

OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 8 January 2004¹

1. The Commission seeks a declaration, under Article 226 EC, that the Italian Republic has failed to fulfil its obligations under Article 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment² ('the Directive').

I — The Community legal framework

3. The Directive is a preventive measure which, by evaluating the effects of certain projects on the environment, is aimed at preventing the damage⁴ liable to be caused by the execution of schemes or installations and by other interventions in the natural surroundings and landscape.⁵

4. In accordance with Article 2(1):

2. The Commission complains that the competent authorities failed adequately to check whether the construction of a road to bypass the city of Teramo³ required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive.

'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.

...'

1 — Original language: Spanish.

2 — OJ 1985 L 174, p. 40. The Directive was amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5).

3 — The official title of the project is Strada Statale n. 80 del 'Gran Sasso d'Italia' — Variante, tra Teramo e Giulianova, Lotto Zero dalla progr. Va Km.ca 72+300 alla località Cartecchio ('Lotto Zero').

4 — That aim is noted in the first and sixth recitals in the preamble to the Directive.

5 — Article 1(1) and (2) of the Directive.

5. Article 4 provides that:

6. Point 10(d) of Annex II refers to the construction of roads other than motorways and express roads.⁸

'1. Subject to Article 2(3),⁶ projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

II — The Italian legislation

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

7. Article 40(1) of Law 146 of 22 February 1994⁹ required the Italian Government to specify, within 60 days following the entry into force of the Law, the conditions, criteria and technical rules governing the application of the environmental impact assessment procedure to the projects listed in Annex II to the Directive.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.⁷

8. That obligation was discharged by means of Article 1 of the Presidential Decree of 12 April 1996¹⁰ which, in relation to the regions and the autonomous provinces of Trento and Bolzano, provides that an evaluation of the impact on the environment of the

6 — Under Article 2(3), the application of the Directive may be excluded in exceptional cases.

7 — That is the version which applies to these proceedings. Following the adoption of Directive 97/11, the wording of Article 4(2) was amended to read as follows: 'Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through: (a) a case by case examination, or (b) thresholds or criteria set by the Member State whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States may decide to apply both procedures referred to in (a) and (b)'

8 — In addition, Point 7 of Annex I refers to the construction of motorways, express roads and lines for long-distance railway traffic and of airports with a basic runway length of 2 100 m or more.

9 — The Law, published in the *Gazzetta Ufficiale della Repubblica Italiana* (GU RI), ordinary supplement to No 52, 4 March 1994, is entitled *Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee* — Legge comunitaria 1993.

10 — *Atto di indirizzo e coordinamento per l'attuazione dell'art. 40, comma 1, della legge 22 febbraio 1994, n. 146, concernente disposizioni in materia di valutazione di impatto ambientale* (GU RI, general series, No 210, 7 September 1996, p. 281).

projects referred to in Annexes A and B must be carried out in conformity with the Directive, following the guidelines set out in the Decree (paragraph 1).

11. Article 10 governs the checking procedure and stipulates that the public- or private-law body which initiates the work¹³ must instigate the screening process and must provide, in that regard, a description of the project and of the information necessary to ascertain, and, where appropriate, to assess, its effects on the environment (paragraph 1). If no specific ruling is given within 60 days, it is understood that an assessment is not required (paragraph 2).

9. Projects listed in Annex B which are, in part, sited within the protected natural areas defined in Law 394 of 6 December 1991¹¹ always require to be assessed (paragraph 4). In the infrastructure category, Annex B refers to the construction of alternative roads in urban areas and the expansion of existing roads of four or more lanes which are more than 1 500 metres in length (Point 7(h)).

12. The Abruzzo region implemented the Presidential Decree of 12 April 1996 by means of Law 112 of 23 September 1997.¹⁴

III — The prior administrative procedure

10. However, in the case of projects sited outside those natural areas, the competent authorities must check, in accordance with the methods stipulated in Article 10 and by reference to the factors set out in Annex D,¹² whether the characteristics of those projects are such that their impact must be assessed (paragraph 6).

13. On 11 May 1998, the Commission asked the Italian authorities for information regarding the Lotto Zero route, because it had come to the Commission's attention that no checks had been carried out to establish

11 — Legge quadro sulle aree protette (GURI, general series, No 292, 13 December 1991).

12 — Annex D refers to the characteristics of the project (inter alia, size, use of natural resources, risk of accidents, effects on the natural or cultural heritage) and its location (for example, the quality of the natural resources and whether they are capable of regeneration, and the resilience of the environment).

13 — The Italian provision uses the term *committente*, which is also used in the Directive, and which the Spanish version, which uses the expression *maestro de obras*, defines in Article 1(2) as the person who '*solicita una autorización relativa a un proyecto privado*' (the applicant for authorisation for a private project) or '*la autoridad pública que toma la iniciativa respecto de un proyecto*' (the public authority which initiates a project).

14 — *Bollettino Ufficiale della Regione Abruzzo* No 17, 21 October 1997.

whether an environmental impact assessment was required, notwithstanding the existence of a document concerning the compatibility of the project with the natural surroundings which had not been communicated to the Commission.¹⁵

14. That request was complied with and a number of authorities of the defendant Member State forwarded explanatory letters¹⁶ to the Commission, from which it appears that the project in question relates to the construction of a two-lane road, which is 10.50 metres in width and of an unspecified length, one section of which crosses the municipal district of Teramo, affecting the right slope of the basin of the Tordino river, and is 5 440 metres in length, 2 260 metres of which is made up of viaducts and 930 metres of which is made up of tunnels.

15. By Regional Decree 25/99 of 15 November 1999,¹⁷ the Abruzzo region concluded that the project respected the natural surroundings because it did not affect the protected zones referred to in State Law 394/91 and Regional Law 38/96,¹⁸ and it therefore decided not to require that the project be assessed for its effects.

16. On 16 June 2000, Italy's Permanent Representative to the European Union forwarded to the Commission a letter from the Ministry of the Environment dated 30 May 2000,¹⁹ stating that the aforementioned decision had been adopted on the basis of a favourable report from the Regional Committee for the Assessment of Effects on the Environment.²⁰ That report, which was not sent to the Commission, referred in turn to the opinion of the road engineer, which was also favourable but to which no reference was made in the Regional Decree.

17. Having allowed the Italian authorities the opportunity to provide an explanation,²¹ on 18 July 2001, the Commission, which was not persuaded by their arguments,²² sent a reasoned opinion,²³ stating that, by failing to check whether the project concerned, which comes under Annex II to the Directive, required to be assessed under Articles 5 to 10 of the Directive, the Italian authorities had failed to fulfil their obligation under Article 4 (2).

18. Moreover, a number of administrative acts relating to the execution of the Lotto

15 — The document in question is the study which the defendant Member State lodged with the defence (report annexed to Regional Decree 25/99), the first page of which was produced subsequently at the request of the Court.

16 — Italy's Permanent Representative to the European Union did so on 23 July 1998, 26 May, 2 June and 6 September (two letters) 1999, and 16 June 2000 (documents 2 to 7 attached to the application); the Ministry of the Environment did so in letters dated 3 December 1998 and 29 September 1999 (documents 8 and 9); and the special commissioner for the Abruzzo region did so in letters dated 20 August and 11 October 1999 (documents 10 and 11).

17 — Document No 1 attached to the defence.

18 — Law of 21 June 1996: Legge quadro sulle aree protette della Regione Abruzzo per l'Appennino parco d'Europa (*Bollettino Ufficiale della Regione Abruzzo*, No 12, 28 June 1996).

19 — Document No 7 attached to the defence.

20 — No 3/76 of 22 October 1999.

21 — Letter of 24 October 2000 which is attached to the application as document No 12.

22 — Letters from Italy's Permanent Representative to the European Union, the first, dated 26 December 2000, forwarding a memo from the Ministry of Public Works (document No 13 attached to the application), and the second, dated 5 January 2001, forwarding a memo from the president of the Italian Council of Ministers and a letter from the Abruzzo Regional Government (document No 14).

23 — Document No 16 attached to the application.

Zero project have been challenged by the Associazione Italia Nostra-Onlus and the Associazione Italiana per il World Wildlife Fund (WWF) in the Lombardy Regional Administrative Court. By order of 21 June 2000, that court dismissed the interim application for suspension.²⁴ At the time of writing, there is no information as to whether the substantive issue has been definitively resolved.

IV — The claims of the parties and the procedure before the Court

19. On 14 March 2002, the Commission brought this action, seeking a declaration from the Court that the Italian Republic has failed to comply with Community law for the reasons set out in the reasoned opinion, a claim which that Member State disputes.

²⁴ — Documents No 2 and 3 attached to the defence. The decision on that application was based on the following grounds: '... as concerns the assessment of whether the public utility works concerned are compatible with the landscape and the environment, from a first examination of the decisions taken by the authorities charged with environmental protection, those decisions do not appear to be affected by the illegality claimed in the application; ... in view of the type of works to be executed under the project, the environmental impact assessment was conducted in conformity with the methods stipulated in Article 1(4) and (5) of the Presidential Decree of 12 April 1996; ... the impact of the road building works on the environment is justified by the greater general interest consideration of limiting vehicular traffic in Teramo city centre, thereby preserving the environmental conditions and the conditions affecting the healthiness of the places concerned'.

20. The Commission maintains that, pursuant to Article 4(2) of the Directive and Article 1(6) of the Presidential Decree of 12 April 1996, the Italian authorities are obliged to check the impact of the Lotto Zero route on the environment. The Commission goes on to state that the decision not to submit the project to an environmental impact assessment, adopted in Regional Decree 25/99, is not explained by reasons.

21. The Italian Government responds that the project was checked and that it was possible to adopt the decision by administrative silence, without providing reasons, but that, in any event, the decision contained in the Presidential Decree of 12 April 1996 is explained by reasons because it refers to the report from the Regional Committee for the Assessment of Effects on the Environment.

22. The Commission contends that its complaint essentially relates to the fact that the Italian authorities failed to check whether the characteristics of the project required it to be assessed for its impact, a failure which is evidenced by the absence of reasons in Decree 25/99.

23. The Italian Government did not submit a rejoinder. Neither party requested that an oral phase be opened.

24. The Court addressed a number of questions to the parties, the replies to which were received on 27 October and 3 November 2003 after they had been translated. Once the Chamber had analysed those replies, it decided, on 19 November, that it was not necessary to conduct a hearing.

Those projects are listed in Annex I to the Directive and are referred to in Article 1(4).

V — Analysis of the alleged breach

25. The objective of the Directive is that any project likely to have significant effects on the environment should undergo an assessment of its impact prior to authorisation.²⁵ It is therefore necessary to distinguish two stages. During the first stage, checks are made to ascertain whether the planned works are liable to have significant effects on the environment; during the second stage, those effects are assessed in accordance with the provisions of Articles 5 to 10 of the Directive.²⁶

27. However, the impact of other projects is less clear, and therefore, under the second paragraph of Article 4(2), it is for the Member States to decide whether such projects are to be subject to the procedure laid down in Articles 5 to 10. That applies to the projects referred to in Annex II, and the Member States must specify the projects from that list which require to be assessed, defining them by type, or establishing the criteria and/or thresholds necessary to make the decision, or using other methods.²⁷ They can also do so by designating them in a general manner by legislation or by specifying, in an administrative document, the criteria previously laid down in legislation.

26. In the case of certain projects, there is a legal presumption that they will always have significant effects on the environment, and, accordingly, their impact on the environment must be assessed without exception.

28. The Member States therefore have a measure of discretion to decide which of the projects listed in Annex II require an environmental impact assessment. However, that right is limited by Article 2(1) of the Directive which sets out the main objective, as a result of which, projects likely to have significant effects on the environment are

²⁵ – See Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 45.

²⁶ – Advocate General Geelhoed made that distinction in the Opinion he delivered on 12 July 2001 in Case C-24/99 *Commission v Germany*, which was closed without judgment by order of 18 February 2002.

²⁷ – The Court mentions those alternatives, which are derived from Article 4(2) of the Directive, in the judgment in *WWF*, paragraphs 42 and 43.

always to be subject to an impact assessment.²⁸

once their impact on the environment has been established.³¹ The road-building operations at issue in these proceedings fall within the second type of project.

29. Where the first method is chosen and the definition is laid down in general terms in the measure, there is a duty to check, at the stage when those abstract provisions are applied, whether the characteristics of the project are such that it will have significant effects on the environment.²⁹ Therefore, in those situations, the general rule applies again: if the relevant checks reveal that the effects are significant, those effects must be assessed.

31. As the Commission rightly points out in the reply, the dispute therefore centres on the issue of whether the Italian competent authorities examined the characteristics of the Lotto Zero project in order to establish whether there would be any damage to the environment and, if so, whether they made their consent conditional on a prior assessment of the impact of the project on the environment.

30. The Italian legislation follows a similar scheme, grouping projects by category and by reference to their location. Some projects³⁰ are automatically made subject to an impact assessment; others, however, are only subject to an assessment if it is appropriate

32. That supervision was carried out, in the formal sense, inasmuch as Regional Decree 25/99 of 15 November 1999 states that it is not necessary to assess the effects of the project on the natural surroundings on the grounds that it does not affect a protected zone and the Regional Committee for the Assessment of Effects on the Environment came to a favourable conclusion in the meeting held on 22 October 1999. However, the committee's report is as lacking in detail as the Decree,³² in that it merely contains a reference to the positive opinion which was issued by the civil engineer on 6 July 1999,

28 — See Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50; Case C-301/95 *Commission v Germany* [1998] ECR I-6135, paragraph 45; *WWF*, paragraph 36; and Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraph 64.

29 — In *Kraaijeveld*, the Court stated that where a Member State exceeds the limits of its discretion and the relevant national provisions must be set aside, it is for the national authorities, according to their respective powers, to take the measures necessary to ensure that projects are examined by analysing their likely effects on the environment (paragraphs 59 to 61 and point 3(c) of the operative part). Following the same line of reasoning, where that discretion is exercised abstractly and according to categories of projects, it is essential to establish in each case whether the proposed works are liable to have significant effects on the environment.

30 — The ones referred to in Annex B to the Presidential Decree, which are, in part, sited in protected natural zones (Article 1 (4)).

31 — Projects listed in Annex B which are sited outside the protected zones (Article 1(6)).

32 — The minutes of the meeting merely state that the committee reached a favourable conclusion, which follows the opinion of the civil engineer second page, final sentence, of document No 7 attached to the application).

under number 8634, and which, like the administrative decision and the conclusion of the committee, is not explained by reasons.³³

Italian Republic has committed the breach complained of by the Commission.

33. That document, which the defendant Member State submitted with its reply to the questions formulated by the Court, is not a report on the environmental impact of the public works under discussion. It is clear from simply reading the document that it is an authorisation, 'solely for hydraulic purposes',³⁴ to cross the Tordino river and to carry out work on the riverbed relating to the construction of a number of viaducts.

34. The report attached to the defence is not the opinion of the civil engineer referred to in the decision of the regional committee; instead it is an environmental compatibility study conducted in December 1997 at the request of a company called ERM Italia Srl.

36. An administrative decision which concludes that the particular features of a project are not such that it is damaging to the environment must be explained by reasons.³⁵ According to the general rule, which I have already set out, all projects must be made subject to an assessment of their effects prior to authorisation; therefore, if a particular project is excluded from that requirement because it is not harmful, the reasons on which that finding was based must still be disclosed. Environmental protection currently occupies a prominent position among Community policies.³⁶ Furthermore, the Member States also have a crucial responsibility in that area.³⁷ Community citizens are entitled to demand fulfilment of that responsibility³⁸ under Article 37 of the Charter of Fundamental

35 — The fact that, in this case, there is a specific act (Decree 25/99) means that it is not necessary to consider the issue of administrative silence which the defendant Government raises in the defence. However, the observations I will go on to make in this paragraph of the Opinion make it clear that silence by way of a response is not admissible, under the scheme of the Directive, as a means of excluding the requirement that a project must be assessed for its effects on the environment.

36 — The importance of the environment is reflected in the EC Treaty, which, since the Single European Act, has a whole title on the environment (Title XIX of Part Three), aimed at promoting its protection and improvement, at protecting human health, and at promoting prudent and rational use of natural resources (Article 174(1)).

37 — See Paragraph 20a of the Fundamental Law of the Federal Republic of Germany; Article 45(2) of the Spanish Constitution; Article 14a of the Finnish Charter of Government of 17 July 1919 (the Finnish Constitution); Article 24(1) of the Greek Constitution; Article 21 of the Fundamental Law of the Kingdom of the Netherlands; and Article 9(e) of the Constitution of the Portuguese Republic.

38 — Article 45(1) of the Spanish Constitution confers the right to enjoy an acceptable environment. Article 66 of the Portuguese Constitution makes a similar declaration. In Sweden, Article 18(3) of Chapter Two of the Law of 24 November 1994 provides that everyone has the right of access to nature.

33 — The defendant Government's complaint that the issue of reasons is 'new' was unjustified because it was raised in paragraphs 11 and 12 of the Commission's reasoned opinion. It is immaterial whether the matter is raised in the operative part, in the grounds, or in the summary of the facts.

34 — That expression is repeated several times in the document.

Rights of the European Union,³⁹ which guarantees a high level of environmental protection and the improvement of the quality of the environment. Accordingly, the main elements of any measure which strays from the general criteria aimed at protecting the environment must be duly specified, since that is an embodiment of the rational exercise of power, as well as being a tool which, if necessary, enables the measure to be reviewed subsequently.

37. More specifically, the Italian law implementing the Directive stipulates that the decision must be explained by reasons. The decision to exclude a project from the requirement that it must be assessed for its impact on the environment is made by reference to its characteristics and the location of the work, in accordance with the criteria and factors set out in Annex D to the Presidential Decree of 12 April 1996. The decision must, therefore, be explained by reasons which relate specifically to those criteria and factors.

38. Naturally, it is possible to provide reasons by reference, and in such cases the decision-making body may follow the opinion of advisory or consultative agencies, provided that two conditions are satisfied: first, the external opinion which is followed must be explained by reasons; second, it must be given by organisations or persons charged with updating, advising and informing the authority responsible for delivering the decision, and they must provide the opinion as part of the decision-making process. That is the only way of ensuring that a decision is taken objectively and in accordance with general interest considera-

tions. Therefore, a report which does not meet those characteristics, and is issued in unknown circumstances without regard to who issued it, will not suffice.

39. In this case, the duty to provide reasons has not been fulfilled. Neither Regional Decree 25/99 nor the favourable report from the Regional Committee for the Assessment of Effects on the Environment sets out any considerations specific to it. The decree refers to the report, which, in turn, refers to the report from the civil engineer, who, as I have already pointed out, was dealing with a different matter, namely the authorisation to cross the Tordino river and to carry out work on the riverbed relating to the construction of a number of viaducts.

40. Those shortcomings are not compensated for by the 'environmental compatibility study' which the defendant Member State attached to the defence and the first page of which was placed in the case-file at the request of the Court. On the one hand, that study is not the document referred to by the regional committee, from which it follows that it was not available to the committee and the committee did not take it into consideration when arriving at its conclusion. On the other hand, the document was not drawn up on behalf of the public authorities charged with making the decision, but rather on behalf of a private body (ERM Italia Srl) which is not recorded as having any involvement in the project. There is a significant difference between providing reasons by reference and attempting to find reasons on which to base a decision after it has been made.

41. Therefore, the Italian authorities did indeed fail to carry out the required checks

39 — OJ 2000 C 364, p. 1.

because a conclusion which is not based on reasons amounts to no conclusion at all.

that, in accordance with the principles of direct effect and primacy,⁴⁰ the measures of the defendant Member State which conflict with the Directive may be set aside.⁴¹

42. In the light of the arguments put forward by the parties, it is appropriate to make two points before I finish.

44. The second point is that, for the purposes of analysing the breach, it is immaterial that the authority charged with ensuring compliance with the rules of Community law is a decentralised — or even a local — authority, which is not part of the central authority of the defendant Member State.⁴²

43. The first is that the fact that contentious proceedings are pending before the Lombardy Regional Administrative Court, in which certain acts pertaining to the Lotto Zero project, *inter alia* Regional Decree 25/99, have been challenged, does not preclude the Court of Justice from exercising its jurisdiction because the functions of the two courts do not overlap. The Court of Justice must determine whether the Italian authorities have fulfilled their obligations under the Directive in relation to the Lotto Zero project, and, in the event that they have not, the Court must make a declaration to that effect. It is for the Italian court to give judgment on whether the act it has been asked to review is compatible with the national law transposing the Community provision, and, where appropriate, to rule that the act should be annulled. It is possible that the body of national provisions may conflict with Community law, but, in that case, the national court is entitled to refer the appropriate question to the Court of Justice for a preliminary ruling on interpretation, so

45. In short, it is clear from the considerations set out above that the Italian Republic has committed the breach complained of by the Commission, and, accordingly, the application should be allowed.

VI — Costs

46. Under Article 69(2) of the Rules of Procedure,⁴³ the costs must be borne by the defendant Member State.

⁴⁰ — See Case 26/62 *Van Gend & Loos* [1963] ECR 1, and Case 6/64 *Costa v E.N.E.L.* [1964] ECR 1141. On the direct effect of directives, see Case 8/81 *Becker* [1982] ECR 53.

⁴¹ — See Case 106/77 *Simmenthal* [1978] ECR 629.

⁴² — See paragraph 7 of the order in Case C-180/97 *Regione Toscana v Commission* [1997] ECR I-5245, cited in paragraph 45 of the application.

⁴³ — Consolidated version published in OJ 2003 C 193, p. 1.

VII — Conclusion

47. I propose that the Court, upholding the application, should:

- (1) declare that the Italian Republic has failed to fulfil its obligations under Article 4 (2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, in that the Abruzzo region failed to check whether the project for the construction of a road to bypass the city of Teramo (the project known as Strada Statale n. 80 del 'Gran Sasso d'Italia' — Variante, tra Teramo e Giulianova, Lotto Zero dalla progr.va Km.ca 72+300 alla località Cartecchio), which falls within Annex II of the Directive, required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive;
- (2) order the Italian Republic to pay the costs.