



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 20 June 2013¹

Case C-72/12

**Gemeinde Altrip,
Gebrüder Hört GbR,
Willi Schneider**

v

Land Rheinland-Pfalz

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany))

(Directive 85/337/EEC — Article 10a — Scope of the right to challenge decisions on the approval of projects likely to have considerable effects on the environment — Applicability *ratione temporis* — Scope of review)

1. This request for a preliminary ruling offers the Court, two years after its judgment in *Trianel*,² a further opportunity to rule on the interpretation of Article 10a of Directive 85/337/EEC ('the EIA Directive'),³ as amended by Directive 2003/35/EC,⁴ in the context of German administrative law and administrative procedural law.
2. Whereas the judgment in *Trianel* related to access by non-governmental environmental organisations to the courts of a Member State under Article 10a of the EIA Directive, the present proceedings are concerned, on the one hand, with the applicability *ratione temporis* of that provision and, on the other hand, and in particular, with the scope of the review for which it provides.
3. The questions have arisen in the course of an action, brought against a planning approval decision adopted under the relevant water legislation by the *Land* of Rheinland-Pfalz (Rheinland-Palatinate), in which the applicants claim that the environmental impact assessment ('the EIA') was carried out incorrectly.

¹ — Original language: German.

² — Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* ('*Trianel*') [2011] ECR I-3673.

³ — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

⁴ — Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

I – Legal framework

A – *International law*

4. The UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') was signed by the European Community on 25 June 1998, entered into force on 30 October 2001 and was approved on behalf of the European Community on 17 February 2005.⁵ The Federal Republic of Germany signed the Aarhus Convention on 25 June 1998 and ratified it on 15 January 2007.

5. The rules of the Aarhus Convention are normally presented as a three-pillar model, with one pillar representing access to environmental information, another representing public participation in decision-making in environmental matters, and a third representing access to justice in environmental matters.⁶

6. Recitals 6, 7, 8, 13 and 18 of the Aarhus Convention read as follows:

[6] Recognising that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

[7] Recognising also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

[8] Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

...

[13] Recognising further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

...

[18] Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced'.

7. Article 1 of the Aarhus Convention sets out its objective:

'In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention'.

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

6 — United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 2nd edition 2013, p. 6; Beyerling, U., and Grote Stoutenburg, J., *Environment, International Protection*, in: Wolfrum, R. (ed.), *Max Planck Encyclopedia of Public International Law*, paragraph 73.

8. Article 2(5) defines ‘the public concerned’ as ‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making’. In accordance with Article 2(4), the term ‘the public’ includes, *inter alia*, ‘one or more natural or legal persons’.

9. Article 3(1) contains the following provisions:

‘Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.’

10. Article 9(2) of the Aarhus Convention reads:

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

- (a) Having a sufficient interest or, alternatively,
- (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

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

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. ...

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

B – *EU law*

11. In order to bring EU law into line with the Aarhus Convention, Directive 2003/35/EC was adopted before the Convention was ratified by the Community.⁷ That directive amended the EIA Directive and Directive 96/61/EC (‘the IPPC Directive’)⁸ ‘to ensure that they are fully compatible with the provisions of the [Aarhus] Convention, in particular ... Article 9(2) ... thereof.’⁹

12. Recital 9 of Directive 2003/35/EC provides:

‘Article 9(2) and (4) of the [Aarhus] Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.’

⁷ — See recital 5 of the directive.

⁸ — Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26).

⁹ — Recital 11 of Directive 2003/35.

13. The first sentence of Article 6(1) of Directive 2003/35 reads:

‘The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 June 2005.’

14. Article 3 of Directive 2003/35 contains several amendments to the EIA Directive. Thus, in Article 1(2) of the EIA Directive, the following definition of ‘the public concerned’ is added: ‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2)’. According to a further definition, ‘the public’ means ‘one or more natural or legal persons’, as it does within the context of the Aarhus Convention.

15. Directive 2003/35 also creates a new Article 10a in the EIA Directive. It reads as follows:

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

- (a) having a sufficient interest, or alternatively,
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

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

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. ...

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

16. The EIA Directive was repealed on 17 February 2012 and codified and replaced by Directive 2011/92/EU,¹⁰ with Article 11 of the new directive corresponding to Article 10a of the EIA Directive. In view of the time of the facts in the present case, the EIA Directive is applicable.

C – National law

17. Paragraph 61 of the *Verwaltungsgerichtsordnung* (Rules of Procedure of the Administrative Courts) (‘the *VwGO*’)¹¹ provides that:

‘The following shall have capacity to take part in proceedings:

- 1. natural and legal persons,
- 2. associations, in so far as they are so entitled ...’

10 — Directive 2011/92/EC of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

11 — As amended by the Notice of 19 March 1991 (BGBl I, p. 686).

18. Paragraph 46 of the *Verwaltungsverfahrensgesetz* (Law on administrative procedure) ('the *VwVfG*'),¹² concerning the consequences of defects of form and procedure, provides:

'An application for the annulment of an administrative act which is not invalid under Paragraph 44 cannot be made solely on the ground that it was adopted in infringement of provisions governing procedure, form or territorial competence, where it is clear that that infringement has not affected the substance of the decision.'

19. The provisions implementing the rules on appeals contained in Directive 2003/35 are to be found in the *Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG* (Law concerning supplementary provisions on the remedies available in environmental matters pursuant to EC Directive 2003/35/EC) (Law on remedies in environmental matters) ('the *UmwRG*').¹³ Paragraph 1(1) of that Law provides:

'This Law shall apply to actions challenging

1. Decisions within the meaning of Paragraph 2(3) of the *Gesetz über die Umweltverträglichkeitsprüfung* (Law on Environmental Impact Assessments) ('the *UVPG*') concerning the permissibility of projects in respect of which, in accordance with

(a) the *UVPG* ...,

there may be an obligation to carry out an environmental impact assessment.'

20. Paragraph 4 of the *UmwRG* reads:

'(1) An application for the annulment of a decision on the lawfulness of a project within the meaning of Paragraph 1(1), first sentence, point 1, may be made if ...

1. an environmental impact assessment or
2. a preliminary assessment of the requirement in the individual case of an environmental impact assessment

as required in accordance with the provisions of the *UVPG* has not been carried out and that omission has not been made good. ...

(3) Subparagraphs (1) and (2) shall apply *mutatis mutandis* to actions by the parties provided for in Paragraph 61, points 1 and 2, of the *Verwaltungsgerichtsordnung*.'

21. As a transitional and temporary provision, Paragraph 5(1) of the *UmwRG* provides that: '[t]his Law shall apply to proceedings as provided for in Paragraph 1(1), first sentence, which were or should have been initiated after 25 June 2005 ...'.

22. Paragraph 2 of the *UVPG*¹⁴ contains the following provision:

'(1) The environmental impact assessment shall be an integral part of the administrative procedures for making decisions on the permissibility of projects. ...

¹² — As amended by the Notice of 23 January 2003 (BGBl I, p. 102).

¹³ — Of 7 December 2006 (BGBl I, p. 2816). The amendment of that Law by the *Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften* (Law amending the Law on the remedies available in environmental matters and other environmental legislation) of 21 January 2013 (BGBl I, p. 95) does not form part of the subject-matter of these proceedings.

¹⁴ — As amended by the Notice of 24 February 2010 (BGBl I, p. 94).

(3) For the purposes of the first sentence of subparagraph 1, “decisions” mean

1. Authorisations, permissions, ... planning approvals ...’

II – Facts and main proceedings

23. The main proceedings concern an action brought against a planning approval decision, adopted under the relevant water legislation by the *Land* of Rheinland-Pfalz, relating to the construction of a flood retention scheme to the south of the cities of Mannheim and Ludwigshafen (Waldsee/Altrip/Neuhofen) on the Upper Rhine.

24. The planned flood retention scheme covers an area of approximately 327 ha. Part of that area is to be flooded regularly, depending on the water level of the Rhine, while another part is to be flooded in the case of extreme flood events in order to protect the low-lying residential, commercial and infrastructure areas of the Rhine flats. The planned scheme is intended to protect against a once-in-every-200-years flood event. Numerous construction measures are planned in connection with the establishment of the flood retention scheme.

25. The planning relates primarily to land and woodlands used for agricultural purposes. However, part of the retention scheme is to be located in the ‘Rheinniederung Speyer-Ludwigshafen’ fauna-flora-habitat site (FFH site) notified under the Habitats Directive in 2004. There is an additional FFH site in the vicinity of the project, as well as two European special protection areas for birds.

26. By letter of 31 January 2002, the lower water authority of the defendant *Land*, as the agency responsible for the project, applied to the Struktur- und Genehmigungsdirektion Süd (Structure and Approval Directorate, Southern Region) of the *Land* of Rheinland-Pfalz for official approval of the plan to build the flood retention scheme. The plan was officially approved by decision of 20 June 2006.

27. The Municipality of Altrip, Gebrüder Hört GbR and Mr Schneider (‘the applicants’) brought an action against that planning approval decision. They claimed inter alia that there were substantial defects in the environmental impact assessment (EIA) carried out for the purposes of the flood retention scheme.

28. 12% of the territory of the Municipality of Altrip is covered by the planned flood retention basins. The Municipality also owns several plots of land in the area of the officially approved project.

29. Gebrüder Hört GbR is a civil-law partnership which grows fruit and vegetables. Its partners are owners and tenants of land located within the planned retention scheme, some of which is also to be used for the construction of dykes.

30. Mr Schneider owns several plots of land located close to the planned flood retention scheme, including a residential plot and plots on a recreational site which are used as a campsite.

31. By judgment of 13 December 2007, the Verwaltungsgericht dismissed the action.

32. By judgment of 12 February 2009, the Oberverwaltungsgericht (Higher Administrative Court) of the *Land* of Rheinland-Pfalz dismissed the appeal brought by the applicants against that judgment. That court took the view that the applicants had no standing to plead defects in the environmental impact assessment on the basis of the UmwRG because, in accordance with Paragraph 5(1) of that Law, the UmwRG applies only to proceedings initiated after 25 June 2005. There was therefore no need to determine whether the applicants have any right at all under Paragraph 4(1) of the UmwRG

to have the planning approval decision annulled in the event of the incorrect implementation of an EIA, even though, according to its wording, that provision covers only the complete absence of an EIA. It was also uncertain whether the applicants satisfied the requirement of a causal link laid down in the case-law of the Bundesverwaltungsgericht (Federal Administrative Court).

33. The applicants lodged an appeal on a point of law with the Bundesverwaltungsgericht.

III – Request for a preliminary ruling and procedure before the Court of Justice

34. Like the Oberverwaltungsgericht Rheinland-Pfalz before it, the Bundesverwaltungsgericht considers that, pursuant to Paragraph 5(1) of the UmwRG, which provides that the UmwRG is to apply only to proceedings initiated after 25 June 2005, it is precluded from applying that law not least on grounds of time. It has doubts, however, as to whether this is consistent with the requirements of EU law.

35. The Bundesverwaltungsgericht takes the view that, even if the UmwRG were applicable *ratione temporis*, a complaint by the applicants to the effect that the EIA was defective would have no prospect of success taking into account the way in which Directive 2003/35 has been transposed into German law. In accordance with Paragraph 4(1) of the UmwRG, which is applicable in accordance with Paragraph 4(3) of the UmwRG and Paragraph 61, point 1, of the VwGO, an application for the annulment of a decision may be made only if the necessary EIA or the necessary preliminary assessment of the requirement in the individual case for an environmental impact assessment was not carried out at all and that omission was not made good. A different interpretation of Paragraph 4(1) of the UmwRG, it states, is not possible in the light of the wording and history of that provision. After all, although, in the draft of the UmwRG,¹⁵ it was originally considered necessary, against the background of the judgment in *Wells*,¹⁶ for greater account to be taken of procedural errors, a provision to that effect did not make it through to the final text adopted in the course of the legislative process. The Bundesverwaltungsgericht has doubts as to whether that rule, too, satisfies the requirements of the directive.

36. If that restriction of the means of challenging a decision is not permissible, the Bundesverwaltungsgericht asks whether the criteria consistently applied by the national courts, which limit the prospects of success of a judicial challenge to the procedural legality of a decision, are in conformity with EU law.

37. In the light of those considerations, the Bundesverwaltungsgericht, by order of 10 January 2012, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 267 of the TFEU:

- ‘(1) Is Article 6(1) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC to be interpreted as meaning that Member States were required to declare the rules of national law adopted to implement Article 10a of Directive 85/337/EEC applicable also to those official permit procedures which had been initiated before 25 June 2005 but in which the permits were not issued until after that date?’

15 — BT-Drucks. (Bundestag printed paper) 16/2495.

16 — Case C-201/02 *Wells* [2004] ECR I-723.

(2) If Question 1 is answered in the affirmative:

Is Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, to be interpreted as meaning that Member States were required to extend the applicability of the rules of national law adopted in implementation of Article 10a of Directive 85/337/EEC for the purpose of challenging the procedural legality of a decision to include cases in which an environmental impact assessment was carried out but was incorrect?

(3) If Question 2 is answered in the affirmative:

In cases in which, in accordance with Article 10a(1)(b) of Directive 85/337/EEC, the administrative procedural law of a Member State lays down in principle that access to a judicial review procedure for members of the public concerned is conditional upon maintaining the impairment of a right, is Article 10a of Directive 85/337/EEC to be interpreted as meaning

- (a) that a challenge before a court to the procedural legality of decisions to which the provisions of this Directive on public participation are applicable can be successful and lead to the decision being set aside only if, in the circumstances of the case, there is a definite possibility that the contested decision would have been different without the procedural error and if, at the same time, the procedural error affected a substantive legal position to which the applicant was entitled, or
- (b) that, in a challenge before a court to procedural legality, procedural errors in decisions to which the provisions of the Directive on public participation are applicable must be considerable on a wider scale?

If it is necessary to answer the above question as in b):

Which substantive requirements should apply to procedural errors, in order for these to be taken into account in challenges before a court to the procedural legality of the decision in favour of an applicant?

38. Written observations have been submitted by the applicants in the main proceedings, the *Land of Rheinland-Pfalz*, the Federal Republic of Germany, Ireland and the Commission.

39. The same parties presented oral argument at the hearing on 16 January 2013.

IV – Legal assessment

40. The Bundesverwaltungsgericht has referred to the Court three questions all of which concern the access to a review procedure granted by Article 10a of the EIA Directive, the second and third questions each being raised only in the event that the previous question is answered in the affirmative. The first question is intended to clarify the applicability *ratione temporis* of the provision in question. If the Court considers that provision to be applicable *ratione temporis*, in the second and third questions, it must address the scope of such a review. The second question concerns the permissibility of restricting the applicability of the rules of national law adopted in implementation of Article 10a of the EIA Directive for the purpose of enabling a challenge to the procedural legality of a decision to cases in which an environmental impact assessment has not been carried out. If such a

restriction is not lawful, the third question seeks to clarify the scope of the review available, and in particular whether the conditions of a causal link and impairment of a subjective right which the national courts attach to the success of a challenge to the procedural legality of a decision are in conformity with EU law.

A – *Admissibility*

41. Ireland considers the second and third questions to be inadmissible. It submits that the order of the Bundesverwaltungsgericht contains no information on the defects which the applicants claim to exist in the EIA. To that extent, the Court is being asked to rule on hypothetical questions the answers to which have no bearing on the dispute.

42. In accordance with the settled case-law of the Court, it is in principle for the national court before which the proceedings are pending to determine, having regard to the particular features of the case, both the need for a preliminary ruling and the relevance of the questions which it refers to the Court.¹⁷

43. The Court may depart from that principle only if ‘it is quite obvious’¹⁸ that the interpretation of EU law is irrelevant to the case pending before it. Accordingly, the Court has only rarely concluded, in the light of the referring court’s submissions on the national law and the facts of the case, that the questions raised are purely hypothetical in nature¹⁹ or indeed that the proceedings were artificially created.²⁰

44. The order of the Bundesverwaltungsgericht shows that the EIA required for the project at issue was carried out and was criticised as defective by the applicants. It does not, however, make clear which defects the applicants claimed to exist in their application.

45. This does not, however, render the second and third questions inadmissible. With regard to the second question, this is apparent not least from the fact that, according to the information supplied by the Bundesverwaltungsgericht, current German law provides that, if an EIA has been carried out, no right to have the decision annulled exists, no matter what type of procedural error is claimed. According to the referring court, the mere fact of the EIA’s being open to review, if that were the case, would in itself cause the proceedings to be referred back to the Oberverwaltungsgericht. It is in that event that the issue raised by third question arises, that is to say the conformity with EU law of the criteria previously applied by the courts under German law or of other criteria which the Bundesverwaltungsgericht, by its own account, is required to prescribe by way of parameters for the legal assessment to be carried out by the Oberverwaltungsgericht. Even though the lack of detail as to the nature of the procedural errors in the present case does not permit a definitive, detailed answer to the third question, as the Commission rightly notes, the Court none the less has sufficient information to enable it to give a useful answer in the context of the relationship of cooperation between the Court of Justice and the referring court.

46. The second and third questions are therefore admissible.

17 — Case C-83/78 *Redmond* [1978] ECR I-2347, paragraph 25, and Case C-134/94 *Esso Española* [1995] ECR I-4223, paragraph 9.

18 — Case C-126/80 *Salonia* [1981] ECR I-1563, paragraph 6.

19 — Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraphs 31-34.

20 — Case C-104/79 *Foglia* [1980] ECR I-745, paragraphs 10-11.

B – *First question*

47. By its first question, the Bundesverwaltungsgericht asks whether Article 10a of the EIA Directive, inserted by Directive 2003/35, is applicable *ratione temporis* in the light of Paragraph 5(1) of the UmwRG, which is contained in the national law transposing Directive 2003/35. In this regard, Directive 2003/35 provides that Member States must comply with that directive by 25 June 2005 at the latest (first sentence of Article 6(1)). The question is, however, whether this means that Member States must grant the access to a review procedure that is provided for by Article 10a of the EIA Directive for official permit proceedings initiated after that date, or whether such access must also be granted for proceedings which were initiated before that date but in which the permits were not issued until after that date.

48. The Federal Republic of Germany and Ireland take the view that Directive 2003/35 does not require the Member States to make the possibility of review provided for in Article 10a of the EIA Directive available for permit proceedings which were initiated before the end of the time-limit for transposing Directive 2003/35, even if the permit was not issued until after the end of that time-limit. Their observations on the other questions referred are therefore made in the alternative. The *Land* of Rheinland-Pfalz endorses the view taken by the Federal Republic of Germany.

49. The applicants, on the other hand, submit that Article 6(1) of Directive 2003/35 requires the Member States to apply the national rules transposing Article 10a of the EIA Directive to official permit proceedings in which the permit was issued after 25 June 2005, irrespective of when those proceedings were initiated. The Commission, too, considers Article 10a of the EIA Directive to be applicable to permit proceedings initiated prior to 25 June 2005.

50. In my view, Article 10a of the EIA Directive is applicable to situations such as that in this case.

51. Member States are required to transpose directives into national law within the time-limit prescribed in each of them.²¹ Rights granted by a directive are to be granted within that time-limit, in so far the directive does not expressly provide for any exceptions. Failure by a Member State to fulfil that obligation may, subject to well-established conditions, render the relevant provisions of the directive directly effective.²²

52. That principle can be problematic where it means that a new provision must be applied to a situation which has already come into being or has even come to an end. In cases where a legal act of the European Union does not expressly adopt a transitional provision for such a circumstance, the Court determines the applicability *ratione temporis* of such an act by means of an interpretation taking into account the principles of legal certainty (prohibition of retroactivity), protection of legitimate expectations and preservation of the effectiveness of the legal act.²³

21 — See, inter alia, Case C-68/11 *Commission v Italy* [2012] ECR, paragraph 60.

22 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 11.

23 — See Joined Cases C-212/80 to C-217/80 *Meridionale Industria Salumi and Others* [1981] ECR I-2735, paragraph 10.

53. The Court has repeatedly been called upon to apply that principle. It thus found that procedural provisions are also applicable to proceedings pending at the time of the entry into force of those provisions but that substantive rules of EU law are generally applicable only to situations which have arisen after their entry into force.²⁴ On the other hand, a new provision is in principle applicable to the future effects of a situation.²⁵ As regards the obligation to carry out an EIA, the Court has held that that obligation does not apply if the application for consent for a project was formally lodged before the date on which the time-limit for transposing the EIA Directive expired.²⁶

54. The present case concerns the question whether the new remedy guaranteed by Article 10a of the EIA Directive with effect from the end of the time-limit for transposing that directive is applicable to permit proceedings which had already been initiated at that stage. Directive 2003/35 contains no transitional rules for that circumstance.

55. An interpretation of Article 10a of the EIA Directive taking into account the principles of legal certainty (prohibition of retroactivity), protection of legitimate expectations and preservation of the practical effectiveness of the directive indicates that that provision must be applied to official permit proceedings which were initiated before the expiry of the time-limit for transposing Directive 2003/35 but had not yet been definitively concluded at that stage.

56. The interest in an efficient and timely transposition of the directive supports the proposition that Article 10a of the EIA Directive is applicable with effect from the expiry of the time-limit for transposition. Even if one contends — as Germany and Ireland do — that there will be a small element of retroactivity²⁷ in the application of new legal remedies to proceedings that were on going at the time when those remedies were created, the principles of legal certainty and protection of legitimate expectations do not preclude the application of that provision in such cases. It is those principles, rather than a classification into rules of procedural and substantive law, which would be of little help in situations such as that in this case, which are decisive in determining the interpretation of the directive with regard to its applicability *ratione temporis*.

57. Contrary to what Germany and Ireland have argued, the Court's case-law on the applicability *ratione temporis* of the obligation to carry out an EIA does not indicate otherwise.

58. In the context of that case-law, the Court of Justice took into account the fact that the EIA Directive increasingly covers large-scale projects which take a long time to implement. An additional delay to procedures already initiated as a result of the specific requirements imposed by the directive affects situations already established.²⁸ To this extent, the project developer is entitled to rely on the assumptions as to how the procedure would progress which it made at the time when it submitted its application and has no reason to expect the procedure to be made more cumbersome.

59. As the Bundesverwaltungsgericht rightly points out, no new requirements with respect to the administrative procedure or ongoing judicial proceedings are created in the present case. The aim here is rather to improve access to procedures for reviewing compliance with legal provisions which were already binding. The principle of protection of legitimate expectations cannot include the

24 — *Meridionale Industria Salumi and Others* (cited in footnote 23, paragraph 10); Opinion of Advocate General Trstenjak in Case C-482/09 *Budějovický Budvar* [2011] ECR, point 106; Opinion of Advocate General Kokott in Case C-17/10 *Toshiba Corporation and Others* [2012] ECR, points 42-46.

25 — Case C-68/69 *Brock* [1970] ECR I-171, paragraph 7, Case C-270/84 *Licata v CES* [1986] ECR I-2305, paragraph 31, Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraph 43, and Case C-428/08 *Monsanto Technology* [2010] ECR I-6765, paragraph 66.

26 — Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23, *Wells* (cited in footnote 15, paragraph 43), and Case C-416/10 *Krízán and Others* [2013] ECR, paragraph 94.

27 — On the issue of retroactivity, see, in addition to the case-law cited in the previous footnotes, Tridimas, T., *The General Principles of EU Law*, OUP, Oxford, 2nd edition 2006, pp. 252-273.

28 — *Gedeputeerde Staten van Noord-Holland* (cited in footnote 26, paragraph 24).

expectation that there will be no review of compliance with applicable law. It is true that, when it comes to extending legal remedies, delays must in practice be expected in the case of large-scale projects. These must, however, be regarded as nothing more than an inevitable consequence of the judicial review of already binding provisions. The project developer has to accept such delays. The interest in the practical effectiveness of the directive takes precedence in this regard.

60. The interest in an efficient and timely transposition of the directive is also reinforced in the present case by the fact that the directive gives effect to the provisions of the Aarhus Convention, which entered into force for the Community on 17 February 2005 and is binding on the institutions of the European Union and on the Member States pursuant to Article 216(2) TFEU.²⁹ If Article 10a of the EIA Directive were applicable only to proceedings initiated after the expiry of the time-limit for transposition, the access to a review procedure which Article 9(2) of the Aarhus Convention requires to be guaranteed would not be granted for a number of years given the considerable length of the relevant permit procedures.

61. It must therefore be concluded that Article 6(1) of Directive 2003/35 is to be interpreted as meaning that Member States have an obligation to declare the rules of national law adopted to implement Article 10a of the EIA Directive applicable also to official permit procedures which were initiated before 25 June 2005 but at that date had not yet been definitively completed. It is therefore necessary to answer the second question, raised in the event of an affirmative answer to the first question.

C – Second question

62. By its second question, the Bundesverwaltungsgericht wishes to ascertain whether Article 10a of the EIA Directive requires Member States to extend the applicability of the rules of national law adopted in implementation of Article 10a of the EIA Directive for the purpose of enabling a challenge to the procedural legality of a decision to include cases in which an environmental impact assessment was carried out but was incorrect.

63. All the parties to the proceedings, with the exception of Ireland, take the view that Article 10a of the EIA Directive requires Member States to extend the remedy of judicial review to include cases in which an environmental impact assessment was carried out incorrectly. The Federal Republic of Germany is of the opinion that German law already fulfils those requirements inasmuch as Paragraph 4(1) of the UmwRG in conjunction with Paragraph 46 of the VwVfG provides that an application for the annulment of an approval decision can also be made where an EIA has been carried out incorrectly. Given the lack of information as to the nature of the errors complained of in this case, Ireland refers to the procedural autonomy of the Member States, which must be exercised consistently with the objectives of the directive.

64. With regard to the observations of the Federal Republic of Germany, I would point out first of all that the Court does not have jurisdiction to interpret national law. In the context of the relationship of cooperation with the national courts, it must to this extent rely on what those courts say about their national law.

²⁹ — On the status of the Aarhus Convention in EU law, see Case C-240/09 *Lesoochranárske zoskupenie* [2011] ECR I-1255, paragraphs 29-31.

65. The wording of Article 10a of the EIA Directive itself makes clear the fundamental scope of the review available under the procedure provided for. The provision requires Member States to ensure that members of the public concerned who fulfil either of the two conditions laid down in that article have ‘access to a review procedure before a court of law ... *to challenge the substantive or procedural legality of decisions* ... subject to the public participation provisions of this Directive’.³⁰ The text highlighted transposes word for word Article 9(2) of the Aarhus Convention.³¹

66. Consequently, the Court held in *Trianel* that that provision does not in any way limit the pleas that can be put forward in support of the action in question.³²

67. Restricting the means of challenging a permit procedure requiring an EIA to cases in which the EIA was not carried out (‘complete absence’) is not compatible with those parameters. A complaint to the effect that the EIA is incorrect cannot in principle be excluded.

68. The answer to the second question must therefore be that Article 10a of the EIA Directive is to be interpreted as meaning that the review procedure provided for in that provision must also include the possibility of challenging the procedural legality of a decision in cases where an EIA was carried out but was incorrect. It is therefore necessary to answer the third and final question referred by the Bundesverwaltungsgericht, raised in the event that the review procedure extends to cases involving an incorrect EIA.

D – *Third question*

69. By its third question, the referring court seeks to clarify the extent to which challenges before a court to the procedural legality of decisions subject to the provisions of the EIA Directive on public participation are possible and must lead to the decision being set aside in cases where, in accordance with Article 10a(1)(b) of the EIA Directive, the administrative procedural law of a Member State lays down in principle that access to a judicial review procedure for members of the public concerned is conditional upon *maintenance of the impairment of a right*. In this regard, the national court wishes to ascertain in particular whether two of the restrictions on the relevance of procedural errors which are cumulatively applied by the national courts, that is to say the requirement of a causal link and the effect on a substantive legal position of the applicant, are permissible.

1. The criteria applied by the national courts

70. For a better understanding of those two criteria applied by the national courts, it is appropriate to present them, with the requisite brevity, by reference to the submissions of the parties to the proceedings and the order for reference.

71. The ‘requirement of a causal link’ states that, if a decision is to be successfully challenged on the basis of a procedural error, there must, in the circumstances of the case, be a definite possibility that the contested decision would have been different without the procedural error.³³

³⁰ — Emphasis added.

³¹ — In the English and French version the word ‘substantive’ and ‘procedural’ in the Aarhus Convention are joined by the conjunction ‘and’ but by the conjunction ‘or’ in the EIA Directive. That is merely an editorial change.

³² — *Trianel* (cited in footnote 2, paragraph 37).

³³ — See inter alia the judgment of the Bundesverwaltungsgericht of 8 June 1995, 4 C 4.94, and the judgment of the Bundesverwaltungsgericht of 13 December 2007, 4 C 9.06.

72. In addition, the procedural error must affect a ‘substantive legal position’ to which the applicant is entitled. According to the Bundesverwaltungsgericht, the national case-law states, however, that the UVPG and the procedural provisions of other specialist laws do not confer independently enforceable procedural positions on persons affected by a project subject to an EIA.³⁴ As is clear from the submissions of the parties to the proceedings, the criterion requiring an effect on a substantive legal position to which the applicant is entitled is also significant from the point of view whether the action is well-founded. This means that that criterion restricts the scope of the review sought by those actions which satisfy the requirement of standing in the context of admissibility — typically, for example, because the applicant relies on a possible impairment of his right of ownership.³⁵

2. The positions of the parties

73. The parties take clearly differing views on the third question. The applicants consider that the two criteria described above are not in conformity with EU law. Procedural errors must instead be considered more broadly. On the basis of the second paragraph of Article 263 TFEU, infringements of essential procedural requirements must in any event be taken into consideration in judicial challenges to the procedural legality of decisions, unless it can clearly be ruled out in the individual case concerned that the error substantively influenced the outcome of the decision. Legal provisions relating to public participation and Article 3 of the EIA Directive constitute essential procedural requirements in this regard.

74. In the context of the procedural autonomy enjoyed by the Member States, the Federal Republic of Germany considers the causal-link criterion developed by the courts to be in conformity with EU law. The *Land* of Rheinland-Pfalz Palatinate endorses that view.

75. Ireland considers that, in the light of the procedural autonomy of the Member States, it is for the Member States themselves to determine which acts, omissions or decisions are subject to review under Article 10a of the EIA Directive and what constitutes an impairment of a right, although that determination must be made consistently with the objective of the directive, that is to say to guarantee access to legal protection for the public concerned.

76. Finally, the Commission is of the opinion that, in the substantive analysis, the national court must at least review all the rules of procedural and substantive law arising from EU law and the provisions transposing them into national law, and not confine its examination to the provisions conferring standing or the infringement of a substantive legal position.

77. Serious procedural errors must not be subject to a requirement of a causal link. Less significant procedural errors, however, do not lead to the annulment of a decision if the authority can conclusively demonstrate that, in the circumstances of the case, there is no definite possibility that the contested decision would have been different without the procedural error.

78. Procedural errors in decisions subject to the provisions of the directive on public participation must be considered to be notable within the context of a challenge in the courts, provided that they are not insignificant to achievement of the objectives of the EIA Directive.

34 — See also the Opinion of Advocate General Sharpston in *Trianel* (cited in footnote 2, point 34).

35 — See Winter, G., Individualrechtsschutz im deutschen Umweltrecht unter dem Einfluss des Gemeinschaftsrechts, NVwZ 1999, 467.

3. Interpretation of Article 10a of the EIA Directive

79. These proceedings are not the first opportunity the Court has had to consider the interpretation of Article 10a of the EIA Directive. At the start of my observations, I pointed out that the *Trianel* case in particular had provided an opportunity to examine that provision.

80. In that case, the Court looked essentially at the scope of access for non-governmental organisations within the meaning of Article 1(2) of the EIA Directive to a review procedure within the meaning of Article 10a of the same directive. The Court held in this regard that such non-governmental organisations may not be refused the opportunity, in an action brought under Article 10a of the EIA Directive against a relevant approval decision, to plead before a court the infringement of provisions which have arisen from EU law and are aimed at environmental protection, because those provisions protect only the interests of the general public and not the legal interests of individuals. It can be inferred from that judgment in this regard that such a restriction may not be applied either at the level of the admissibility of the action or at the level of its well-foundedness.³⁶ The Federal Republic of Germany, whose national law had given rise to the reference for a preliminary ruling in *Trianel*, took the action required in response to that judgment.³⁷

81. In contrast to *Trianel*, these proceedings concern natural and legal persons who, in accordance with Article 1(2) of the EIA Directive, are all members of the public concerned but do not constitute a non-governmental organisation as mentioned there.

82. I have already stated in my answer to the second question that, in the case of such persons, Article 10a of the EIA Directive does not allow the possibility of challenging the relevant decisions to be restricted to cases where a necessary EIA has not been carried out.

83. This certainly does not mean, however, that, in Article 10a of the EIA Directive, EU law lays down detailed rules on the scope of the review afforded by that remedy. Rather, it is the Court's case-law that, by virtue of the procedural autonomy which they enjoy, Member States have, in principle, a degree of discretion in the implementation of Article 10a of the EIA Directive (and Article 9(2) of the Aarhus Convention, to which the former provision gives effect). To that extent, they can themselves lay down the rules governing the procedure by which the access to legal protection in question is granted. They are subject to two limitations in this regard. The rules must not be less favourable than those governing similar domestic situations (principle of equivalence) and they must not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).³⁸

84. From the point of view of EU law, the criteria governing the scope of the review provided for in Article 10a of the EIA Directive follow in particular from the principle of effectiveness. There is no indication of any infringement of the principle of equivalence in these proceedings.

85. As I have already explained in the context of my proposed answer to the second question, the wording of Article 10a of the EIA Directive is clear in relation to the review of the procedural legality of decisions under the procedure provided for in that article. In this regard, it does not in any way limit the pleas that may be put forward in support of the action in question.

³⁶ — *Trianel* (cited in footnote 2, paragraph 60).

³⁷ — The national law was adjusted first in the context of case-law; see the judgment of the *Bundesverwaltungsgericht* of 29 September 2011, 7 C 21.09. Since then, the relevant law has been amended: Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften (Law amending the Law on the remedies available in environmental matters and other environmental legislation) of 21 January 2013 (BGBl I, p. 95), see BT-Drucks. 17/10957.

³⁸ — *Wells* (cited in footnote 15, paragraph 67), Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others* [2011] I-9711, paragraph 52, and *Trianel* (cited in footnote 2, paragraph 43).

86. However, Article 10a of the EIA Directive allows Member States to make access by members of the public concerned to the review procedure provided for in that article subject to a condition. As an expression of their procedural autonomy, Member States can choose between two alternatives. The first alternative is the possession of a ‘sufficient interest’. The second alternative, and the one chosen by Germany, is the maintenance of ‘impairment of a right, where the administrative procedural law of a Member State requires this as a precondition’. Furthermore, in accordance with Article 10a of the EIA Directive, the Member States themselves are to determine what constitutes impairment of a right. That determination must, however, be made consistently with the objective of giving the public concerned wide access to justice.

87. Do those two alternatives listed in Article 10a have an effect on the scope of the examination carried out in the context of the review procedure that must be made available?

88. The wording of that provision suggests that the two alternatives set out in Article 10a of the EIA Directive each describe a condition for the admissibility of the action in question. If that condition is met, an examination of the ‘substantive and procedural legality of decisions’ must be carried out. The Court, too, expressly refers, in relation to those alternatives, to ‘the conditions for the admissibility of actions’.³⁹

89. An interpretation of Article 10a of the EIA Directive that is consistent with international law, taking into account Article 9(2) of the Aarhus Convention,⁴⁰ confirms that the two alternatives set out in Article 10a of the EIA Directive are intended to make it possible to restrict the admissibility of the review procedure, not the scope of the examination carried out as part of that procedure. After all, the Implementation Guide available for use as an aid to interpreting the Convention⁴¹ refers to the criteria in question, tellingly, as ‘standing’ criteria.⁴²

90. In this regard, I endorse the view expressed by Advocate General Sharpston, whose explanation of the two alternatives is also that they were necessary to enable the States signatory to the Aarhus Convention to take account of the different national conditions governing standing.⁴³

91. With regard to the scope of the procedural examination, it therefore remains the case that the EIA Directive provides for the review of the procedural legality of decisions and does not in any way limit the pleas that may be put forward in support of such an action. In accordance with the principle of effectiveness, that remedy must not be rendered impossible in practice or excessively difficult in relation to provisions arising from EU law and aimed at environmental protection. A national system of remedies that meets those criteria is also consistent with the second subparagraph of Article 19(1) TEU, which states that Member States are to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. Given the lack of information concerning the procedural errors specifically complained of, it is not possible to comment more extensively on the scope of the review.

39 — *Trianel* (cited in footnote 2, paragraph 38).

40 — See recital 9 in the preamble to Directive 2003/35.

41 — Case C-182/10 *Solvay and Others* [2012] ECR, paragraph 28.

42 — United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 2nd edition 2013, p. 202-204.

43 — Opinion of Advocate General Sharpston in *Trianel* (cited in footnote 2, point 44).

4. Review of the national criteria

92. I should now like to examine, first of all, whether the criterion requiring an effect on a substantive legal position of the applicant, as described by the Bundesverwaltungsgericht in the context of Article 10a of the EIA Directive, is in conformity with the requirements of that directive. Commentators on administrative law in the Member State concerned have focused intensively on this topic in recent years and, influenced in part by the case-law in *Trianel*, have fiercely debated the extent to which the requirement of impairment of a subjective right can be maintained in the area of environmental law, including in the present context of procedural errors in the EIA.⁴⁴

93. A careful interpretation of Article 10a of the EIA Directive, in particular from the point of view of its spirit and purpose, shows that the criterion in the form described by the Bundesverwaltungsgericht is not consistent with the requirements of the directive.

94. As I have indicated above, the wording of Article 10a provides for a review procedure for challenging (inter alia) procedural legality, without any indication that it restricts the pleas put forward in support of the challenge. In this regard, that provision does allow access to the review procedure to be restricted to those members of the public concerned who maintain that a right has been impaired. That concept is defined by the Member States themselves, taking expressly into account the objective of giving the public concerned wide access to justice. However, as I have again already indicated, that criterion is a permitted criterion of admissibility, not a potential restriction of the scope of the review. It cannot therefore serve to justify a restriction of the scope of the review.

95. It must also be borne in mind that the Aarhus Convention, which Article 10a of the EIA Directive is intended to implement, provides a valuable indication of the purpose of that provision. Article 1 of the Convention states that it is intended to contribute to the protection of the right to live in an environment adequate to a person's well-being. To that end, it lays down certain procedural provisions (access to information, public participation) and grants effective access to justice.

96. Recitals 7 and 8 in the preamble to the Convention provide further clarification of the background to the right of access to justice in environmental matters. Citizens are guaranteed access to justice in order to enable them to exercise their right to a healthy environment and to fulfil their duty to protect and improve the environment for the benefit of present and future generations.

97. There are, in my opinion, two conclusions to be drawn from the foregoing. First, procedural provisions and compliance with such provisions perform an essential function in protecting granted rights in the present context of environmental law too. This explains the growing importance of participation rights in environmental law, which are now part and parcel not only of legitimising decisions but also of improving environmental protection.⁴⁵ That understanding of the procedure also explains the value of carrying out an EIA correctly.⁴⁶ Against that background, it becomes clear why Article 10a of the EIA Directive refers to the review of substantive and procedural legality at one and the same time.

44 — See Kment, M., *Europarechtswidrigkeit des § 4 I UmwRG?*, NVwZ 2012, 481; Siegel, T., *Zur Einklagbarkeit der Umweltverträglichkeit*, DÖV 2012, 709; Ziekow, J., *Das Umwelt-Rechtsbehelfsgesetz im System des deutschen Rechtsschutzes*, NVwZ 2007, 259. Previous seminal works: Calliess, C., *Feinstaub im Rechtsschutz deutscher Verwaltungsgerichte*, NVwZ 2006, 1; Schoch, F., *Die europäische Perspektive des Verwaltungsverfahrens- und Verwaltungsprozessrechts*, in: Schmidt-Assmann, E. and Hoffmann-Riem, W. (eds.), *Strukturen des Europäischen Verwaltungsrechts*, Nomos, Baden-Baden, 1999, p. 279; Kokott, J., *Europäisierung des Verwaltungsprozessrechts*, Die Verwaltung 31 (1998), 335.

45 — Ebbesson, J., *Public Participation*, in: Bodansky D. and others (Eds.), *The Oxford Handbook of International Environmental Law*, Oxford, OUP, 2007, p. 681.

46 — Clément, M., *Droit Européen de l'Environnement*, Bruxelles, Larcier, 2nd edition 2012, p. 119.

98. Secondly, the Aarhus Convention does not view protection of the environment as a function specific to non-governmental organisations created for that purpose, but regards individuals as having the right, indeed the duty, to pursue environmental interests.⁴⁷ To this extent, a restriction on the scope of the review to be carried out in the case of actions brought by individuals cannot be justified by arguing that environmental protection organisations are generally able to champion environmental interests. With regard to the right to bring an action, it is true that the second and third sentences of the third paragraph of Article 10a put environmental protection organisations in a privileged position inasmuch as it provides that they have rights which may be impaired.⁴⁸ As regards substance, however, there is nothing to indicate that members of the public concerned are in a worse position than environmental protection organisations. As the aforementioned provisions of the Aarhus Convention show, the citizen himself becomes the implementing authority for environmental protection,⁴⁹ a task which, as the applicants point out, environmental protection organisations are able to take on only to a limited extent because of insufficient financial resources.

99. In the light of the foregoing, national law may not exclude questions of procedural legality in the (environmental law) context of the EIA Directive from the scope of the review carried out by the courts in the case of actions brought by members of the public concerned. This would infringe the principle of effectiveness and would not constitute an appropriate transposition of Article 10a of the EIA Directive in accordance with EU law. If a criterion requiring a claim of impairment of a subjective right excludes provisions arising from EU law and aimed at environmental protection from the scope of the examination carried out as part of the review procedure under Article 10a of the EIA Directive, which the Bundesverwaltungsgericht claims to be the case, it cannot be upheld in my opinion.

100. The foregoing background also affords an understanding of the Court's finding in *Trianel* to the effect that 'the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 10a of Directive 85/337 ...'.⁵⁰ The term 'individual public-law rights' must be interpreted as meaning that provisions of EU law which are aimed at environmental protection may be relied on by individuals for substantive purposes. To this extent, as the right to live in an environment adequate to a person's health and well-being, referred to in Article 1 of the Aarhus Convention, also indicates, there is a convergence between the objective and subjective conceptions of the protection of rights.

101. The Convention's Compliance Committee also regards the exclusion of environmental-law claims from actionable claims on the ground that actions relating to the rights of neighbours were restricted to subjective rights and the exclusion of environmental law from actions relating to the rights of neighbours as an infringement of Article 9(2). Even though that finding is not binding on the Court,⁵¹ it nevertheless supports my interpretation of the Convention.⁵²

47 — Recitals 7 and 8 in the preamble to the Aarhus Convention.

48 — *Trianel* (cited in footnote 2, paragraphs 40 and 42).

49 — The concept of the citizen as guardian of compliance with the law is by no means unfamiliar in European law (judgment in Case 26/62 *van Gend & Loos* [1963] ECR 1). See Weiler, J.H.H., 'The Transformation of Europe', in: *The Constitution of Europe*, CUP, Cambridge, 1999, 10, 20.

50 — *Trianel* (cited in footnote 2, paragraph 45).

51 — See Article 15 of the Aarhus Convention, which provides for the non-confrontational, non-judicial and consultation-based review of compliance with the provisions of the Convention, and Meeting of the Parties, Decision 1/7, Review of Compliance, UN Doc. ECE/MP.PP/2/Add.8 of 2 April 2004.

52 — Economic Commission for Europe, Findings and recommendations with regard to communication ACCC/C/2010/48 concerning compliance by Austria. Adopted by the Compliance Committee on 16 December 2011, UN Doc. ECE/MP.PP/C.1/2012/4 of 17 April 2012, p. 14. In the absence of adequate information, the Committee did not find that an infringement had been committed and argued by way of hypothesis.

102. Similar standards must be applied in relation to the causal-link principle. Here too, the Member States undoubtedly enjoy procedural autonomy. Such autonomy does not in principle rule out the use of a causal-link criterion for the purposes of assessing the relevance of procedural errors. If such a criterion is used, however, it is important that the principles of equivalence and effectiveness are observed. The requirement of a causal link, too, therefore, must be measured in particular against the condition of effectiveness.⁵³ Once again, there is no indication of an infringement of the principle of equivalence.

103. Accordingly, the requirement of a causal link must not obstruct the exercise of rights arising from Article 10a of the EIA Directive.

104. As I mentioned earlier, the area with which we are concerned here is in fact one in which procedure has a special role to play in guaranteeing effective environmental protection. Access to a procedure for reviewing procedural errors is effective, however, only if the success of the complaint is not precluded from the outset. The causal-link criterion must, not least in the present context of EU environmental law, be applied in a manner commensurate with the special importance of the procedure and must not have the effect of excluding procedural errors from the scope of review.

105. This certainly does not mean that every procedural error must lead to the annulment of a decision. This is apparent not least from the parallel with the consequences of errors in European Union legal acts. The second paragraph of Article 263 TFEU provides in that respect that the Court of Justice has jurisdiction in ‘actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of ... infringement of an essential procedural requirement.’ In its case-law, the Court — for reasons of simplicity — applies that rule in such a way that an act is automatically void if it infringes particularly important procedural provisions,⁵⁴ while, in the case of less important provisions, the infringement must produce an effect.⁵⁵ The criteria developed in the context of that provision cannot automatically be transposed to Article 10a of the EIA Directive because of the procedural autonomy enjoyed by the Member States.

106. Rather, the causal-link criterion must be applied in accordance with the principle of effectiveness. This means that that criterion, in particular the way in which the burden of demonstration and proof is applied in the context of that criterion, must not make it impossible in practice to rely on procedural provisions arising from EU law and aimed at environmental protection. This means that, in the case of particularly important procedural provisions, the requirement of a causal link for the purposes of the outcome of the administrative procedure must be dispensed with entirely.

V – Conclusion

107. For the reasons set out above, I propose that the Court give the following answers to the questions referred by the Bundesverwaltungsgericht:

- (1) Article 6(1) of Directive 2003/35 is to be interpreted as meaning that Member States are required to declare the rules of national law adopted to implement Article 10a of the EIA Directive applicable also to official permit procedures which were initiated before 25 June 2005 but at that date had not yet been definitively concluded.

53 — See von Danwitz, T., *Europäisches Verwaltungsrecht*, Springer, Berlin, 2008, p. 541.

54 — Case C-138/79 *Roquette Frères v Council* [1980] ECR I-3333, paragraph 33.

55 — See, with differences as regards the effect specifically required, Joined Cases C-209/78 to C-215/78 and C-218/78 *van Landewyck and Others v Commission* [1980] ECR I-3125, paragraph 47, and Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 31.

- (2) Article 10a of the EIA Directive is to be interpreted as meaning that the review procedure provided for in that article must also include the possibility of challenging the procedural legality of a decision in cases where an EIA was carried out but was incorrect.
- (3) In cases in which, in accordance with Article 10a(1)(b) of the EIA Directive, the administrative procedural law of a Member State lays down that access to a judicial review procedure for members of the public concerned is conditional upon maintaining the impairment of a right, Article 10a of the EIA Directive is to be interpreted as meaning that
- the prospects of success of a challenge before a court to the procedural legality of decisions which are subject to that directive's provisions on public participation may not be restricted to cases in which the procedural error also affected a substantive legal position to which the applicant was entitled, in so far as this has the effect of excluding provisions arising from EU law and aimed at environmental protection from the scope of the review;
 - the prospects of success of a challenge before a court to the procedural legality of decisions which are subject to the provisions of that directive on public participation may not be restricted to cases in which, in the circumstances of the case, there is a definite possibility that the contested decision would have been different without the procedural error, in so far as this makes it impossible in practice to rely on provisions arising from EU law and aimed at environmental protection and in so far as that criterion also relates to particularly important procedural provisions.

So that the requirements applicable to procedural errors can be taken into account for the benefit of an applicant in challenges before a court to the procedural legality of a decision, their assessment is subject to the procedural autonomy of the Member States, which, however, must not make the pursuit of a legal remedy in relation to provisions arising from EU law and aimed at environmental protection impossible in practice, excessively difficult or subject to rules less favourable than those governing similar domestic situations.