Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 April 2012 [1]

Case C-416/10

Jozef Križan and Others
v
Slovenská inšpekcia životného prostredia

(Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Slovakia))

(Environment — Construction of a landfill site — Reference for a preliminary ruling — Right to refer questions to the Court after the decision of a national constitutional court — Directive 2008/1/EC — Integrated pollution prevention and control — Directive 1999/31/EC — Landfill of waste — Public participation — Access to a location decision — Principle of effectiveness — Remedying procedural errors — Directive 85/337/EEC — Environmental impact assessment for certain public and private projects — Up-to-date nature of the environmental impact assessment — Power of national courts to review the up-to-date nature of the environmental impact assessment ex officio — Interim relief in environmental cases — Property)

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I – Introduction

1. The Supreme Court of the Slovak Republic, the Najvyšší súd Slovenskej republiky ('the Supreme Court'), refers several questions to the Court which arise from a highly complex dispute concerning the permit for a landfill site.

2. In particular, it must be clarified whether for the purposes of public participation in a permit procedure under the Directive concerning integrated pollution prevention and control [2] ('the IPPC Directive') it is necessary to submit a decision determining the location of a landfill site which was made in a separate procedure from the permit procedure.

3. In addition, questions arise as to the application of the Directive on the assessment of the effects of certain public and private projects on the environment [3] ('the EIA Directive'), in particular in relation to temporal applicability, the sufficiently up-to-date nature of the assessment and on public participation for the purposes of the decision as to whether the assessment is still sufficiently up-to-date.

4. These questions of environmental law are embedded in problems of putting the principle of effectiveness into practice in the organisation of administrative proceedings and appeal proceedings under national law.

5. Thus, in connection with access to the location decision, the question arises whether an initial unlawful refusal to give access to the decision may be remedied later in the administrative proceedings.

6. With regard to possible defects in the environmental impact assessment, it is necessary to clarify whether European Union law permits the laying down of separate appeal proceedings, distinct from the remedies provided for against the integrated permit for the landfill and whether, in legal proceedings concerning the integrated permit, the competent national court may, or must, raise defects in the environmental impact assessment *ex officio* where appropriate.

7. In addition, the Supreme Court asks whether it has the right to grant interim relief and whether the enforcement of both of the directives referred to above and of the Aarhus Convention [4] is compatible with the fundamental right to property.

II – Legal context

A – *The Aarhus Convention*

8. Article 6 of the Aarhus Convention, which the Community signed on 25 June 1998 in Aarhus (Denmark), [5] provides for public participation when permitting specific activities.

2 — Directive 2008/1 of the European Parliament and the Council of 15 January 2008 (codified version) (OJ 2008 L 24, p. 8). With effect from 7 January 2014, this directive has been replaced by Directive 2010/75/EU of the European Parliament and the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

3 — Council Directive 85/337/EEC of 27 June 1985 (OJ 1985 L 175, p. 40) in the version brought into force by Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (OJ 2003 L 156, p. 17). With effect from 16 February 2012, that directive has been codified and replaced by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 (OJ 2012 L 26, p. 1).

4 — Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 4).

5 — Approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

9. Article 6(4) of the Convention regulates the quality of the public participation:

‘Each Party shall provide for early public participation, when all options are open and effective public participation can take place.’

10. Access to information for the purposes of public participation is governed by Article 6(6) of the Convention:

‘Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with Article 4(3) and (4) ...’.

11. Article 9 of the Convention contains provisions on remedies. Article 9(4) is of particular interest in relation to the case at issue:

‘In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. ...’.

B – *European Union law*

1. The IPPC Directive

12. The main proceedings concern a decision of 18 August 2008. On 18 February 2008, Directive 96/61/EC,[6] the subject of multiple amendments, had already been codified without any change in terms of content by Directive 2008/1/EC and without any further transitional period, pursuant to Article 22 of the lastmentioned directive. Consequently, references to the IPPC Directive below should be construed as references to that directive in the version brought into force by Directive 2008/1.

13. Recital 11 deals with the relationship to the EIA Directive:

‘The provisions of this Directive should apply without prejudice to the provisions of [the EIA Directive]. When information or conclusions obtained further to the application of that Directive have to be taken into consideration for the granting of authorisation, this Directive should not affect the implementation of [the EIA Directive].’

14. Recital 24 concerns public participation:

‘Effective public participation in the taking of decisions should enable the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken. In particular, the public should have access to information on the operation of installations and their potential effect on the environment, and, before any decision is taken, to information relating to applications for permits for new installations or substantial changes and to the permits themselves, their updating and the relevant monitoring data.’

6 — Council Directive 96/61/EC concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26).

15. Article 1 of the IPPC Directive explains its purpose as follows:

‘The purpose of this Directive is to achieve integrated prevention and control of pollution arising from the activities listed in Annex I. It lays down measures designed to prevent or, where that is not practicable, to reduce emissions in the air, water and land from the abovementioned activities, including measures concerning waste, in order to achieve a high level of protection of the environment taken as a whole, without prejudice to [the EIA Directive] and other relevant Community provisions.’

16. The requirements concerning an application for a permit are laid down in Article 6 of the IPPC Directive:

‘1. Member States shall take the necessary measures to ensure that an application to the competent authority for a permit includes a description of:

(a) the installation and its activities;

...

(d) the conditions of the site of the installation;

...

(j) the main alternatives, if any, studied by the applicant in outline.

An application for a permit shall also include a non-technical summary of the details referred to in [the above points].

2. Where information supplied in accordance with the requirements provided for in [the EIA Directive] ... or other information produced in response to other legislation fulfils any of the requirements of this Article, that information may be included in, or attached to, the application.’

17. Article 9 of the IPPC Directive includes provisions concerning the content of a permit:

‘1. Member States shall ensure that the permit includes all measures necessary for compliance with the requirements of Articles 3 and 10 for the granting of permits in order to achieve a high level of protection for the environment as a whole by means of protection of the air, water and land.

2. In the case of a new installation or a substantial change where Article 4 of [the EIA Directive] applies, any relevant information obtained or conclusion arrived at pursuant to Articles 5, 6 and 7 of that Directive shall be taken into consideration for the purposes of granting the permit.

...

4. Without prejudice to Article 10, the emission limit values and the equivalent parameters and technical measures referred to in paragraph 3 shall be based on the best available techniques, without prescribing the use of any technique or specific technology, but taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions. In all circumstances, the conditions of the permit shall contain provisions on the minimisation of long-distance or transboundary pollution and ensure a high level of protection for the environment as a whole.’

18. Article 15 of the IPPC Directive regulates public participation:

‘1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for:

(a) issuing a permit for new installations;

(b) ….

The procedure set out in Annex V shall apply for the purposes of such participation.

2. …

3. Paragraphs 1 and 2 shall apply subject to the restrictions laid down in Article 4(1), (2) and (4) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.’

19. Implementing Article 9(2) of the Aarhus Convention, Article 16 of the IPPC Directive includes special provisions on appeals.

20. Annex V specifies what information must be made available to the public:

‘1. The public shall be informed (by public notices or other appropriate means such as electronic media where available) of the following matters early in the procedure for the taking of a decision or, at the latest, as soon as the information can reasonably be provided:

(a) the application for a permit or, as the case may be, the proposal for the updating of a permit or of permit conditions in accordance with Article 15(1), including the description of the elements listed in Article 6(1);

...

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(f) an indication of the times and places where, or means by which, the relevant information will be made available;

...

2. Member States shall ensure that, within appropriate time-frames, the following is made available to the public concerned:

(a) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned were informed in accordance with point 1;

(b) in accordance with the provisions of Directive 2003/4/EC, information other than that referred to in point 1 which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with point 1.’

21. Public consultation is regulated in Annex V, points 3 and 4:

‘3. The public concerned shall be entitled to express comments and opinions to the competent authority before a decision is taken.

4. The results of the consultations held pursuant to this Annex must be taken into due account in the taking of a decision.’

2. The Directive on the landfill of waste

22. The Directive on the landfill of waste[7] (‘the Landfill Directive’) regulates the setting up and operation of landfills.

23. Under Article 1(2), the Landfill Directive contains the technical requirements for those landfills to which the IPPC Directive is applicable:

‘In respect of the technical characteristics of landfills, this Directive contains, for those landfills to which Directive 96/61/EC is applicable, the relevant technical requirements in order to elaborate in concrete terms the general requirements of that Directive. The relevant requirements of Directive 96/61/EC shall be deemed to be fulfilled if the requirements of this Directive are complied with.’

24. Article 7 of the Landfill Directive regulates the content of an application for a permit. In particular, an application must contain the following:

‘(d) the description of the site, including its hydrogeological and geological characteristics’.

25. The conditions of the permit are laid down in Article 8:

‘Member States shall take measures in order that:

(a) the competent authority does not issue a landfill permit unless it is satisfied that:

(i) without prejudice to Article 3(4) and (5), the landfill project complies with all the relevant requirements of this Directive, including the Annexes;

(ii) …’.

26. Annex I to the Landfill Directive specifies the requirements for a landfill and in particular for its location:

‘1. Location

1.1. The location of a landfill must take into consideration requirements relating to:

(a) the distances from the boundary of the site to residential and recreation areas, waterways, water bodies and other agricultural or urban sites;

(b) the existence of groundwater, coastal water or nature protection zones in the area;

(c) the geological and hydrogeological conditions in the area;

7 — Council Directive 1999/31/EC of 26 April 1999 (OJ L 1993 182, p. 1), in the version brought into force by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

(d) the risk of flooding, subsidence, landslides or avalanches on the site;

(e) the protection of the nature or cultural patrimony in the area.

1.2. The landfill can be authorised only if the characteristics of the site with respect to the abovementioned requirements, or the corrective measures to be taken, indicate that the landfill does not pose a serious environmental risk.'

3. The Directive on public access to environmental information

27. Article 15(3) of the IPPC Directive refers to the Directive on public access to environmental information [8] ('the Environmental Information Directive'). Article 4 regulates the exceptions:

'(1) …

(2) Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

…

(d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;

…

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.

…

(3) …

(4) Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested.'

4. The EIA Directive

28. Article 1(2) of the EIA Directive defines the term 'development consent' as follows:

'the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

8 — Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

29. Article 2(1) of the EIA Directive lays down the fundamental obligation to conduct an environmental impact assessment:

'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. These projects are defined in Article 4.'

30. For the purposes of implementing Article 9(2) of the Aarhus Convention, Article 10a of the EIA Directive contains special provisions on appeals.

C – *Slovak law*

31. In Slovakia, the IPPC Directive was transposed by means of Law 245/2003. Paragraph 8(3) and (4), which regulate the relationship to other administrative proceedings are of particular interest for the proceedings at issue:

'(3) Where there is an integrated operating permit, which at the same time requires a permit for a new building or for alterations to an existing building, part of the procedure is also a building permit procedure. For the purposes of the integrated permit, the building authority has the position of an authority concerned (Paragraph 10(2)).

(4) The land-use procedure, the EIA assessment of the operation and the determination of the conditions with regard to avoiding serious industrial accidents are not part of the integrated permit.'

32. In addition, reference must be made to Paragraph 11(2)(g), which provides that any location decision must be submitted with the application for a permit:

'The application must be accompanied by:

…

the land-use decision, if it is a new operation or the expansion of an existing operation,

...'

III – Facts of the case, the main proceedings and the reference for a preliminary ruling

33. The main proceedings concern the construction of a landfill site in the Slovak town of Pezinok. There has been a landfill site on the site of a former brickworks for several decades. Now a new landfill site is to be constructed in a former quarry on the same site.

34. According to the file, this project has been the subject of three decisions which were based on each other, each of which was issued in separate administrative proceedings. The town and the regional authority for town planning determined the location, the Ministry of the Environment decided upon the environmental impact and finally the Environment Inspectorate issued a new integrated permit for the installation in proceedings which took place at first instance and on appeal. The reference for a preliminary ruling was made in the legal proceedings concerning the last of these decisions.

A – *Location*

35. On 26 June 1997 the town of Pezinok adopted an urban development plan, in the form of general regulation 2/1997, which provided, inter alia, for the construction of a new landfill site in the former claypit in close proximity (approximately 300 m) to the town. However, the town amended that plan in 2002 and, after the Slovak constitutional court declared the existing plan to be unconstitutional, it issued a new plan in 2006; both the amended plan and the new plan provided that *no* landfill site was to be established on the relevant site.

36. However, Ekologická skládka a.s. had already applied for the location of the new landfill site to be determined on 7 August 2002. The town refused that application on 30 November 2006, but the Bratislava Regional Building Authority amended that decision on 7 May 2007and issued a permit relating to the land use, in which the location of the landfill site was determined.

37. In the course of those administrative proceedings, various residents ('Križan and Others') filed objections. In particular, they claimed inconsistency with the amended urban development plan of 2006 and bias on the part of the regional building authority's staff. However, they were excluded from the proceedings on the grounds that at that stage of the proceedings their rights were not directly affected. Therefore the decision to amend did not deal with those objections.

38. The town of Pezinok's action against the decision to amend was dismissed on the basis that it could not be both first instance administrative authority and a party to those proceedings.[9] Križan and Others state that they had successfully brought an action against their exclusion from the proceedings,[10] but say that in the meantime the location decision had become final and not subject to appeal.

B – *Environmental impact assessment*

39. On the application of the company Pezinské tehelne a.s. of 16 December 1998, the Ministry of the Environment conducted an environmental impact assessment of the landfill project and issued a final opinion on the environmental impact on 26 July 1999.

40. In parallel with the procedure to determine the location, upon the request of Pezinské tehelne a.s., by its decision of 27 March 2006, the Ministry of the Environment prolonged the validity of the abovementioned opinion on the environmental impact until 1 February 2008.

C – *Integrated permit for the installation*

41. After both of the procedures referred to above had been completed, upon the request of Ekologická skládka of 25 September 2007, the Slovak Environment Inspectorate initiated the integrated procedure under Law number 245/2003, which implements the IPPC Directive. On 17 October 2007, the Environment Inspectorate published the application and commenced the public participation procedure.

9 — Decision of the Supreme Court of 14 September 2010 (1 Sžo 373/2009, Annex 15 to the pleading of Ekologická skládka of 15 December 2012, p. 82).

10 — They refer to the decisions of the Supreme Court of 17 June 2010 (Sžp 52/2009) and of 28 September 2011 (Sžp 3/2011).

42. In the administrative proceedings at first instance, Križan and Others and the town of Pezinok argued that the application was incomplete because it did not include a location decision, which is required by statute to be included by way of annex. Although Ekologická skládka, a.s. submitted the Regional Building Authority's final location decision at the invitation of the Environment Inspectorate, it argued that the decision was protected as a trade secret. As a result it was not made available.

43. On 22 January 2008, the Environment Inspectorate issued the integrated permit for the construction and operation of the landfill site.

44. Križan and Others and the town of Pezinok challenged that decision in an appeal, on which the Environment Inspectorate also ruled. In particular, they claimed inconsistency with the urban development plan and that the location decision had been withheld from them. They also argued that the proposed landfill site was not sufficiently far from human dwellings and was incompatible with comprehensive protection of the environment.

45. In those proceedings, the Environment Inspectorate published the location decision on the official notice boards within their premises from 14 March to 14 April 2008. By decision of 18 August 2008, the Environment Inspectorate dismissed the appeal. In relation to the objection concerning inconsistency with the urban development plan, the Environment Inspectorate held that that objection should have been made in the procedure relative to the location decision.

D – *Judicial proceedings*

46. Križan and Others and the town of Pezinok brought an action against the Environment Inspectorate's second instance decision of 18 August 2008 before the Bratislava Regional Court, which dismissed the action by judgment of 4 December 2008.

47. In the appeal proceedings, first of all the Supreme Court made an interim judicial order of 6 April 2009 which suspended the effect of the integrated permit and subsequently annulled it by its judgment of 28 May 2009. It based its decision on the late publication of the location decision and the unfounded extension of the validity of the decision on the environmental impact of the construction project.

48. Ekologická skládka, a.s. challenged those decisions before the Constitutional Court of the Slovak Republic. By judgment of 27 May 2010, the Constitutional Court annulled the Supreme Court's interim judicial order of 6 April 2009 and its judgment of 28 May 2009 and referred the case back to the Supreme Court for further proceedings.

49. As grounds, the Constitutional Court stated in particular that in the judgment under appeal the Supreme Court did not sufficiently examine whether in the appeal proceedings sufficient public participation had been ensured for the purposes of the integrated permit procedure. It found that this was not excluded from a procedural law point of view.

50. The Constitutional Court also criticised the findings made in relation to the extension of the validity of the decision on the environmental impact. That decision had not been the subject of the proceedings, since the appellants had not argued that it was unlawful in their action and a separate procedure was designated for the examination of the EIA opinion.

E – *The Supreme Court's questions*

51. Following the referral of the case back to the Supreme Court, the case is once more pending before that court, which has referred the following questions to the Court of Justice:

'1. Does [European Union] law (specifically Article 267 TFEU) require or enable the supreme court of a Member State of its own motion to refer a question to the [Court of Justice] for a preliminary ruling even at a stage of proceedings where the constitutional court has annulled a judgment of the supreme court based in particular on the application of the [European Union legal] framework on environmental protection and imposed the obligation to abide by the constitutional court's legal opinions based on breaches of the procedural and substantive constitutional rights of a person involved in judicial proceedings, irrespective of the [European Union law] dimension of the case concerned, that is, where in those proceedings the constitutional court, as the court of last instance, has not concluded that there is a need to refer a question to the [Court of Justice] for a preliminary ruling and has provisionally excluded the application of the right to an acceptable environment and the protection thereof in the case concerned?

2. Is it possible to fulfil the basic objective of integrated prevention as defined, in particular, in recitals 8, 9 and 23 in the preamble to and Articles 1 and 15 of [the IPPC Directive] and, in general, in the [European Union legal] framework on the environment, that is, pollution prevention and control involving the public in order to achieve a high level of environmental protection as a whole, by means of a procedure where, on commencement of an integrated prevention procedure, the public concerned is not guaranteed access to all relevant documents (Article 6 in conjunction with Article 15 of [the IPPC Directive]), especially the decision on the location of a structure (landfill site), and where, subsequently, at first instance, the missing document is submitted by the applicant on condition that it is not disclosed to other parties to the proceedings in view of the fact that it constitutes trade secrets: can it reasonably be assumed that the location decision (in particular its statement of reasons) will significantly affect the submission of suggestions, observations or other comments?

3. Are the objectives of [the EIA Directive] met, especially in terms of the [European Union legal] framework on the environment, specifically the condition referred to in Article 2 that, before consent is given, certain projects will be assessed in the light of their environmental impact, if the original position of the Ministerstvo životného prostredia (Ministry of the Environment) issued in 1999 and terminating a past environmental impact assessment (EIA) procedure is prolonged several years later by a simple decision without a repeat EIA procedure; in other words, can it be said that a decision under [the EIA Directive], once issued, is valid indefinitely?

4. Does the requirement arising generally under [the IPPC Directive] (in particular the preamble and Articles 1 and 16) for Member States to engage in the prevention and control of pollution by providing the public with fair, equitable and timely administrative or judicial proceedings in conjunction with Article 10a of [the EIA Directive] and Articles 6 and 9(2) and (4) of the Aarhus Convention apply to the possibility for the public to seek the imposition of an administrative or judicial measure which is preliminary in nature in accordance with national law (for example, an order for the judicial suspension of enforcement of an integrated decision) and allows for the temporary suspension, until a final decision in the case, of the construction of an installation for which a permit has been requested?

5. Is it possible, by means of a judicial decision meeting the requirement of [the IPPC Directive] or [the EIA Directive] or Article 9(2) and (4) of the Aarhus Convention, in the application of the public right contained therein to fair judicial protection within the meaning of Article 191(1) and (2) [TFEU], concerning European Union policy on the environment, to interfere unlawfully with an operator's right of property in an installation as guaranteed, for example, in Article 1 of

the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, for example by revoking an applicant's valid integrated permit for a new installation in judicial proceedings?'

52. Križan and Others, the town of Pezinok, the Slovak Environment Inspectorate, Bratislava and Ekologická skládka a. s., together with the Czech Republic, the Republic of Austria, the Slovak Republic and the European Commission have lodged written observations. The French Republic also participated in the hearing of 17 January 2012, whilst Ekologická skládka did not appear.

IV – Legal assessment

A – *First question – the right of the Supreme Court to refer questions for a preliminary ruling*

53. By its first question, the Supreme Court would essentially like to know whether the judgment of the Constitutional Court precludes the reference for a preliminary ruling. The reason for this question is that under national law, the supreme court is obliged to reach its decision in the main proceedings abiding by the view of the Constitutional Court. The question also asks whether the reference may be brought *ex officio*, that is, without corresponding applications from the parties to the proceedings.

54. However, the question whether European Union law enables or even requires the Supreme Court to raise certain legal issues *ex officio*, which is also mentioned in the grounds of the order for reference, will be examined in the context of the third question.[11] According to the case-law, the legislation concerned may itself be decisive as to whether it must be raised *ex officio*.[12] It is only in the context of the legal issues raised in the third question that the Supreme Court mentions the possibility of raising issues *ex officio*.

55. According to the case-law, neither the requirements of the Constitutional Court nor the fact that the parties have not asked for questions to be referred to the Court of Justice preclude a reference for a preliminary ruling.

56. Article 267 TFEU confers on national courts the widest discretion – which may be exercised *ex officio* or at the request of the parties –[13] to make a reference to the Court of Justice if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of provisions of European Union law and requiring a decision by them.[14]

57. If questions on the interpretation of European Union law arise before a court against whose decisions there is no judicial remedy under national law, that court is *required* under Article 267(3) TFEU to bring the matter before the Court. A judicial remedy, within the meaning of that provision, must allow the raising, as its subject-matter, of a question concerning the correct application of European Union law,[15] since the obligation to refer to which courts of last instance are subject is designed to prevent a body of national case-law that is not in accordance with the rules of European Union law from coming into existence in any Member State.[16]

11 — See below under D. 3, (point 152 et seq.).

12 — Thus Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 26; Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 33; and Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 29) are concerned with the content of Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

13 — Case C-104/10 *Kelly* [2011] ECR I-6813, paragraph 61.

14 — Case C-173/09 *Elchinov* [2010] ECR I-8889, paragraph 26 and case-law cited.

15 — See Case C-99/00 *Lyckeskog* [2002] ECR I-4839, paragraphs 17 and 18).

16 — *Lyckeskog*, cited in footnote 15, at paragraph 14 and the case-law cited.

58. I am proceeding on the basis that the Supreme Court of the Republic of Slovakia is – at least in the dispute in the main proceedings – a court within the meaning of Article 267(3) TFEU. Whilst its decisions may be reviewed by the Slovak Constitutional Court, that court is limited to ensuring compliance with the Slovak Constitution and does not have the power to verify compliance by national authorities and courts with European Union law. [17]

59. The Court of Justice has held that a rule of national law, pursuant to which courts that are not adjudicating at final instance are bound by legal rulings of a higher court, cannot take away from those courts the discretion to refer to the Court questions of interpretation of the point of European Union law concerned by such legal rulings. A court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to European Union law, to refer to the Court of Justice questions which concern it. [18]

60. In order to ensure the primacy of EU law, the functioning of that system of cooperation also requires the national court to be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality. [19]

61. A judgment in which the Court of Justice gives a preliminary ruling is also binding on the national court for the purposes of the decision to be given in the main proceedings. Therefore the national court, having exercised the discretion conferred on it by the second paragraph of Article 267 TFEU, is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by this Court and must, if necessary, disregard the rulings of the higher court if it considers, having regard to that interpretation, that they are not consistent with European Union law. [20]

62. Whilst these views were expressed with regard to courts which do not decide as courts of last instance, they must apply all the more to courts which do decide questions of European Union law as courts of last instance but which are subject to review of their decisions by a constitutional court with regard to compliance with national constitutional law. Whilst national constitutional law may override ordinary law, it cannot preclude the application of European Union law. [21]

63. It follows that the first question must be answered to the effect that in the event of doubt as to the interpretation of European Union law in a case pending before a court of a Member State against whose decisions there is no judicial remedy, Article 267 TFEU requires that court, even without any request from the parties, to refer a question to the Court of Justice of the European Union for a preliminary ruling *ex officio* although the constitutional court in that Member State has already decided the case and imposed on the first-mentioned court the obligation to abide by its opinions on national constitutional law.

B – *Second question – access to location decision in the integrated permit procedure*

64. The second question concerns access to the decision on the location of the landfill site in the integrated permit procedure.

17 — See the judgment of the Constitutional Court of the Slovak Republic of 27 May 2010 (I. ÚS 223/09-131, Annex 9 to the reference for a preliminary ruling, paragraph 16).

18 — *Elchinov*, cited in footnote 14, at paragraph 27 and the case-law cited.

19 — Joined Cases C-188/10 and C-189/10 *Melki* [2010] ECR I-5667, paragraph 52.

20 — *Elchinov* (cited in footnote14, paragraph 29 et seq. and case-law cited).

21 — Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61.

65. In the administrative proceedings at first instance, that decision was initially regarded as a trade secret and it was therefore not disclosed. However, it was made available to the public in the administrative proceedings at second instance. The Supreme Court wishes to know whether such an approach is compatible with the IPPC Directive.

66. It is therefore necessary to examine, first, whether the location decision is included in the information which, in principle, must be disclosed to the public in the integrated permit procedure (see 2 below), secondly, to what extent trade secrets justify an exemption from disclosure (see 3 below) and finally whether disclosure in the administrative proceedings at second instance sufficed for the purposes of the requirements of European Union law or occurred too late (see 4 below). However, it is necessary at the outset to address doubts that have been raised as to the admissibility of this question (see 1 below).

1. Admissibility of the second question

67. Ekologická Skládka states that under Slovak law the location decision is independent of the integrated permit for an installation (Paragraph 8(4) of Law 245/2003). It argues that the location decision may no longer be called into question in the integrated permit procedure. Therefore, disclosure was unnecessary. Ekologická Skládka even concludes from this that the second question is irrelevant to the outcome of the main proceedings and is accordingly inadmissible.

68. However, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court of Justice to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[22]

69. The question whether and in what circumstances the location decision must be disclosed in the integrated permit procedure for an installation is clearly connected to a dispute concerning the legality of the permit: an error in relation to disclosure may establish a procedural error. Accordingly, the second question referred by the Supreme Court must be admissible.

2. The need to give access to the location decision

70. The information which must be made available to the public in the integrated permit procedure must be assessed on the basis of Article 15(1) and Article 6 of the IPPC Directive together with Annex V thereto.

a) Disclosure of information in the integrated permit procedure

71. Under Article 15(1)(a) of the IPPC Directive, the public concerned should be given early and effective opportunities to participate in the procedure for issuing a permit for new installations. The procedure set out in Annex V applies for the purposes of such participation.

22 — Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; Case C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Case C-478/07 *Budějovický Budvar* [2009] ECR I-7721, paragraph 63; and Case C-145/10 *Painer* [2011] ECR I-12533, paragraph 59.

72. Annex V, point 1 of the IPPC Directive provides that the public is to be *informed* of certain facts early in the procedure for the taking of a decision or, at the latest, as soon as the information can reasonably be provided. This applies in particular to the application for a permit, including the description of the elements listed in Article 6(1).

73. Under Annex V, point 2, within appropriate time-frames, certain information is to be *made available* to the public concerned. This information includes, first (point 2 (a)), the main reports and advice, issued to the competent authority or authorities at the time when the public concerned were informed in accordance with point 1 and, secondly (point 2 (b)), information other than that referred to in point 1 which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with point 1.

74. Interpreted strictly, these provisions could be understood as meaning that *access* must merely be given to the information listed in Annex V, point 2 of the IPPC Directive, whilst the information coming under point 1 must be circulated in a notice when the permit procedure is initiated. Reading it in this way, the relevant original documents – in particular the application for a permit – could however be withheld.

75. However, the information to be disclosed under Annex V, points 1(c) and 1(f), points towards more extensive access to the original documents. Information should, in particular, be given as to the times and places where, or means by which, the relevant information will be made available and at which authorities. This means that the information given to the public under point 1 is not final, but should facilitate access to further information which is relevant for the permit procedure.

76. It would also be contradictory to give access under Annex V, point 2(b) to information which is submitted later which is relevant for the permit but not to the information which was available from the start.

77. In addition, withholding the application for a permit and the enclosures thereto would be a restriction on the information to be given to the public as compared to the original version of the IPPC Directive, which expressly provided for public access to the application for a permit in Article 15(1). The legislature did not intend the amendment of Article 15(1) of the IPPC Directive by Directive 2003/35[23] to restrict transparency, but as stated in recitals 10 and 11 to the last-mentioned directive, only to adapt the former directive to the more-extensive requirements of the Aarhus Convention.

78. That Convention is not aimed at restricting the information to be given to the public, but expressly provides, in Article 6(6), that the public must be given access for examination to all information relevant to the decision-making referred to in that article that is available at the time of the public participation procedure. The provisions of the IPPC Directive on the information to be given to the public must, so far as is possible, be interpreted in a manner that is consistent with the international treaty obligations of the European Union which arise from the Aarhus Convention, which are, inter alia, transposed by that directive.[24] Accordingly, they must be understood as meaning that in principle access must be given to all information which is relevant to the integrated permit procedure.

b) Disclosure of the location decision

79. According to the considerations outlined above, in principle, access to the location decision should be given in the integrated permit procedure if that decision was relevant to the permit.

23 — Cited in footnote 3.

24 — Case C-115/09 *Trianel Kohlekraftwerk Lünen* [2011] ECR I-3673, paragraph 41. See, more generally, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52; Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20; Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33; Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 35; and Case C-161/08 *Internationaal Verhuis- en Transportbedrijf Jan de Lely* [2009] ECR I-4075, paragraph 38.

80. At first glance, one could expect that an integrated permit procedure for an installation includes determining the location of it. The high level of protection of the environment taken as a whole required, for instance, in Article 1 and Article 9(1) of the IPPC Directive, would certainly be promoted if the location of an installation were selected with the objective of minimising detrimental effects on the environment.

81. However, the IPPC Directive does not integrate the permit for an installation as a whole, but (only) the necessary measures for the protection of the various environmental media affected, in particular of air, water and land. It primarily regulates the operation of installations and the best available techniques to be applied for that purpose. It is true that the location decision may influence the integrated permit; thus, Article 9(4) of the IPPC Directive provides that for the purposes of the conditions of the permit, the geographical location of the installation and the local environmental conditions must be taken into account. However, there is no provision for the location also to be determined in the integrated permit procedure or for an existing location decision to be reviewed. Consequently, at most, the location decision may only be indirectly called into question in exceptional cases if under the IPPC Directive the installation should not be approved due to the conditions at the location which has already been determined.

82. Nevertheless, there are special rules which apply to landfills, which are laid down in the Landfill Directive. Where the IPPC Directive applies to landfills, Article 1(2) of the Landfill Directive contains the relevant 'technical requirements' necessary to elaborate in concrete terms the general requirements of the IPPC Directive. The relevant requirements of the IPPC Directive are deemed to be fulfilled if the requirements of the Landfill Directive are complied with.

83. Annex I, point 1 of the Landfill Directive regulates the location of a landfill. In particular, point 1, 1(a) provides that the distances from the boundary of the site to residential and recreation areas or urban sites must be taken into consideration. Under point 1.2, the landfill can be authorised only if the characteristics of the site indicate that the landfill does not pose a serious environmental risk.

84. Whilst one may question whether the provisions of the Landfill Directive on location elaborate the relevant 'technical requirements' of the IPPC Directive in concrete terms within the meaning of Article 1(2) of the Landfill Directive, pursuant to Article 8(a)(i) of the Landfill Directive the landfill permit must in any case comply with *all* the requirements of the directive. It follows that the integrated landfill permit must not be issued if the requirements for the location have been infringed.

85. Even if the requirements of the Landfill Directive for the location of a landfill were to be excluded from the integrated permit procedure, the location decision would be of interest in other respects: in that procedure various circumstances which are related to location must be taken into consideration. Under Article 7(d) of the Landfill Directive, even the application for a permit must describe the condition of the installation site, including its hydrogeological and geological characteristics.[25] The requirements for the protection of soil and water under Annex I, point 3, adopt these requirements which are dictated by the location. An administrative decision on the location of a landfill should also take these points into consideration and accordingly include the corresponding information.

86. Finally, a decision on the location of a landfill site which has been made in advance is also of interest for the purposes of the integrated permit procedure to the extent that it imposes a framework for the integrated permit in accordance with national law.

25 — See Article 6(1)(d) of the IPPC Directive as well as Article 6(1)(j), where it is also required that the applicant outlines the main alternatives, if any, studied by the applicant, including alternative locations.

87. Accordingly, a location decision is in any case included in the information which is relevant to the integrated permit procedure. This explains why Paragraph 11(2)(g) of the Slovak Law 245/2003 expressly requires it to be submitted with the application for a permit. For that reason, in the integrated permit procedure, access must in principal be given to an earlier administrative decision on the location of the installation.

3. Protection of commercial information

88. However, access to information may be refused if interests which should be protected preclude disclosure. Under Article 15(3) of the IPPC Directive, the requirements of Article 15(1) apply to public participation subject to the restrictions laid down in Article 4(1), (2) and (4) of the Environmental Information Directive.

89. Under Article 4(2)(d) of the Environmental Information Directive, Member States may provide for a request for information to be refused if disclosure of the information would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy.

90. However, under Article 4(2) of the Environmental Information Directive, the grounds for refusal of access must be interpreted in a restrictive way, taking into account the public interest served by disclosure in every particular case.[26] Even if documents contain commercial information pursuant to that provision, under Article 4(4) access must be given at least to the passages which are not protected as commercial information.

91. The extent to which the location decision should have been treated as commercial information under the above provisions cannot be finally determined by the Court, since the Supreme Court did not provide details as to any commercial information. Such a review is therefore a matter for the national courts.

92. However, as a result of the disclosure of the location decision in the administrative proceedings at second instance, it may be assumed that the decision did not contain any commercial information. To date, no evidence has been submitted, not even by Ekologická Skládka, that the decision contains information which should be protected. By contrast, there is significant public interest in information concerning the location of a landfill site. Such an interest will normally outweigh the interest in protecting business-related information.

93. Accordingly, for the purposes of the assessment below, I shall proceed on the basis that the location decision does not fall to be protected as commercial information, whether wholly or in part.

4. Time of disclosure

94. Consequently, it is necessary to assess whether the disclosure of the location decision in the administrative proceedings at second instance satisfied the requirements of the IPPC Directive or took place too late.

26 — Case C-266/09 *Stichting Natuur en Milieu* [2010] ECR I-13119, paragraph 52, and Case C-71/10 *Office of Communications* [2011] ECR I-7205, paragraph 22.

95. Article 15(1) of the IPPC Directive requires that the public concerned be given early and effective opportunities to participate in the procedure for issuing a permit for new installations. Article 6(4) of the Aarhus Convention, which is intended to be transposed in the directive, is even clearer. Pursuant to the latter provision, early public participation should be implemented when all options are open and effective public participation can take place.

96. However, the disclosure of information alone does not suffice. Annex V, point 3, of the IPPC Directive entitles the public concerned to express comments and opinions to the competent authority before a decision is taken. Under point 4, the results of the consultations must be taken into due account in the taking of a decision. This corresponds to Article 6(7) and (8) of the Aarhus Convention.

97. If – which must be assumed – the location decision did not come fully within the protection of commercial information and consequently access should have been given to it, it follows that the procedure in relation to the integrated permit decision taken at first instance did not satisfy the requirements of the IPPC Directive. The public did not have any access to the location decision and could not express its opinion as to whether it was complied with or as to whether it satisfied the requirements of Annex I, point 1, of the Landfill Directive.

98. For this reason, the Supreme Court considers the disclosure to be too late. It is of the opinion that there was a failure to ensure sufficient public participation.

99. However, in the administrative proceedings at second instance the location decision was disclosed and in those proceedings, after the amended decision on the integrated permit the public had 30 days in which to express comments. The Slovak Constitutional Court considers it possible that this disclosure remedied the procedural error. It emphasised that according to the general principles of Slovak administrative proceedings the administrative proceedings at second instance may amend the whole administrative decision and there is also an obligation to consult the public appropriately.

100. It is true that neither the IPPC Directive nor the Landfill Directive contain rules concerning the remedying of procedural errors. However, in European Union law the opportunity to remedy procedural errors is recognised in principle [27] and neither the IPPC Directive nor the Landfill Directive can be interpreted so as to exclude the remedying of procedural errors. *Wells* adopts a similar approach in relation to the complete lack of an environmental impact assessment, in so far as it regards the *suspension* of a consent already granted in order to carry out an environmental impact assessment of the project in question (which had been omitted earlier) as provided for by the EIA Directive as an appropriate measure to remedy an infringement of that directive. [28]

101. In the absence of a rule of European Union law on remedying procedural defects in the integrated permit procedure for landfills, it is national provisions that will apply in this regard. However, the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law must not be less favourable than the rules governing similar domestic actions (principle of equivalence) and they must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). [29]

27 — See Case C-109/10 P *Solvay* v *Commission* [2011] ECR I-10329, paragraph 56, on remedying procedural errors in Commission antitrust proceedings and Case C-334/90 *Marichal-Margrève* [1992] ECR I-101, paragraph 25 on customs procedural law.

28 — Case C-201/02 *Wells* [2004] ECR I-723, paragraph 65. However, see also Case C-215/06 *Commission* v *Ireland* [2008] ECR I-4911, paragraphs 57 to 60.

29 — *Trianel Kohlekraftwerk Lünen* (cited in footnote 24, paragraph 43).

102. If the usual national provisions on remedying procedural errors apply, the principle of equivalence is complied with. In order to satisfy the principle of effectiveness, the remedial measure must put the persons entitled in the position which they would have been in if the procedural error had not happened.[30] Moreover, the remedial measure should not offer the opportunity to circumvent European Union law or to dispense with applying it, and it should remain the exception.[31] Otherwise, the exercise of their rights by the persons entitled would be made virtually impossible or at least excessively difficult.

103. It follows that the fact that in the administrative proceedings at second instance access was given to the information which was initially lacking, that there was an opportunity to comment and that in those proceedings the administration had the power to amend the decision at first instance in response to those comments are necessary but not sufficient conditions for remedying the procedural error.

104. Remedying the defect requires that at the time of the supplementary public participation all options remain open. Otherwise, the procedural step taken to make up for the earlier omitted act would be a purely formal act without being capable of realising the function of public participation.

105. Whether all options were actually still open at the time of the supplementary public participation is a matter for the national courts to decide. For those purposes, they could, for example, assess what consequences the omission of an administrative instance had. They could also examine whether at the time of the remedial action the administrative decision at first instance had been implemented for all practical purposes and so it was a fait accompli or whether the administrative proceedings at second instance dealt with any objections openly and objectively. Since it concerned the location of a landfill site, a consideration of the requirements of Annex I, point 1 of the Landfill Directive in respect of the choice of location of the landfill site would, in particular, be expected.

5. Conclusion in relation to the second question

106. In summary, the second question must accordingly be answered to the effect that in the integrated permit procedure for a landfill site under Article 15(1) of and Annex V to the IPPC Directive, the public must obtain access to an earlier location decision on the landfill site provided that such access is not precluded by grounds which prevail such as, for example, commercial information. If access to that document is initially refused without sufficient justification, that defect may be remedied later in the administrative proceedings in accordance with national law if by means of the later access the public is put in the position in which it would have been if access had been given already at the start.

C – Third question – application of the EIA Directive

107. By its third question, the Supreme Court would like to know whether it was permissible to prolong the validity of the original opinion on the environmental impact of the landfill project issued in 1999 without a repeat EIA assessment in 2006.

108. Ekologická Skládka doubts whether this question is relevant to the decision in the main proceedings. It submits that the Constitutional Court has in fact already established that any defects in the environmental impact assessment are not the subject-matter of the main proceedings. It argues that it is possible to review such defects only in a procedure separately designated for that purpose and this had not been the subject of claims by the parties in the main proceedings either.

30 — See, in relation to antitrust procedural law, *Solvay* (cited in footnote 27).

31 — *Commission* v *Ireland* (cited in footnote 28, paragraph 57).

109. The latter objection is connected with the point which I left open when answering the first question, namely whether European Union law enables or requires a national court to raise certain environmental law issues *ex officio*, although national law does not provide for this.[32] Therefore the third question is to be understood in conjunction with the first question as asking whether the EIA Directive allows the validity of an opinion on environmental impact to be prolonged without a repeat EIA assessment (see 1 below), whether this question must be examined in connection with the integrated permit although national law provides for a special procedure for challenging defects in an environmental impact assessment (see 2 below) and whether under European Union law it may or must be raised *ex officio* (see 3 below).

1. EIA Directive

a) Applicability of the EIA Directive

110. In order to give an opinion on whether the environmental impact assessment issued in 1999 should have been prolonged in 2006 without a repeat EIA assessment, it is necessary to determine, first of all, whether the EIA Directive applies at all.

111. The Court has decided that in cases in which a permit has been issued after the date for the implementation of the EIA Directive but where the consent procedure was formally initiated before that time (so-called 'pipeline projects'), that directive does not require any EIA assessment.[33]

112. Under Article 2 of the Act of Accession,[34] the EIA Directive had to be implemented in Slovakia by the date of accession, that is, by 1 May 2004.

113. Ostensibly, the formal initiation of the consent procedure would be the application for the issue of an integrated permit. The application was made on 25 September 2007 and therefore the EIA Directive would be applicable.

114. Nevertheless, on the basis of the information included in the file, it is also necessary to review whether the three consecutive procedures, namely the environmental impact assessment, the determination as to the location and the integrated permit procedure constitute a unitary consent procedure within the meaning of the EIA Directive.[35] In those circumstances, the application for initiation of the EIA, which had already been made on 16 December 1998, would have to be regarded as formal initiation of the consent procedure within the meaning of the EIA Directive. The EIA Directive would not apply in such a case.

115. In particular, such an approach is given support by the fact that the environmental impact was assessed with the specific objective of constructing the landfill site. The fact that under Slovak law the environmental impact is assessed separately from the actual permit procedure should not extend the temporal scope of the EIA Directive.

116. Since the procedure to assess environmental impact constitutes a formal administrative procedure, it may be differentiated from informal contact for the purposes of preparing an application for consent, which the Court has not accepted as constituting the initiation of a consent procedure.[36]

32 — See point 54 above.

33 — Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23, and *Wells* (cited in footnote 28, paragraph 43).

34 — OJ 2003 L 236, p. 33.

35 — See Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 102; Case C-275/09 *Brussels Hoofdstedelijk Gewest and Others* [2011] ECR I-1753, paragraph 37; and Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus und Roua* [2011] ECR I-9711, paragraph 44.

36 — Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, '*Großkrotzenburg*', paragraph 32.

117. Therefore initiation of the consent procedure by means of the environmental impact assessment would not have to be assumed only if it had related to another project which had never started to be realised in practical terms.[37] It is decisive here whether the landfill project has been continuously pursued or whether it has in the meantime been abandoned.[38]

118. The town of Pezinok has in the meantime changed its plans several times inasmuch as it has refused the construction of a landfill, but under Slovak law those decisions did not apparently lead to the termination of the project. Despite superficial similarities, the case at issue may also be differentiated from the situation in *Gedeputeerde Staten van Noord-Holland*. In that case, a municipal authority also changed its plans in a fundamental way several times. Consequently, the Court regarded the last planning measure as a new plan.[39] However, in those proceedings the municipal authority was itself the applicant and consequently initiated a new consent procedure in each case.[40]

119. In the case at issue, Ekologická Skládka made the application. Its observations state that the project was pursued continuously, since according to those submissions the delays in comparison to the original timetable had primarily been attributable to opposition on the part of the town of Pezinok.

120. Whilst the application to initiate the procedure for the environmental impact assessment was lodged by another company, Pezinské tehelne a.s., the companies appear to be associated companies. Pezinské tehelne a.s. clearly supports the implementation of the project since it applied for the validity of the environmental impact assessment to be prolonged, whilst, by the time of the location proceedings, Ekologická Skládka had come on the scene. Both companies also applied jointly for the administrative appeal proceedings, which led to the location decision being issued.

121. Even the complete change of the company which wants to carry out a project would not necessarily lead to the assumption that the project has been temporarily abandoned: it is not inconceivable that commercial interests in a project are transferred from one company to another without the project itself significantly changing.

122. Ultimately, however, the national courts must review whether the landfill project was continuously pursued or whether it had been abandoned in the meantime and re-started again later. For that reason alone, the present question must be examined further, despite the doubt as to the temporal applicability of the EIA Directive.

123. One interest which the Supreme Court might have in this question being answered could also be apparent from the submissions of several parties, namely that even prior to accession to the European Union Slovakia had adapted and applied its national law so as to be consistent with the EIA Directive. Consequently, this would suggest that an environmental impact assessment carried out exclusively in accordance with national law for reasons of its timing should be treated in precisely the same way as an assessment to which the EIA Directive is already applicable.[41] *Ynos* [42] would not preclude such an approach being taken by national courts, since, whilst the consent procedure was commenced prior to the accession of Slovakia, it was not concluded until much later.

37 — *Gedeputeerde Staten van Noord-Holland*, cited in footnote 33, paragraph 25.

38 — See my Opinion in Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* [2012] ECR I-0000, point 169.

39 — *Gedeputeerde Staten van Noord-Holland*, cited in footnote 33, paragraph 25.

40 — Opinion of Advocate General Mischo in *Gedeputeerde Staten van Noord-Holland*, cited in footnote 33, point 47.

41 — Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 37 et seq.; Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28; and Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10627, paragraph 21 et seq.

42 — Case C-302/04 *Ynos* [2006] ECR I-371, paragraph 36.

b) The criteria for prolonging the validity of the decision on environmental impact

124. If it were to become apparent that the EIA Directive is applicable to the permit for the landfill project or that national law requires a corresponding application of the requirements of that directive, the question arises whether it was compatible with the directive to prolong the validity of a decision on environmental impact issued in 1999 in 2006.

125. In this respect, the national court would have to review, first of all, whether the assessment issued in 1999 already satisfied all of the requirements of the EIA Directive: even in the event of its validity being prolonged, an inadequate assessment cannot be a substitute for an assessment within the meaning of the directive.

126. The EIA Directive does not expressly govern the question whether the validity of an assessment which is adequate in terms of its content can be prolonged. Nevertheless, the objective of the environmental impact assessment which is laid down in Article 2(1) of the EIA Directive must be determinative. Pursuant to that provision, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an environmental assessment. Such an assessment cannot be restricted to the effects which would have been caused if the project had been proceeded with at some time in the past. On the contrary, it must include all the effects which may actually be likely at the time of the consent.

127. This is also apparent from Annex II, point 13, of the EIA Directive, which covers changes to projects,[43] for the purposes of which the concept of changes must be understood in a broad sense.[44]

128. If, in the meantime, environmental conditions or the project have changed so that other significant effects on the environment are possible, the procedure for the environmental impact assessment must be supplemented or even be carried out completely again in a repeat EIA procedure. Consequently, it may become necessary to examine whether the environmental impact assessment still correctly represents the possible significant effects of the project on the environment at the time of consent;[45] therefore, in other words, an *updating assessment* must be carried out with the objective of determining whether a supplementary environmental impact assessment is necessary.

129. In the main proceedings, various circumstances could have been of significance for the purposes of an updating assessment.

130. The first arises from the timing of events. In principle, the environmental impact assessment must already take into consideration the specific form of the project as apparent from the integrated permit.[46] It would not be surprising if the effects of the project on the environment had changed as compared with the environmental impact assessment. The Landfill Directive was adopted only in the year of the decision on the environmental impact, but the requirements of that directive had to be complied with for the purposes of the integrated permit. Even if Slovakia already applied European Union law in 1999 in anticipation of accession, it is not clear that the environmental impact assessment would already have taken into consideration the consequences of the Landfill Directive in relation to the environmental effects of the landfill.

43 — Judgment of 15 December 2011 in Case C-560/08 *Commission* v *Spain*, '*M-501*', paragraph 103 et seq.

44 — Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 39.

45 — See *Wells* (cited in footnote 28, paragraph 47); Case C-290/03 *Barker* [2006] ECR I-3949, paragraph 47 et seq.; *Commission* v *United Kingdom* (cited in footnote 35, paragraphs 103 to 106); and my Opinion in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (cited in footnote 38, point 140).

46 — See point 128 above.

131. Furthermore, since the environmental impact assessment the town of Pezinok has changed its development plans. Consequently, the possibility cannot, in particular, be ruled out that the environmental effects of the landfill project will need to be re-evaluated with regard to changes to the use of neighbouring areas which have not yet been taken into account. Such uses could be more sensitive as regards the effects of a landfill or could intensify the cumulative effects compared to the original assessment. [47]

132. However, intensified cumulative effects might also result from the fact that the existing Pezinok landfill site was not closed in 2001, as had been assumed in the environmental impact assessment, but had continued in use until at least 31 October 2007, possibly even for longer. As a consequence of this, the previous impact upon the area could have increased.

c) Public participation in the decision on whether an old environmental impact assessment is still sufficient

133. According to the grounds set out in the reference for a preliminary ruling, the Supreme Court would also like to know whether the updating assessment may be made solely on the basis of an application by the developer without any further public participation.

134. In that regard, it must be noted that the updating assessment should determine whether repeat public participation is necessary. The interests in effective and timely administrative proceedings must be balanced against the rights of the public. Public participation would make the procedure more cumbersome, especially since in the course of a permit procedure it would possibly be necessary to examine, on more than one occasion, whether the environmental impact assessment is sufficiently up to date following changes in circumstances which have occurred in the meantime.

135. Even if there is no public participation with regard to the updating decision, the public is not left without rights. The updating decision demonstrates parallels to the preliminary investigation as to whether smaller-scale projects, which are listed in Annex II to the EIA Directive, must be subject to an assessment at all. For the purposes of the preliminary investigation, the competent authorities must ensure that no project likely to have significant effects on the environment, within the meaning of the directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive screening, be regarded as not being likely to have such effects. [48] The public, as well as the other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. [49] In order to guarantee effective remedies, the competent national authority is under a duty to inform the public and the authorities of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request. [50]

136. These principles must also apply to an updating assessment, since it is also aimed at identifying significant effects on the environment which have not yet been sufficiently assessed. Subject to that proviso, it should be left to the Member States to determine whether and, where appropriate, to what extent they involve the public in the updating decision. [51]

47 — In relation to taking into consideration cumulative effects, see Case C-404/09 *Commission* v *Spain* [2011] ECR I-11853; '*Spanish Brown Bear*' paragraph 76 et seq.; and *M-501*, cited in footnote 43, paragraph 98 et seq.

48 — Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, '*Loto zero*', paragraph 44.

49 — Case C-75/08 *Mellor* [2009] ECR I-3799, paragraph 58.

50 — *Mellor* (cited in footnote 49, paragraph 59).

51 — See, in relation to telecommunications regulation, Case C-426/05 *Tele2 Telecommunication* [2008] ECR I-685, paragraph 52.

d) Interim conclusion

137. In summary, it may be stated that if the EIA Directive is applicable *ratione temporis*, an environmental impact assessment which has been carried out earlier continues to be valid in the event that it correctly represents the possible significant environmental effects of the project at the time of consent being given. The investigation as to whether in the meantime the environmental conditions or the project have changed so considerably that other significant detrimental effects on the environment are possible does not require mandatory public participation.

2. Whether a separation of remedies is permissible in relation to various requirements of a consent

138. The considerations set out above are only of significance to the main proceedings if defects in the environmental impact assessment can, in general, be the subject of claims in the integrated permit procedure. Slovak law appears to exclude this, since in this respect the Constitutional Court refers to separate appeal proceedings. Consequently, it is necessary to examine whether it is compatible with European Union law to exclude the review of any defects in an earlier environmental impact assessment from judicial proceedings to review the integrated permit for the landfill and to provide that any review of such defects is a matter for separate appeal proceedings.

139. The IPPC Directive does not require the environmental impact assessment to be carried out as part of the integrated permit procedure. Whilst pursuant to Article 9(2) of the IPPC Directive, the information obtained in the environmental impact assessment must be taken into consideration, under Article 1 and recital 11 it is otherwise to be applied without prejudice to the EIA Directive. Consequently, in principle, the IPPC Directive allows the Member States to implement the two directives in separate procedures and also to separate the judicial review of those procedures.

140. Nevertheless, under Slovak law the integrated permit for the landfill is both a permit for its operation within the meaning of the IPPC Directive and a permit to construct the landfill site (Paragraph 8(3) of Slovak Law 245/2003). The permit to construct the landfill site constitutes development consent within the meaning of Article 1(2) of the EIA Directive. Therefore it may only be decided upon after an environmental impact assessment. Consequently, the link between the environmental impact assessment and the integrated permit arises from Slovak law, although European Union law does not require it.

141. Under Article 10a of the EIA Directive, members of the public concerned must have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive. It follows that the judicial review of the permit for the construction of the landfill must also cover the environmental impact assessment.

142. However, the necessity for a review procedure does not necessarily exclude allocating individual issues for review – such as the environmental impact assessment – to a separate review procedure.

143. European Union law does not actually regulate in detail how the review procedure must be organised. That is a matter for the Member States. Detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law must merely be not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law (principle of effectiveness). [52]

52 — *Trianel Kohlekraftwerk Lünen* (cited in footnote 24, paragraph 43) and *Boxus and Roua* (cited in footnote 35, paragraph 52).

144. There can be justifiable grounds for creating separate review procedures for individual issues for review. In particular, the applicant may gain legal certainty if certain questions are declared to be final and absolute beforehand in advance of a comprehensive further procedure being carried out.

145. However, by its very nature, the environmental impact assessment is not wholly amenable to being arranged into legally certain stages. It must cover the environmental effects which arise from the approved project and the condition of the environment concerned at that time.[53] It would be incompatible with that to make final and absolute findings as to the environmental effects at an earlier point in the proceedings. It must at least be possible to make inadequacies in the environmental impact assessment which only arise or become apparent later the subject of a claim.

146. In addition, defects in separate procedural steps must also have an impact on subsequent steps. If, for instance, legal action leads to the result that an environmental impact assessment was erroneous, the project must not be approved with final and absolute effect or implemented while those court proceedings are pending.[54] At the same time, the splitting up of the remedies must not lead to persons or organisations entitled to judicial review of the procedural and substantive legality of a decision under Article 10a of the EIA Directive being excluded from the review of certain separate procedural steps. Nor must such a system increase, to a disproportionate extent, the effort to which the public would have to go to in order to claim against a project.

147. A national system of remedies which does not satisfy those requirements would not be compatible with the principle of effectiveness, since it would make it excessively difficult or even impossible to enforce rights deriving from the environmental law of the European Union.

148. In such a case, in order to make the directives concerned effective in practical terms in the context of a legal dispute over subsequent procedural steps, it would be necessary to review the errors in carrying out the earlier steps.[55] This would be required in particular if the conduct of the national authorities combined with the provisions governing the remedies available have the result that a person is completely deprived of the opportunity to enforce his rights before the national courts,[56] for instance by the competent authorities concealing the opportunities for remedies.

149. There is insufficient information available to the Court in order to allow it to determine conclusively, in the proceedings at issue, whether the system of remedies in Slovakia or its application in the relevant proceedings which are at issue here is compatible with the principle of effectiveness. However, the reference for a preliminary ruling gives rise to doubts in this respect. The Supreme Court puts forward evidence suggesting a collusive cooperation between Ekologická skládka and the competent public authorities:

— It was clearly submitted that the head of the authority which issued the location decision was himself the owner of sites within the project area and was, together with his sister, a member of the supervisory board of Ekologická skládka.[57]

— Križan and Others were excluded from the location proceedings since their rights were not yet directly affected, yet in the integrated permit procedure the location decision was held to be binding on them.[58]

53 — See point 128 above.

54 — See Case C-41/11 *Inter-Environnement Wallonie* [2012] ECR, paragraph 47, in relation to the environmental assessment of plans and programmes.

55 — *Brussels Hoofdstedelijk Gewest and Others* (cited in footnote 35, paragraph 37).

56 — See Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 48; Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 43; Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 57 et seq.; Case C-542/08 *Barth* [2010] ECR I-3189, paragraph 33; and Joined Cases C-89/10 and C-96/10 *Q-Beef* [2011] ECR I-7819, paragraph 51.

57 — Point 6 of the order for reference.

58 — Points 5, 6 and 49 of the order for reference.

— In the first instance of the integrated permit procedure the location decision was kept secret without any discernible reason.[59]

150. It is incumbent upon the national courts to carry out a detailed investigation of these circumstances and where they have doubts they may use proceedings for a preliminary ruling in order to obtain more specific information on the application of the principle of effectiveness to particular situations.

151. In summary, it must be concluded that it is compatible with European Union law to exclude the review of any defects in an earlier environmental impact assessment from the judicial proceedings to review the integrated permit for the construction of a landfill and allocate review of such defects to separate appeal proceedings if as a result of this separation of remedies, judicial review of the integrated permit is not made virtually impossible or excessively difficult. If the organisation of the remedy or its application do not satisfy these requirements, in order to make the directives concerned effective in practical terms it is necessary, in the context of a legal dispute over subsequent procedural steps, to review errors made in carrying out the earlier steps.

3. Raising certain legal issues *ex officio*

152. However, a second finding of the Constitutional Court could preclude the review of possible defects in the environmental impact assessment in the main proceedings. Specifically, that court noted that the parties did not question the validity of the environmental impact assessment. Consequently, it held that the Supreme Court had ruled *ultra petita* and thereby exceeded its powers. As a result of this, the Supreme Court asks whether it can raise this question *ex officio* under European Union law.

153. In this respect, the absence of applicable provisions of European Union law means that in principle the procedural autonomy of the Member States will also apply, which nevertheless must be exercised having regard to the principle of equivalence and the principle of effectiveness.[60]

154. The reference for a preliminary ruling does not give any indication of the extent to which questions of national law may be raised *ex officio*. Consequently, it does not provide any assistance in determining whether the *principle of equivalence* requires that defects in the environmental impact assessment be rasied *ex officio*. In this respect, the case at issue may be distinguished from *van der Weerd*, where the question arose as to whether the provisions of European Union law at issue in that case corresponded to national rules of public policy (*ordre public*) which could be raised *ex officio* under Dutch law.[61]

155. For the purposes of applying the *principle of effectiveness*, each case which raises the question whether a national procedural provision renders application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.[62] This involves assessments on a case-by-case basis, taking account of each case's own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made.[63]

59 — See my observations on the second question, point 88 et seq.

60 — Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28 and the case-law cited. In relation to the general requirements of these principles, see points 101 and 143 above.

61 — *Van der Weerd and Others* (cited in footnote 60, paragraph 29 et seq.).

62 — Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14; Joined Cases C-430/93 and C-431/93 *van Schijndel und van Veen* [1995] ECR I-4705, paragraph 19; and *van der Weerd and Others* (cited in footnote 60, paragraph 33).

63 — *Cofidis* (cited in footnote 12, paragraph 37).

156. In principle, national law provisions are compatible with the principle of effectiveness if they prevent national courts from raising, *ex officio*, an issue concerning the breach of provisions of European Union law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim. [64]

157. Such a limitation on the power of the national court may be justified by the principle that, in a civil suit, it is for the parties to take the initiative, and that, as a result, the court is able to act *ex officio* only in exceptional cases involving the public interest. That principle safeguards the rights of the defence and ensures the proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas. [65]

158. These statements were made in proceedings concerning membership in a state compulsory insurance system [66] and in relation to evidence of an animal epidemic upon which measures to the detriment of the agricultural businesses concerned were based. [67]

159. The most important case in which national courts are nevertheless entitled to raise a question of European Union law *ex officio* concerns Article 6(1) of the Directive on unfair terms in consumer contracts. [68] Taking into account the weaker position of a consumer compared to the contractual partner, this provision provides that an unfair term is not binding on the consumer. As is apparent from the case-law, it is a mandatory provision which aims to replace the formal balance of the rights and obligations of the parties with an effective balance which re-establishes equality between them. In order to ensure the effectiveness of that provision, the Court has ruled that the national court must examine the unfairness of a contractual term *ex officio*. [69]

160. The environment also requires protection and there is a significant public interest in environmental impact assessments which are required by European Union law being carried out correctly.

161. However, the EIA Directive does not contain a provision which is comparable to Article 6(1) of the Directive on unfair terms in relation to the consequences, for the validity of consents, of defects in an environmental impact assessment. In particular, it does not provide that a consent is to be invalid in the event of defects in the environmental impact assessment.

162. It can be left open whether completely dispensing with an environmental impact assessment which is required by European Union law must possibly be raised *ex officio*. After all, such an assessment is an important basis for the formulation of objections to a project that are based on environmental law.

163. However, I do not consider it to be necessary to raise doubt as to the *up-to-date nature* of an environmental impact assessment *ex officio* in every case. If an environmental impact assessment exists, it should give potential claimant sufficient grounds in order to object to any inadequacies in the assessment. Such defects can also arise relatively easily as a result of the passage of time or changes in external circumstances without necessarily leading to additional significant environmental effects. A supplementary assessment is ultimately necessary where such additional effects are possible. If the

64 — *Van Schijndel and van Veen* (cited in footnote 62, paragraph 22) and *van der Weerd and Others* (cited in footnote 60, paragraph 33).

65 — *Van Schijndel and van Veen* (cited in footnote 62, paragraph 21) and *van der Weerd and Others* (cited in footnote 60, paragraph 35).

66 — *Van Schijndel and van Veen* (cited in footnote 62).

67 — *Van der Weerd and Others* (cited in footnote 60).

68 — Cited in footnote 12.

69 — See in addition to the judgments cited in footnote 12, Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 22 et seq., and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 30 et seq.

up-to-date nature of the environmental impact assessment had to be reviewed by the courts *ex officio*, as a consequence serious procedural risks would ensue without there necessarily being the expectation of a corresponding gain for the environment. Consequently, the public interest in an up-to-date environmental impact assessment being taken into consideration should not be attributed such weight as to justify a review *ex officio*. On the contrary, it is sufficient that such doubts be examined only on the basis of express claims.

164. The consideration may turn out differently with regard to other environmental law aspects. Thus, according to the submissions of Križan and Others, it would stand to reason to review whether the old landfill site in Pezinok is operated in accordance with Article 14 of the Landfill Directive.[70] That site is associated with significant health risks. However, it is not apparent that the operation of the old landfill site is an issue in the main proceedings.

165. As far as the new landfill is concerned, the Supreme Court does not indicate that it is to be operated contrary to the applicable technical standards. As compared to the continued operation of the old landfill site, it could therefore even result in an improvement in the protection of the environment.

166. Accordingly, I do not see any special reasons of public interest based on European Union environmental law, to place the Supreme Court under an obligation to raise, *ex officio* and contrary to national provisions, possible doubts as to the up-to-date nature of the environmental impact assessment.

167. However, European Union law issues must also be raised *ex officio* on the basis of the principle of effectiveness, where the parties are not given a genuine opportunity to raise a plea based on the provisions at issue before a national court.[71]

168. If an infringement of the principle of effectiveness in fact arose from the evidence cited by the Supreme Court of collusive cooperation between Ekologická Skládka and the competent authorities,[72] it might also be presumed that Križan and Others were not given a genuine opportunity to raise the apparent lack of an up-to-date environmental impact assessment before a national court. In those circumstances, the Supreme Court would be under an obligation to raise this question *ex officio*.

4. Conclusion in relation to the third question

169. The reply to the third question must therefore be:

If the EIA Directive is applicable *ratione temporis*, an assessment of the environmental effects of a project which has been carried out in the past may be taken as a basis for the consent to the project if it correctly represents the possible significant environmental effects of the project at the time of consent being given. The investigation as to whether in the meantime the environmental conditions or the project have changed so considerably that other significant detrimental effects on the environment are possible does not require mandatory public participation.

It is compatible with European Union law to exclude the review of the up-to-date nature of an earlier environmental impact assessment from judicial proceedings to review the integrated permit for the construction of a landfill and allocate that to separate appeal proceedings if as a result of this separation of remedies, judicial review of the integrated permit with regard to the environmental

70 — See the pending proceedings in Case C-331/11 *Commission* v *Slovakia* (OJ 2011 C 282, p. 4) in relation to a landfill site in Žilina – Považský Chlmec.

71 — See *van der Weerd and others* (cited in footnote 60, paragraph 40 et seq.); see also *Peterbroeck* (cited in footnote 62).

72 — See point 149 above.

impact assessment is not made virtually impossible or excessively difficult. If the organisation of the remedy or its application do not satisfy these requirements, in order to make the directives concerned effective in practical terms it is necessary, in the context of a legal dispute over subsequent procedural steps, to review the errors made in carrying out the earlier steps.

The national courts must raise the issue of the up to date nature of an environmental impact assessment *ex officio* if the persons entitled are not given a genuine opportunity to raise this issue before a national court. This must be assumed in particular where the organisation of the remedy or its application do not satisfy the requirements of the principle of effectiveness.

D – *Fourth question – interim remedies*

170. By the fourth question, the Supreme Court would like to know whether the public's remedies under the IPPC Directive and the EIA Directive include the possibility of the imposition of an administrative or judicial measure which is preliminary in nature in accordance with national law (for example, an order for the judicial suspension of enforcement of an integrated decision) and allows for the temporary suspension, until a final decision in the case, of the construction of a planned installation.

171. Whilst neither the IPPC Directive nor the EIA Directive provide for interim relief, it is settled case-law that the national court seized of a dispute governed by European Union law must be able to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law.[73]

172. That obligation is an expression of the right to an effective remedy which is recognised in Article 47 of the Charter of Fundamental Rights of the European Union, which the Member States must ensure pursuant to the second sentence of Article 19(1) TEU.

173. Moreover, Article 9(4) of the Aarhus Convention which must be taken into account when interpreting the IPPC Directive and the EIA Directive[74] also requires that regard must be given to the fact that the remedies under those directives facilitate adequate interim relief.

174. It is apparent from the reference for a preliminary ruling that the Supreme Court also has doubts as to whether a party affected by interim relief must be heard before the relief is granted.

175. In this respect, it is necessary to comply with the principle of a fair trial, which includes the right to be heard.[75] Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and supplemented by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.[76]

73 — Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 21; Case C-226/99 *Siples* [2001] ECR I-277, paragraph 19; and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 67.

74 — See point 78 above.

75 — Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 27 and 39 et seq.; Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 66; and Case C-394/07 *Gambazzi* [2009] ECR I-2563, paragraph 28.

76 — *Eurofood IFSC*, cited in footnote 75 above, and Case C-256/09 *Purrucker* [2010] ECR I-7349, paragraph 95. See also the judgment of the European Court of Human Rights in *Micallef v. Malta* (Application No 17056/06, § 85 and 86).

176. Consequently, where there is a particularly urgent need for a measure which is interim in nature, a court may initially waive the hearing of all parties,[77] but must either hear them as soon as possible thereafter,[78] or must at least provide the opportunity to challenge the measure with an appeal in an accelerated procedure which gives all parties the opportunity to make representations.

177. Therefore the fourth question must be answered to the effect that the public's remedies under the IPPC Directive and the EIA Directive include the opportunity to obtain the imposition of an administrative or judicial measure which is interim in nature in accordance with national law and allows for the temporary suspension of the construction of a planned installation. In particularly urgent cases, the hearing of the parties may be waived, provided that they have the opportunity to obtain a review of the order as soon as possible.

E – *Fifth question – scope of the protection of property*

178. By the fifth question, the Supreme Court would like to know whether a judicial decision meeting the requirements of the IPPC Directive, the EIA Directive or of Article 9(2) and (4) of the Aarhus Convention which revokes an applicant's valid integrated permit for a new installation may interfere unlawfully with an operator's right of property in an installation. It is particularly concerned with the proportionality test to be applied in balancing the public interest in environmental protection with the private right to property protection, if the content of that right of property (in particular the aspect of the enjoyment of property) inevitably leads to or is necessarily connected with interference in the environment protected by European Union law.

179. The right of property is recognised by Article 17 of the Charter of Fundamental Rights and prior to that had already been recognised by the settled case-law of the Court. However, restrictions may be imposed on the right of property provided that such restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.[79]

180. In the case in the main proceedings, two different aspects of property are affected. On the one hand, the property in the site earmarked for the landfill site, the enjoyment of which is restricted by being subject to a permit and on the other hand, the right, which may be established by the permit, to construct and operate a landfill on the site.

181. Nevertheless, the right to construct and operate a landfill may acquire the quality of a property right only if the continued existence of the permit may no longer be challenged. Prior to that, all that is involved is the prospect of being able to construct and operate a landfill. However, mere prospects do not enjoy any protection as property rights,[80] particularly when their realisation is disputed.[81]

182. On the other hand, being subject to a permit for the landfill site restricts the enjoyment of the property in the site concerned.

77 — See Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 15.

78 — See, by way of illustration, Case C-27/09 P *France* v *People's Mojahedin Organization of Iran* [2011] ECR I-13427, paragraph 61, in relation to the granting of administrative measures. See also Article 50(4) of the TRIPS Agreement.

79 — Case C-548/09 P *Bank Melli Iran* v *Council* [2011] ECR I-11381, paragraph 114 and the case-law cited; see also the third sentence of Article 17(1) of the Charter of Fundamental Rights.

80 — Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 14; Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 79 et seq.; and the judgment of the European Court of Human Rights in *Pine Valley Developments Ltd and Others v. Ireland* (Application No 12742/87, § 51).

81 — Judgment of the European Court of Human Rights in *Anheuser-Busch Inc. v. Portugal* (Application No 73049/01, ECHR 2007-I, § 64 et seq.).

183. As a result of this requirement for a permit, the planned use of the property is to be the subject of several administrative proceedings. In that regard, the EIA Directive is intended to ensure that all significant effects of the project on the environment are identified and factored into the decision. The IPPC Directive has the objective of reducing the environmental effects of the installation. Both directives also provide the opportunity comprehensively to challenge the substantive and procedural legality of decisions.

184. It is possible that due to those rules it will not be possible to implement certain projects at all and that others will at least be delayed or restricted in terms of how they are configured.

185. Nevertheless, in principle, these restrictions on property may be justified by the general interest in a high level of protection for the environment,[82] which is an objective of the European Union pursuant to Article 191 TFEU and Article 37 of the Charter of Fundamental Rights.[83]

186. Consequently, it is compatible with the fundamental right to property to refuse a use of land which is excessively detrimental to the environment. It must also be permissible to subject a project which could have a significant detrimental effect on the environment to a careful review before it can be realised. There is nothing to suggest that the requirements of the EIA Directive, the IPPC Directive or the Aarhus Convention would be disproportionate in that regard.

187. Finally, the fundamental right to an effective remedy, within the meaning of Article 47 of the Charter of Fundamental Rights, requires that compliance with justified provisions on environmental protection may be judicially reviewed and that, where appropriate, permits may be annulled if at the time they were granted those provisions were infringed.

188. In summary, it must be concluded that the revocation of an applicant's integrated permit for a new installation by a judicial decision meeting the requirements of the IPPC Directive, the EIA Directive or of Article 9(2) and (4) of the Aarhus Convention does not interfere unlawfully with an operator's right of property.

V – Conclusion

189. I therefore propose that the Court should rule as follows:

(1) In the event of doubt as to the interpretation of European Union law in a case pending before a court of a Member State, against whose decisions there is no judicial remedy, Article 267 TFEU requires that court, even without any request from the parties, to refer a question to the Court of Justice of the European Union for a preliminary ruling *ex officio* although the constitutional court in that Member State has already decided the case and imposed on the first-mentioned court the obligation to abide by its opinions on national constitutional law.

(2) In the integrated permit procedure for a landfill site under Article 15(1) of and Annex V to Directive 2008/1/EC of the European Parliament and the Council of 15 January 2008 concerning integrated pollution prevention and control, the public must obtain access to an earlier location decision on the landfill site provided that such access is not precluded by grounds which prevail, such as, for example, commercial information. If access to that document is initially refused

82 — Case 240/83 *ADBHU* [1985] ECR 531, paragraph 13; Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-2007, paragraph 81; and the judgments of the European Court of Human Rights in *Depalle v. France* (Application No 34044/02, § 81 and the case-law cited; *Pine Valley Developments Ltd and Others v Ireland* (cited in footnote 80, § 57); and *Curmi v. Malta* (Application No 2243/10, § 44).

83 — See also recital 9 to the preamble to the TEU and Article 11 TFEU.

without sufficient justification, that defect may be remedied later in the administrative proceedings in accordance with national law if by means of the later access the public is put in the position in which it would have been if access had been given already at the start.

(3) If Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment in the version, as amended by Directive 2003/35/EC is applicable *ratione temporis*, an assessment of the environmental effects of a project which has been carried out in the past may be taken as a basis for the consent to the project if it correctly represents the possible significant environmental effects of the project at the time of consent being given. The investigation as to whether in the meantime the environmental conditions or the project have changed so considerably that other significant detrimental effects on the environment are possible does not require mandatory public participation.

It is compatible with European Union law to exclude the review of the up-to-date nature of an earlier environmental impact assessment from judicial proceedings to review the integrated permit for the construction of a landfill and allocate that to separate appeal proceedings if as a result of this separation of remedies, judicial review of the integrated permit with regard to the environmental impact assessment is not made virtually impossible or excessively difficult. If the organisation of the remedy or its application do not satisfy these requirements, in order to make the directives concerned effective in practical terms it is necessary, in the context of a legal dispute over subsequent procedural steps, to review the errors in carrying out the earlier steps.

The national courts must raise the issue of the up to date nature of an environmental impact assessment *ex officio* if the persons entitled are not given a genuine opportunity to raise this issue before a national court. This must be assumed in particular where the organisation of the remedy or its application do not satisfy the requirements of the principle of effectiveness.

(4) The public's remedies under Directive 2008/1 and Directive 85/337 include the opportunity to obtain the imposition of an administrative or judicial measure which is interim in nature in accordance with national law and allows for the temporary suspension of the construction of a planned installation. In particularly urgent cases, the hearing of the parties may be waived, provided that they have the opportunity to obtain a review of the order as soon as possible.

(5) The revocation of an applicant's integrated permit for a new installation by a judicial decision meeting the requirements of Directive 2008/1, Directive 85/337 or of Article 9(2) and (4) of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters does not interfere unlawfully with an operator's right of property.