring it within the category headed "Modifications to development projects included in Annex I", mentioned in paragraph 12 of Annex II.'

9 — (1995) ECR I-2189.

A project is thus a project, regardless of whether it is integrated into an existing installation.

lasting longer than an old one. In addition the actual work of constructing the dyke may have significant effects on the environment. It therefore seems to be most in conformity with the purpose of the directive to consider in all the situations mentioned by the court of reference whether an environmental impact assessment should be carried out for the project in question.

37. The decision as to which projects fall within the directive's field of application must be taken on the basis of an interpretation of the detailed content of Annexes I and II to the directive. The word 'anlæg' in the Danish version of paragraph 10(e) of Annex II, which as I said relates to 'anlæg til regulering af vandløb' [lit. water regulation works] (canalization and flood-relief works) might give the impression that it must concern something more than a mere replacement of something already existing. A number of the other language versions however use the broader expression 'works'.<sup>10</sup> In my view therefore it is not possible to read such quantitative limitations into the expression 'anlæg' in paragraph 10(e). The fact that it is found necessary for example to replace an existing dyke with a new one also indicates that, as a matter of pure fact, a modification of the *status quo* is taking place. A new dyke replacing an existing dyke will perhaps contain other materials or will be designed differently from the old one. New dykes are not constructed to replace existing ones unless the cost involved relates to modifications which in one way or another bring advantages as compared with the previous state of affairs. In any event, all other things being equal, a new dyke will be capable of

38. For the sake of completeness I shall make one or two comments on the question of how far modification to Annex II projects falls within the scope of the directive.

39. It may be seen from Article 2(1) of the directive that the *projects* covered by the directive are defined in Article 4. When Article 4(2) refers to 'projects of the classes listed in Annex II' and paragraph 12 of Annex II refers to 'modifications to ... projects included in Annex I', it must follow that modifications to projects are in themselves projects within the meaning of the directive. Thus Article 1(2) of the directive is brought into harmony with Article 2(1), which mentions only projects, and with Annex II, which describes those projects in greater detail. The purpose of paragraph 12 of Annex II is therefore in my view to provide that modifications to Annex I projects not yet completed are to be considered under Article 4(2) of the directive, so that such modifications to Annex I projects are

10 — Thus in the French version the word 'ouvrages' is used, in the Italian version 'opere' and in the German 'Arbeiten'.

subject to environmental impact assessment not solely where the modification itself exceeds the threshold values in Annex I. On the other hand the contrary inference cannot be drawn from paragraph 12 of Annex II. Thus as far as modifications to both Annex I and Annex II projects are concerned specific consideration must be given to whether the modifications may have a significant effect on the environment, so that where necessary an environmental impact assessment must be undertaken in pursuance of Articles 5 to 10 of the directive.

Paragraph 12 of Annex II ensures in this situation that the modifications to the project and the need for a fresh environmental impact assessment are specifically considered.

41. An interpretation to the effect that modifications to projects fall in general within the scope of the directive in addition prevents attempts to circumvent the directive by preparing a lesser project which does not significantly affect the environment and is not therefore subject to an environmental impact assessment and then modifying it into something which may well have significant effects on the environment.<sup>11</sup>

40. The purpose of the directive, according to which projects which may have significant effects on the environment must be subject to a prior environmental impact assessment, militates decisively in favour of that interpretation. A modification of an Annex I or Annex II project which is not yet completed may very well be regarded as capable of having significant effects on the environment. Whether that is the case will however depend upon a specific appraisal. A scheme based on thresholds such as that contained in Annex I is not automatically suitable as the basis for an appraisal of the environmental impact of modifications to projects. For example an increase in a projected power-station's capacity from 300 to 550 megawatts may significantly affect the environment. The increase does not however amount to 300 megawatts or more, so that it does not in itself constitute an Annex I project.

42. To sum up, my view is that the second question must be answered to the effect that paragraph 10(e) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be interpreted as meaning that it covers all projected work relating to dykes along waterways, irrespective of whether these involve constructing a new dyke, relocating an existing dyke, reinforcing and/or widening an existing dyke, replacing a dyke *in situ* whether or not the new dyke is stronger and/or wider than the old one, or a combination of such works.

<sup>11</sup> — See point 26 of my Opinion delivered on 21 February 1995 in Case C-431/92 *Commission v Germany* [1995] ECR I-2189, at p. 2192.

### The third question

43. By the third question the court of reference is asking in substance whether Articles 2(1) and 4(2) of the directive must be interpreted as meaning that the Member States are obliged to undertake an environmental impact assessment concerning a given project where, after the matter has been specifically considered, it must be accepted that it may have a significant effect on the environment, and that the Member States have therefore failed to fulfil their obligations under the directive if they lay down thresholds which result in no environmental impact assessment being undertaken in such cases.

44. In the opinion of the court of reference it follows from the directive that Annex II projects which are likely to have significant effects on the environment by virtue of their nature, size or location, must be the subject of an environmental impact assessment. Kraaijeveld agrees with that view.

45. The Netherlands Government, supported by the Italian Government, has contended that Article 4(2) of the directive gives the Member States a discretion to determine the circumstances under which an environmental impact assessment of Annex II

projects is to be carried out. The directive does not lay down detailed limits in this respect. The thresholds in the Decision concerning dykes along waterways are laid down on the basis that there is a close connection between the length and size of a dyke and the effect on the environment. Before these thresholds were fixed the authorities investigated the ways in which dykes along waterways may affect the environment. The Netherlands Government is therefore of the opinion that the limits of the discretion conferred by the directive have not been exceeded.

46. The Commission has claimed that Article 2(1) of the directive contains a general obligation to undertake an environmental impact assessment of projects which may have significant effects on the environment. Article 4(1) and (2) gives further details of that obligation. Annex I projects always have significant effects on the environment and must therefore always be the subject of an environmental impact assessment. Annex II projects on the other hand must be given specific consideration on the basis of their individual characteristics. Article 4(2) allows the Member States to establish criteria and thresholds with a view to facilitating that appraisal. In establishing them Member States are however restricted by the obligation in Article 2(1) so that they are not entitled to establish criteria and thresholds which would result in a failure to carry out an environmental impact assessment of projects likely to have significant effects on the environment. The Commission considers that there is much to show that the thresholds laid down by the Netherlands authorities, which make only dykes along water-

ways with a length of at least five kilometres and a cross-section of at least 250 square metres subject to an environmental impact assessment, generally tend to exclude projects for river dykes from the field of application of the directive.

ering whether a given project may significantly affect the environment.

47. I must refer to the first recital in the preamble to the directive, which states that the best environmental policy consists in preventing the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects. In that light the directive introduces a procedure aimed at ensuring that projects likely to have significant effects on the environment are subject to a prior environmental impact assessment (see the sixth recital and Article 1(1) of the directive). That purpose is further supported by Article 2(1), according to which the Member States are to adopt the measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects.

48. The directive relates to effects on the environment in a broad sense. Article 3 refers to the direct and indirect effects of a project on human beings, fauna and flora, soil, climate, landscape and inter-action between them as well as material assets and the cultural heritage. There is thus a whole series of factors to be investigated in consid-

49. In paragraphs 39 and 40 of the judgment in Case C-431/92, which I mentioned previously, concerning the Großkrotzenburg power-station, the Court stated that Article 2 of the directive lays down an unequivocal obligation incumbent on the competent authority to make certain projects subject to an assessment of their effects on the environment. The Court also stated in those paragraphs that Article 3, which prescribes the content of the assessment and lists the factors to be taken account of in it, also lays down an unequivocal obligation incumbent upon the national authorities.

50. Article 4(2), according to which Annex II projects are to be assessed where Member States consider that their characteristics so require and according to which the Member States may specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary for determining which projects are to be subject to an assessment, must be interpreted in the light of these obligations.

51. In my opinion it would be incompatible with that to interpret Article 4(2) as meaning that it gives the Member States an unfettered discretion to determine when an environ-

mental impact assessment of Annex II projects is to be undertaken. If that were so, Article 2(1), requiring Member States to 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 would be deprived of any independent content and would in reality be interpreted out of the context of the directive. That would not be compatible with the fact that the provisions of Article 2(1) of the directive, in the light of the sixth recital and Article 1(1), seem intended to be of central significance in delimiting the field of application of the directive. According to those provisions the directive concerns precisely projects likely to affect the environment significantly. Such an interpretation would also be quite incompatible with the fact that, according to the second recital, the directive, in addition to promoting protection of the environment, also seeks to approximate the national laws of the Member States. If the Member States were allowed an unfettered discretion, considerable differences might arise between them as to which projects were to be subjected to an environmental impact assessment.

obligation for the Member States.<sup>12</sup> That obligation implies that the Member States, in assessing whether a project can significantly affect the environment, must make a specific estimate as to whether the project is likely to have significant effects on the environment and where appropriate carry out an environmental impact assessment.

53. The wording of the second subparagraph of Article 4(2) is, I think, entirely compatible with that interpretation. That provision, as I said, provides for the possibility on the one hand of specifying certain types of project which *must* be assessed, and on the other of establishing criteria and/or thresholds for deciding which Annex II projects falling within the categories referred to *must* be assessed. The Member States can thus lay down rules with the object of facilitating an appraisal as to which projects are likely to have significant effects on the environment. If it is generally recognized, for example, that discharge of cadmium above a certain level may have such an effect, the Member States may determine that there *must* be an environmental impact assessment in the case of Annex II projects which will entail discharge of that substance above a certain threshold.

52. In those circumstances I think that Article 2(1) of the directive contains the basic criterion for deciding when a project must be subject to an environmental impact assessment and thus contains an independent

<sup>12</sup> — As stated by the Commission in its report on the directive, COM(93)28, p. 5, the directive has in certain respects the character of a framework law. The Member States are given wide opportunities for exercising their own discretion concerning its transposition into national law. But the Member States are not thereby granted unfettered discretion. As the Commission states in the same document, it is a condition that the fundamental requirements are observed.

54. It does not follow, however, that discharges below a threshold thus prescribed can never significantly affect the environment. That will depend upon the vulnerability of the specific environment and there must therefore be a specific investigation as to whether there will be significant effects on the environment such that an environmental impact assessment should be carried out under the rules of the directive. The second subparagraph of Article 4(2) is by no means worded in such a way as to entitle the Member States to omit such an investigation in all cases in which a given threshold is not exceeded. The Member States may establish criteria and thresholds for deciding when an environmental impact assessment *must* be carried out under the rules of the directive, but there is nothing in that provision to the effect that Member States may establish criteria and thresholds for deciding when such an environmental impact assessment need *not* be carried out. The purpose cannot therefore be assumed to be that of exempting Member States from undertaking a specific appraisal, but that of allowing criteria and thresholds to be established in order to delimit projects which, according to experience in the Member State, — as is always the case with Annex I projects — are likely to have significant effects on the environment so that Member States are relieved of the administrative burden of having to investigate that question in every individual case.

implies that an environmental impact assessment must be undertaken. As far as the expression 'criteria' is concerned, it must be regarded as referring to other yardsticks, such as the capacity or size of an installation, for instance the number of animals for which a piggery is installed, which may also be decisive as to whether in general an environmental impact assessment must be undertaken.

56. That interpretation is supported by the content of Article 2(3) of the directive, under which Member States may, in exceptional cases, exempt a *specific* project in whole or in part from the provisions laid down in the directive, but only on condition that they observe the very strict conditions laid down in the directive. On the other hand the Member States cannot in general exclude groups or whole categories of projects from the environmental impact assessment procedure.

57. In those circumstances my view is that Article 4 has the following three functions:

55. A threshold within the meaning of the directive will thus typically be a numerical value, for example a given concentration of heavy metals or of sulphur discharged into the atmosphere, which, if it is exceeded,

— to establish which categories of projects fall within the field of application of the directive;

— to identify a series of projects (Annex I projects) which in the view of the Community legislature are in general likely to have significant effects on the environment and for which an environmental impact assessment must be carried out in all cases;

an installation shall always be subject to an environmental impact assessment in accordance with Article 4(1) of the directive.

— to list the main group of projects (Annex II projects) for which, in the view of the Community legislature, it is not possible to make a general estimate in advance as to whether the environment may be significantly affected and which therefore require a specific appraisal of that point; however, each Member State may define certain types of projects in that Member State which *must* be assessed and establish criteria or thresholds for deciding when projects in that Member State *must* be subject to an environmental impact assessment.

59. On the other hand where it is a question for example of installing a dyke along a river, it is far from clear that the environment may be significantly affected. That will depend entirely on the dyke's size and location. The construction of a smaller dyke in an unspoilt natural area may be thought to affect the landscape, the flora and fauna more than a large dyke replacing a smaller existing dyke. Apart from altering the natural landscape the new smaller dyke in the unspoilt natural area may for example be regarded as destroying the conditions of life for frogs and other types of animal.

58. Such categorization may be clarified by an example. A thermal power-station with a heat output of 300 megawatts or more will in general constitute a significant source of pollution. The emissions from such a power-station contain *inter alia* CO<sub>2</sub> and acidic particles which directly affect soil, water, air, flora, fauna and possibly also the climate. It is therefore in accordance with the overriding aims of the directive to ensure that such

60. Similarly an extension of an existing dyke may, as a result of its location, prove to be more of an intervention in the environment than the installation of a new dyke. If an existing dyke in a natural area is extended, a remaining wetland may be destroyed with the consequence that the conditions of life for any rare animal or plant species are affected. On the other hand if a new dyke is installed in an industrial area where there are no special flora or fauna it may well be thought that such a dyke is unlikely in itself to have significant effects on the environment, since the negative impact which the presence of industry in the district has

already had on the environment of the area is not significantly increased.

These examples show why, if the directive is to achieve its aim, it is necessary to give specific consideration to the projects included in Annex II.

third question to the effect that the provisions of Articles 2(1) and 4(2) of the directive must be interpreted as meaning that the Member States must investigate whether the projects mentioned in Annex II are likely to have significant effects on the environment and where appropriate must ensure that these effects are subjected to an environmental impact assessment in accordance with Articles 5 to 10 of the directive.

#### **The fourth question**

61. To sum up, my opinion is that the second subparagraph of Article 4(2) of the directive confers on the Member States neither an unfettered discretion with regard to the Annex II projects which must be the subject of an environmental impact assessment nor the possibility of replacing the specific discretion with a firm rule that an environmental impact assessment need not be carried out.<sup>13</sup> If the Member States establish criteria or thresholds the result of which is that projects which are likely to have significant effects on the environment are not subjected to an environmental impact assessment or that the competent authorities omit to include all the factors which are relevant in relation to a given project, they are, in my view, acting contrary to their obligations under Articles 2(1) and 3.

62. Having regard to those considerations, I suggest that the Court should answer the

63. The fourth question from the court of reference really consists of two separate parts. The court wishes to know whether the provisions of Article 2(1) of the directive have direct effect and whether those provisions must where appropriate be applied by the national court even if they are not invoked in connection with the dispute before it. It will be convenient to deal with these questions separately.

#### *The question of direct effect*

64. The court of reference is of the opinion that if the third question is answered in the affirmative, the view may be taken that there is here an unconditional and precise provision of a directive. Kraaijeveld has also associated itself with the national court's point of view in this respect.

<sup>13</sup> — Cf. similarly point 50 of Advocate General Léger's Opinion, delivered on 11 January 1996, in Case C-133/94 *Commission v Belgium* [1996] ECR I-2323.

65. The Netherlands Government, the United Kingdom Government and the Italian Government have contended that Article 2(1) of the directive does not have direct effect. The Netherlands and Italian Governments think it is clear from the reference in Article 2(1) to Article 4 that the provision has no independent content. According to Article 4(2) it is left to the Member States to consider whether it is necessary to carry out an environmental impact assessment with regard to Annex II projects. The United Kingdom Government has stated that the directive identifies neither the individuals who are entitled to invoke the rights which might arise therefrom nor the authority against which such rights may be invoked.

discharge its obligations so as to deprive individuals of the benefits of those rights'.

The Court has thus established that whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State.<sup>15</sup>

66. The Commission has stated that Article 2(1) of the directive contains a clear obligation. Furthermore no discretion is left to the Member States with regard to the result to be achieved. The Commission therefore considers that the provision has direct effect.

68. Precise and unconditional provisions of a directive may therefore be relied upon by individuals against the authorities whether in order to avert the application of contrary national rules or in order to rely on rights which may be derived therefrom.<sup>16</sup>

67. In considering this I should like, by way of introduction, to refer to the fact that, as the Court of Justice declared in its judgment in Case C-91/92 *Faccini Dori*,<sup>14</sup> 'It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations — or those of State entities — with individuals and to confer certain rights on individuals, were able to rely on its own failure to

69. In the case now before the Court there is no question of the authorities' seeking to

15 — See for example the judgments in Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, paragraph 11, and in Case 8/81 *Becker* [1982] ECR 53, paragraph 25.

16 — Cf. H. Jarass, 'Folgen der innerstaatlichen Wirkung von EG-Richtlinien', *NJW*, 1991, p.2665, Section II. As an example of the first situation reference may be made to *Becker*, referred to in footnote 15. As an example of the latter situation reference may be made to the judgment in Case 380/87 *Enichem Base and Others* [1989] ECR 2491, in which the Court concluded, however, that the relevant provision of the directive did not confer rights on individuals.

14 — [1994] ECR I-3325, paragraph 23.

apply a contrary national rule as against an individual. The question is on the contrary whether the Member State has complied with the obligations arising from the directive. We must therefore consider whether rights for individuals may be derived from these obligations.

individual where the obligation which it imposes is set out in unequivocal terms and is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States.<sup>17</sup>

70. According to Article 6(2) of the directive, it is for the Member States to ensure that any request for development consent and any information gathered are made available to the public and that the public concerned is given the opportunity to express an opinion before the project is initiated. The directive thus requires the Member States to introduce a consultation procedure to give individuals a right to express their opinion. Where a Member State's implementation of the directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard. The Member State's own negligent implementation of the directive thus deprives the citizen of a right under the directive. I would point out that there can hardly be any doubt that Kraaijeveld forms part of the public concerned, since the project, it is stated, has serious consequences for the business operated by Kraaijeveld. In those circumstances my view is that Articles 2(1) and 4(2) of the directive, in conjunction with Article 6(2), confer rights on individuals.

71. According to the Court's consistent case-law a provision is unconditional and sufficiently precise to be relied on by an

72. Article 2(1) of the directive contains in my opinion, as I have said, an independent obligation for the Member States to carry out an environmental impact assessment regarding projects likely to have significant effects on the environment. The Court of Justice declared in its judgment in Case C-431/92, previously cited, regarding the Großkrotzenburg power-station that Article 2 lays down an unequivocal obligation to make certain projects subject to an assessment of their effects on the environment. In my view it also follows from that that the obligation contained in Article 2(1) is sufficiently precise.

73. The decision as to whether an effect is to be designated as significant is a discretionary one. It is not, however, an unfettered discretion or a discretion the exercise of which is conditional upon the Member States' laying down further provisions. It is, rather, a legal discretion the exercise of which is entirely suitable for judicial review in the light of all the specific circumstances affecting the indi-

17 — See for example the judgment in Case C-236/92 *Cava* [1994] I-483, paragraphs 9 and 10.

vidual project. On the contrary it follows from the duty under Article 2(1) to exercise a specific discretion that the Member States are not entitled to implement the provision in such a way that the discretion is subject to the application of fixed rules which in general exclude the environmental impact assessment of certain projects. The Member States can certainly lay down detailed criteria but cannot invalidate the obligation to exercise the prescribed discretion.

mean that a court leaves out of account an element of superior Community law.

77. Kraaijeveld has stated that the question of compatibility with Community law was in fact raised during the proceedings.

74. In those circumstances it is my view that Article 2(1) of the directive has direct effect.

#### *The question of automatic application*

75. Finally, the court of reference, as I mentioned, has asked whether Article 2(1) must be applied by the national court even if it is not invoked in connection with the dispute before that court.

78. The Netherlands Government, the United Kingdom Government, the Italian Government and the Commission have referred to the Court's existing case-law. The Commission has further stated that it does not appear that Netherlands law prevents the court of reference in a case like this from applying Community law of its own motion. The Netherlands Raad van State is an administrative court which is not bound by the principle normally applicable in civil law according to which it is left to the parties to define the scope of the action.

79. In its judgment in Joined Cases C-430/93 and C-431/93 *Van Schijndel* and *Van Veen*<sup>18</sup> the Court declared that a national court which according to domestic law has a discretion to apply of its own motion rules of law which have not been raised must apply a provision of Community law even when the party with an interest in application of that provision has not relied on it.

76. The court of reference expresses the opinion that that question must be answered in the affirmative, since otherwise that may

<sup>18</sup> — [1995] ECR I-4705, paragraphs 14 and 15.

80. It may further be seen from the Court's judgment in Case C-312/93 *Peterbroeck*<sup>19</sup> that Community law may preclude a domestic procedural rule which prevents the national court from applying of its own motion rules of law which have not been invoked by the party interested. That is the position where the domestic procedural rule renders the application of Community law impossible or excessively difficult. Whether that is the case depends, according to paragraph 14 of the judgment, on a specific analysis of the provision in its context and of its relation to the basic principles of the domestic judicial system. As stated by the Commission, however, it is not clear whether Netherlands procedural law precludes the court of reference from applying Community law of its own motion or what

connection such a rule might have with the procedure. The necessary basis for a further answer to this question is therefore in my view not available.

81. In view of the foregoing considerations I think the answer to the fourth question from the court of reference should be that Article 2(1) of the directive has direct effect and that a national court which according to domestic law has a discretion to apply of its own motion rules of law which have not been raised must apply that provision even when the party with an interest in application of that provision has not relied upon it.

## Conclusion

82. In all the circumstances I propose that the Court should give the following answers to the questions referred to it by the Administrative Appeal Section of the Netherlands Raad van State:

- (1) The expression 'canalization and flood-relief works' in paragraph 10(e) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be interpreted as including dykes along waterways.
- (2) Paragraph 10(e) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the

<sup>19</sup> — [1995] ECR I-4599.

environment must be interpreted as meaning that it covers all projected work relating to dykes along waterways, irrespective of whether it is a question of constructing a new dyke, relocating an existing dyke, reinforcing and/or widening an existing dyke, replacing a dyke *in situ* whether or not the new dyke is stronger and/or wider than the old one, or a combination of such work.

- (3) Articles 2(1) and 4(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 must be interpreted as meaning that the Member States must investigate whether the projects mentioned in Annex II are likely to have significant effects on the environment and where appropriate must ensure that these effects are subjected to an environmental impact assessment in accordance with Articles 5 to 10 of the directive.
- (4) Article 2(1) 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 has direct effect and a national court which according to domestic law has a discretion to apply of its own motion rules of law which have not been raised must apply that provision even when the party with an interest in application of that provision has not relied upon it.