Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 8 September 2016[1]

Case C-348/15

Stadt Wiener Neustadt

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Environmental policy — Directive 85/337/EEC as amended by Directive 97/11/EC — Assessment of the effects of certain public and private projects on the environment — Scope — Provision adopted by a Member State to remedy a final consent granted despite the lack of an environmental impact assessment — Legal certainty and the protection of legitimate expectations)

I – **Introduction**

1. Several cases involving Austria have shown that that Member State has had great difficulties in applying the EIA Directive,[2] at least in the past.[3] There is a risk that many projects which would have required an assessment of their environmental effects under that directive were completed without one.

2. The present preliminary ruling proceedings concern a provision which has as its subject matter the consequences of such an infringement of the EIA Directive. Under that provision, a project is regarded as having been granted consent in accordance with the Austrian legislation transposing the EIA Directive if three years have elapsed since the grant of the consent given in breach of that legislation. That time limit also restricts the power of the competent authorities to revoke a consent granted in breach of the Austrian legislation.

3. It must therefore be clarified to what extent such a fiction of lawful consent is compatible with EU law. The Court's decision may have significant practical implications not only in Austria but also in other Member States.

1 — Original language: German.

2 — Now Directive 2011/92/EU 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 2011 L 26, p. 1), as last amended by Directive 2014/52/EU of the European Parliament and the Council of 16 April 2014 (OJ 2014 L 124, p 1).

3 — See, for example, judgments of 14 March 2013, *Leth* (C-420/11, EU:C:2013:166); of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203); of 11 February 2015, *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79); and of 16 April 2015, *Gruber* (C-570/13, EU:C:2015:231).

II – **Legal context**

A – *EU law*

4. The request for a preliminary ruling relates to an exception to the obligation to carry out an environmental impact assessment that was laid down first in Article 1(5)[4] and later in Article 1(4)[5] of the EIA Directive:

'This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process'.

5. That provision can now be found, with minor modifications, in Article 2(5) of the EIA Directive.

6. In addition, reference must be made to the fundamental obligation contained in Article 2(1) of the EIA Directive, which was not affected by the aforementioned versions 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 a requirement for development consent and an assessment with regard to their effects ...'

B – *Austrian law*

7. Material to the present case are two provisions of the Austrian Law on Environmental Impact Assessments (Umweltverträglichkeitsprüfungsgesetz) ('UVP-G 2000'), in the 2009 version applicable to the situation forming the subject matter of the action before the national court. Paragraph 3(6) of that Law contains a mandatory time limit for the revocation of consents granted without the necessary environmental impact assessment:

'Consents for projects subject to an assessment as provided for in subparagraphs 1, 2 or 4 shall not be granted before the completion of the environmental impact assessment or the case-by-case assessment, and notices given under administrative provisions shall have no legal effect before the completion of the environmental impact assessment. Consents granted in breach of this provision may be annulled within a period of three years by the authority competent in accordance with Paragraph 39(3)'.

8. Point 4 of Paragraph 46(20) of the UVP-G 2000 provides for a fictional consent, linked to Paragraph 3(6) of that Law, for older projects:

'Projects the consent for which is no longer at risk of annulment under Paragraph 3(6) at the time of entry into force of the Federal Law promulgated in BGBl. I, No 87/2009 shall be regarded as having been granted consent under the present Federal Law'.

III – **Facts and request for a preliminary ruling**

9. According to the records of the Stadt Wiener Neustadt, A.S.A. Abfall Service AG ('ASA Abfall') operates a physico-chemical treatment plant for hazardous waste, a transfer station for waste and a substitute fuel preparation plant, which is the sole subject of the present proceedings.

4 — 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), in the version of Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p 5).

5 — Original version of Directive 2011/92.

10. According to the request for a preliminary ruling, the last-mentioned plant essentially uses a multi-stage process to crush plastic waste and produce an industrially replaceable substitute fuel which is used principally in the cement industry; that plant thus carries out the physical treatment of non-hazardous waste.

11. The plant benefits from consents granted under individual sectoral laws, that is to say industrial plant development consents granted under commercial legislation by the mayor of Wiener Neustadt in 1986 and 1993; those consents gave approval for a treatment capacity of 9 900 tonnes per annum. On 10 December 2002, the First Minister for the Province of Lower Austria granted a consent under waste management legislation for the plant's treatment capacity to be extended to a maximum of 34 000 tonnes per annum. However, that decision does not lay down the maximum volume to be processed per day. That plant does not benefit from a consent granted under the UVP-G 2000, which governs environmental impact assessments in Austria.

12. According to the findings in the national proceedings, the increase in capacity was to be achieved by extending the existing line and constructing a further processing line. Some 17 000 to 21 000 tonnes per annum are produced at present, so the approved capacity has not been exhausted. The reason for this lies in the fact that the second processing line approved by that decision has not yet been constructed.

13. On 19 August 2009, the date of entry into force of the Law of 2009 amending the Law on Environmental Impact Assessments of 2000 ('UVP-G-Novelle 2009'), that final decision was no longer at risk of annulment under Paragraph 3(6) of the UVP-G 2000. Under that provision, consents for projects subject to an obligation to carry out an environmental impact assessment which had been granted under sectoral laws instead of under the UVP-G 2000 could be annulled within a period of three years.

14. By letter of 30 April 2014, the Environmental Ombudsman for Lower Austria asked the Regional Government for Lower Austria to establish whether the facilities, activities and measures operated by ASA Abfall at the Wiener Neustadt site, either separately or as a whole, fulfilled the conditions for the application of the UVP-G 2000 and whether there was therefore an obligation to carry out an environmental impact assessment.

15. By decision of 27 June 2014, the Regional Government for Lower Austria established that the substitute fuel preparation plant was not subject to an obligation to carry out an environmental impact assessment. This was justified by reference to the provision contained in point 4 of Paragraph 46(20) of the UVP-G 2000, which states that, following the expiry of the three-year time limit laid down in Paragraph 3(6) of the UVP-G 2000, old plants are to be regarded as having been granted consent under the UVP-G 2000.

16. The Stadt Wiener Neustadt brought a judicial action against that decision. Following the dismissal of that action at first instance, the Stadt Wiener Neustadt lodged an appeal which is now pending before the Verwaltungsgerichtshof (Supreme Administrative Court). The national court has referred the following question to the Court:

'Does EU law, in particular [the new version of the EIA] Directive …, in particular Article 1(4) thereof, or … [the earlier version of that directive], in particular Article 1(5) thereof, preclude a provision of national law whereby projects subject to an obligation to carry out an environmental impact assessment, which have not benefited from a consent granted under the national Umweltverträglichkeitsprüfungsgesetz 2000 (Law on Environmental Impact Assessments of 2000) … but have benefited only from consents granted under individual sectoral laws (such as the Abfallwirtschaftsgesetz (Law on Waste Management)) which, since 19 August 2009 (date of entry into force of the UVP-G-Novelle 2009 (Law of 2009 amending the Law on Environmental Impact

Assessments)), can no longer be annulled following the expiry of a three-year time limit laid down in national law (Paragraph 3(6) of the UVP-G 2000), are regarded as approved under the UVP G 2000, or is such a provision consistent with the principles of legal certainty and the protection of legitimate expectations established in EU law?'

17. Written observations have been submitted by the Stadt Wiener Neustadt, A.S.A. Abfall Service AG and the European Commission.

IV – **Legal assessment**

18. The request for a preliminary ruling concerns the question of the extent to which it is compatible with the EIA Directive for the lack of a mandatory environmental impact assessment to be remedied by the statutory fiction that the project was granted consent in accordance with the legislation transposing the EIA Directive.

19. The request for a preliminary ruling is not, however, concerned with the questions of whether the disputed waste treatment plant would have required an environmental impact assessment [6] or whether all the requirements of such an assessment had already been fulfilled as part of a different procedure. [7]

20. In order to answer that question, we must first identify the applicable version of the EIA Directive (see in this regard section A), then consider the fundamental obligation to carry out an environmental impact assessment (see in this regard section B), thereafter look at the provision, expressly referred to in the question, concerning the grant of consents for projects through acts of legislation, previously Article 1(4) or (5), now Article 2(5), of the EIA Directive (see in this regard section C) and, finally, examine the principle of effectiveness that governs the implementation of obligations under EU law (see in this regard section D).

A – *The relevant version of the EIA Directive*

21. It is true that the application for a declaratory judgment at issue was brought in 2014 and the final decision will probably not be given until 2017. Nevertheless, the obligation to carry out an environmental impact assessment must be assessed by reference to the provisions which were applicable to the relevant consent. On that basis, the only consent that can be considered is the consent for capacity expansion granted on 10 December 2002, since the other consents were granted before Austria joined the European Union.

22. On 10 December 2002, the applicable legislation was Directive 85/337 as amended by Directive 97/11. Under Article 3(2) of the latter directive, the amendments it introduced were to be applied to development consent applications made as from 14 March 1999.

23. Since ASA Abfall applied for the consent granted on 10 December 2002 on 17 June 2002, [8] the applicable legislation is therefore Directive 85/337 as amended by Directive 97/11.

6 — See, in that regard, judgment of 23 November 2006, *Commission* v *Italy* (C-486/04 [Massafra], EU:C:2006:732, paragraph 40 et seq.).

7 — See my Opinion in *Gruber* (C-570/13, EU:C:2014:2374, points 55 to 59).

8 — P. 12 of the decision of 10 December 2002 (Annex to the written observations of ASA Abfall).

B – *The assessment obligation*

24. The starting point for answering the question referred for a preliminary ruling must be Article 2(1) of the EIA Directive. According to that provision, Member States are to adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue of their nature, size or location are made subject to an assessment with regard to their effects.

25. For that reason, the Court has already held that it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment. Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question, as provided for by the EIA Directive.[9]

26. The fictional consent provided for in Austrian law could have the effect of preventing projects for which consent has been granted in breach of the EIA Directive from being assessed. It must therefore be examined whether the statutory fiction may be based on exceptions to the assessment obligation.

C – *Exceptions to the assessment obligation*

27. As has already been intimated by the order for reference and emphasised by the Stadt Wiener Neustadt and the Commission, the grant of statutory fictional consents for an unknown number of projects that require an environmental impact assessment cannot be based on the exception applicable to the grant of consent for individual projects by means of an act of legislation, as provided for at that time in Article 1(5) of the EIA Directive (later Article 1(4), now, after amendment, Article 2(5)).

28. The reason for this is, first, that the application of that exception requires that the details of the project be adopted by a specific act of legislation, and, secondly, that the Court has already held that the objectives of the directive, including that of supplying information, must be achieved through the legislative process.[10] While the latter requirement was already contained in Article 1(4) or (5) of the earlier version of the directive, it was expressed more clearly in the most recent version of the relevant provision, Article 2(5) of the EIA Directive applicable today.

29. When the fictional development consent provided for in Austrian law was granted, however, the details of the relevant projects and their effects on the environment had not even been ascertained, let alone examined. Accordingly, the provision at issue does not constitute a specific act of legislation which provided consent for particular projects, and the objectives of the EIA Directive were not achieved through the legislative process.

30. That said, the foregoing cannot be taken to mean that the exception applicable to the grant of consent by means of acts of legislation precludes statutory fictional consent. It is simply that that exception makes no provision for the grant of fictional consent for projects that would have required an environmental impact assessment.

9 — Judgment of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraph 65).

10 — Judgment of 16 February 2012, *Solvay and Others* (C-182/10, EU:C:2012:82, paragraph 31 and the case-law cited).

31. For the sake of completeness, it should be noted that the same is true of the other exceptions provided for in the EIA Directive: although not relevant, they too make no provision for statutory fictional consent.

D – *The principle of effectiveness*

32. It should be recalled, however, that the aforementioned [11] obligation to revoke or suspend existing consents that were granted without an environmental impact assessment is limited by the principle of the procedural autonomy of Member States. [12]

33. According to that principle, the detailed procedural rules applicable are, at least in so far as they are not governed by EU law, a matter for the domestic legal order of each Member State. However, they may not be less favourable than those governing similar domestic situations (principle of equivalence) and may not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness). [13]

34. There is nothing in the present case to indicate that there has been an infringement of the principle of equivalence.

1. The retrospective regularisation (remedying) of infringements

35. As regards the principle of effectiveness, while EU law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of EU law, such a possibility should be conceded only if it does not offer the persons concerned the opportunity to circumvent the EU rules or to dispense with applying them and if it remains the exception. [14]

36. It can be concluded, without the need for a more detailed examination to determine which particular 'cases' might justify regularisation or whether there is a risk of circumvention, that the statutory fictional consent provided for in Austrian law is certainly not an exception.

37. It is true that the fiction in question concerns a group of projects which have in principle already been completed, that is to say projects for which consent was granted more than three years before the entry into force of the legislation providing for that fiction. However, it is unclear which of those projects actually benefit from that legislation because they were granted consent without an environmental impact assessment even though one should have been carried out. In order to answer that question, it would be necessary to assess all projects which were granted consent in Austria during the period in question and which are capable of falling within the scope of the EIA Directive but which were not subjected to an environmental impact assessment.

11 — See point 25 above.

12 — Judgment of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraph 65).

13 — See, for example, judgments of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraph 67), and of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 26 and 27).

14 — Judgments of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380, paragraph 57), and of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 87).

38. Furthermore, the Court recently pointed out, in relation to the directive on the assessment of the effects of certain plans and programmes on the environment,[15] which exhibits many points of similarity with the EIA Directive, that, in order to be maintained even on a purely temporary basis, plans and programmes adopted in breach of the former directive must at least undergo an individual assessment and are subject to further strict conditions.[16] Because of the legislative structure of the statutory fictional consent under Austrian law, however, such consent cannot be made subject to individual assessment.

2. Permissibility of mandatory time limits

39. However, it does not follow from the foregoing that consents which should have been subject to an environmental impact assessment but were granted without one must without exception be revoked or suspended in order to enable the relevant projects to be assessed. Rather, it is settled case-law that laying down reasonable time limits within which to bring proceedings in the interests of legal certainty, which protects both the individual and the administrative authority concerned, is compatible with EU law. Such time limits do not in principle make it impossible in practice or excessively difficult to exercise the rights conferred by EU law,[17] and are therefore compatible with the principle of effectiveness.

40. To that extent, the three-year time limit for revoking a consent that was granted without the mandatory environmental impact assessment seems reasonable, if not positively generous, if the persons concerned — such as the Stadt Wiener Neustadt in the main proceedings — were or should have been aware of that consent.[18]

41. In the interests of legal certainty, therefore, the EIA Directive and the principle of effectiveness do not preclude national legislation which makes it impossible for the competent authorities to annul a development consent granted in breach of that directive if three years have elapsed since that consent was granted.

3. The additional obligations under the EIA Directive

42. A reasonable time limit for challenging a consent does not mean that that consent may be assumed to have been granted in accordance with the requirements of the EIA Directive. This is apparent not least from the fact that the Court distinguishes between the regularisation of a consent, which is permissible only exceptionally, and reasonable time limits, which are not exceptional. That distinction also has practical consequences inasmuch as the project at issue, notwithstanding the mandatory time limit, may be subject to additional obligations under the EIA Directive.

43. The Court has already held such obligations to be applicable to situations where it proves to be the case that, since the entry into force of the EIA Directive, works or physical interventions which are to be regarded as a project within the meaning of that directive were carried out on a development without any assessment of their effects on the environment having been carried out at an earlier stage

15 — Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 (OJ 2001 L 197, p. 30).

16 — Judgment of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603, in particular paragraph 43).

17 — Judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188, paragraph 5); of 17 November 1998, *Aprile* (C-228/96, EU:C:1998:544, paragraph 19); of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 56); and of 29 October 2015, *BBVA* (C-8/14, EU:C:2015:731, paragraph 28).

18 — See my Opinion in *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:491, point 108).

in the consent procedure. In those circumstances, the competent authorities must take account of that omission at the stage at which a later consent is granted and ensure that the directive is effective by satisfying themselves that such an assessment is carried out at the very least at that stage of the procedure. [19]

44. So far as concerns the plant at issue here, it does not seem inconceivable, for example, that the construction of the second processing line, for which consent has already been given under waste management legislation, may still require development consent. Such a consent procedure would have to include the environmental impact assessment that was not carried out if this should have been completed at the outset.

45. Neither legal certainty nor the legitimate expectation as to the existence of consent preclude the obligation to rectify the failure to carry out an environmental impact assessment.

46. For the assessment itself does not entail substantive legal consequences in relation to the balancing of the environmental effects with other factors and would not prohibit the completion of projects which are liable to have negative effects on the environment. [20] While it is to be hoped that the identification of significant environmental damage will lead to the adoption of preventive measures or the abandonment of the project, where this is not the case, an environmental impact assessment still has the function of collecting, documenting and disseminating information on the environmental effects of the project. [21]

47. Although the disadvantages for the developer lie primarily in the cost of the assessment, this is a burden which the developer would have had to bear even if the assessment had been carried out at the required time. In any event, any expectation of avoiding that disadvantage does not outweigh the interest of the public affected by a project in obtaining comprehensive information on its environmental impact and commenting on it.

48. The declaration sought in the main proceedings, to the effect that the project requires an environmental impact assessment, would be such as to support the rectification of the failure to carry out such an assessment. For a declaration to that effect removes any further need, in the context of a later consent procedure, to debate whether works carried out in the past should have undergone an assessment the omission of which should be rectified.

49. On the other hand, there is a risk that a statutory fictional consent which is consistent with the EIA Directive will be construed as meaning that the consent in question is not only final but also satisfies all of the requirements laid down in the directive.

50. Consequently, a statutory fiction whereby a project is regarded as having been granted consent in accordance with the EIA Directive if three years have elapsed since the grant of the consent given in breach of that directive is incompatible with that directive and the principle of effectiveness.

V – **Conclusion**

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

(1) In the interest of legal certainty, 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 Council Directive 97/11/EC of 3 March 1997, and the principle of effectiveness do not preclude a national

19 — Judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154, paragraph 37).

20 — Judgment of 14 March 2013, *Leth* (C-420/11, EU:C:2013:166, paragraph 46).

21 — See my Opinion in *Leth* (C-420/11, EU:C:2012:701, point 49 et seq.).

provision which makes it impossible for the competent authorities to annul a development consent granted in breach of that directive if three years have elapsed since that consent was granted.

(2) A statutory fiction whereby a project is regarded as having been granted consent in accordance with Directive 85/337/EEC as amended by Directive 97/11/EC if three years have elapsed since the grant of the consent given in breach of that directive is incompatible with that directive and the principle of effectiveness.