Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

28 February 2018*

(Reference for a preliminary ruling — Environment — Directive 2011/92/EU — Article 4(2) and (3) and Annexes I to III — Environmental impact assessment — Authorisation to carry out work in a plant for the production of electricity from biogas without preliminary examination of the need for an environmental impact assessment — Annulment — Regularisation after the event of the authorisation on the basis of new provisions of national law without preliminary examination of the need for an environmental impact assessment)

In Case C-117/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per le Marche (Regional Administrative Court for Le Marche, Italy), made by decision of 13 January 2017, received at the Court on 6 March 2017, in the proceedings

Comune di Castelbellino

v

Regione Marche,

Ministero per i beni e le attività culturali,

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Regione Marche Servizio Infrastrutture Trasporti Energia — P. F. Rete Elettrica Regionale,

Provincia di Ancona,

the other party to the proceedings being:

Società Agricola 4 C S.S.,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund, President of the Chamber, J.-C. Bonichot (Rapporteur) and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

– the Comune di Castelbellino, by A. Lucchetti, avvocato,

– the Regione Marche, by P. De Bellis, avvocato,

– Società Agricola 4 C S. S., by M. Misiti, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Palatiello, avvocato dello Stato,

– the European Commission, by G. Gattinara and C. Zadra, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 2012 L 26, p. 1).

2 The request has been made in proceedings between, on the one hand, the Comune di Castelbellino (municipality of Castelbellino, Italy) and, on the other hand, the Regione Marche (Marche Region, Italy), the Ministero per i beni e le attività culturali (Ministry for Cultural Assets and Activities, Italy), the Ministero dell'Ambiente e della Tutela del Territorio e del Mare (Ministry for the Environment, Land and Sea, Italy), the Regione Marche Servizio Infrastrutture Trasporti Energia — P. F. Rete Elettrica Regionale and the Provincia di Ancona (Province of Ancona, Italy) concerning the decision by which the Marche Region took the view that there was no need to examine whether it was necessary to subject the project of Società Agricola 4 C S. S. ('4 C'), by which it sought to increase the capacity of a plant for the production of electricity from biogas, to an environmental impact assessment ('an EIA').

Legal context

3 Article 2(1) of Directive 2011/92 provides:

'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. Those projects are defined in Article 4.'

4 Article 4(2) and (3) of that directive states as follows:

'2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.'

5 Annex I to that directive, headed 'Projects referred to in Article 4(1)', provides in paragraph 2(a), that 'thermal power stations and other combustion installations with a heat output of 300 megawatts [MW] or more' form part of those projects.

6 Annex II to the same directive, headed 'Projects referred to in Article 4(2)', provides in paragraph 3 that those projects include 'industrial installations for the production of electricity, steam and hot water (projects not included in Annex I)'.

7 Annex III to Directive 2011/92, headed 'Selection criteria referred to in Article 4(3)', is worded as follows:

'1. Characteristics of projects

The characteristics of projects must be considered having regard, in particular, to:

(a) the size of the project;

(b) the cumulation with other projects;

(c) the use of natural resources;

(d) the production of waste;

(e) pollution and nuisances;

(f) the risk of accidents, having regard in particular to substances or technologies used.

2. Location of projects

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

(a) the existing land use;

(b) the relative abundance, quality and regenerative capacity of natural resources in the area;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas:
   (i) wetlands;
   (ii) coastal zones;
   (iii) mountain and forest areas;
   (iv) nature reserves and parks;
   (v) areas classified or protected under Member States' legislation; special protection areas designated by Member States pursuant to [Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7)] and to [Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7)];

(vi) areas in which the environmental quality standards laid down in Union legislation have already been exceeded;
(vii) densely populated areas;
(viii) landscapes of historical, cultural or archaeological significance.

3. Characteristics of the potential impact

The potential significant effects of projects must be considered in relation to criteria set out in points 1 and 2, and having regard in particular to:

(a) the extent of the impact (geographical area and size of the affected population);

(b) the transfrontier nature of the impact;

(c) the magnitude and complexity of the impact;

(d) the probability of the impact;

(e) the duration, frequency and reversibility of the impact.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 4 C operates a plant for the production of electricity from biogas in the municipality of Castelbellino in the Marche Region ('the plant in question'), the operation of which was authorised by that municipality pursuant to legislation on protection of the landscape.

9 By decision of 20 June 2012, the Marche Region gave 4 C authorisation to carry out the work necessary to increase the capacity of the plant in question from 249 kilowatts (kW) to 999 kW.

10 On the basis of Legge Regione Marche n. 3 (Marche Regional Law No 3) of 26 March 2012 ('Law No 3/2012'), that authorisation was given without the project being made subject to an EIA or even to a prior examination of the need for such an assessment, the nominal power rating of the facility in question being below the 1 MW threshold set by that law.

11 The municipality of Castelbellino brought an action before the referring court, the Tribunale amministrativo regionale per le Marche (Regional Administrative Court for Le Marche, Italy), seeking annulment of that authorisation for infringement of Directive 2011/92.

12 On 22 February 2013, that court dismissed the municipality of Castelbellino's application for interim measures to suspend the contested authorisation.

13 By judgment No 93/2013 of 22 May 2013, the Corte costituzionale (Constitutional Court, Italy) declared Law No 3/2012 partially unconstitutional because it is incompatible with EU law, on the grounds that it did not require all the criteria laid down in Annex III to Directive 2011/92 for the purpose of identifying projects subject to an EIA to be taken into account, in accordance with Article 4(3) of that directive.

14 On 16 April 2015, 4 C submitted a request to the Marche Region seeking confirmation that the plant in question complied with the requirements laid down by Directive 2011/92.

15 It is clear from the order for reference that the provisions of Law No 3/2012, which previously allowed regions to adopt different thresholds for exemption from EIA, and on the basis of which the regional authorities relied in adopting their decision of 20 June 2012, were repealed as a result of Judgment

No 93/2013 of the Corte costituzionale (Constitutional Court) of 22 May 2013. New provisions have been adopted which have established, at national level only, the conditions under which projects of regional interest are exempted from EIA. The threshold above which installations of the kind at issue in the main proceedings are required to undergo an EIA was increased to 50 MW from 1 MW, with the possibility of that threshold being reduced by 50% in certain circumstances.

16 It is in that context that, under the new legal regime, the Marche Region, by decision of 3 June 2015, first, found that the plant in question was exempt from the requirement to carry out a preliminary assessment of the need for an EIA and, second, 'endorsed' the authorisation previously granted on 20 June 2012.

17 However, by judgment of 19 June 2015, the referring court, the Tribunale amministrativo regionale per le Marche (Regional Administrative Court for Le Marche), annulled the authorisation granted by the Marche Region on 20 June 2012, on the ground that it had been given on the basis of legal provisions subsequently declared unconstitutional.

18 4 C brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy).

19 The municipality of Castelbellino brought an action before the referring court for the annulment of the decision of the Marche Region of 3 June 2015.

20 It is in that context that the Tribunale amministrativo regionale per le Marche (Regional Administrative Court for Le Marche) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does [EU law] (and in particular Directive [2011/92], in the version in force on the date of adoption of the … measures [at issue in the main proceedings]) preclude, as a rule, a national rule or administrative practice which allows EIA screening or EIAs to be carried out in respect of projects relating to plants already in existence at the time when the procedure takes place, or does it, on the other hand, allow account to be taken of exceptional circumstances which justify a derogation from the general rule that an EIA is, by nature, a preventative assessment?

(2) More particularly, is such a derogation justified in the case where a new law exempts from an EIA a specific project which would have been subject to screening on the basis of a decision of the national court that declared unconstitutional or disapplied an earlier rule providing for exemption?'

Consideration of the questions referred

21 As a preliminary point, it must be noted that it is apparent from the order for reference that the main proceedings concern a project to increase the capacity of an existing plant for the production of electricity using biogas, in respect of which the regional authorities decided that a preliminary assessment of the need for an EIA was not necessary, in accordance with regional authority legislation which was subsequently declared unconstitutional because it did not require all the criteria listed in Annex III to Directive 2011/92 for the purpose of identifying projects required to undergo an EIA to be taken into account, in accordance with Article 4(3) of that directive.

22 It is also apparent from the order for reference that, following 4 C's request of 16 April 2015, referred to in paragraph 14 above, since the works in question had been carried out, the competent regional authorities considered, on the basis of the new legislation, that a re-examination of the need to carry out an EIA was not necessary.

23 By its two questions, which it is appropriate to examine together, the referring court thus asks, in essence, whether, when a project to increase the capacity of a plant for the production of electricity, such as the project at issue in the main proceedings, has not been subject to a preliminary assessment of the need to carry out an EIA pursuant to provisions of national law subsequently declared incompatible with Directive 2011/92 in that regard, EU law precludes that plant from being subject, after the completion of that project, to a new assessment by the competent authorities for the purpose of verifying whether it complies with that directive and, where appropriate, to an EIA. The referring court also asks whether those authorities are entitled to take the view, on the basis of national law in force at the time they are required to give a decision, that such an EIA is not required.

24 It should be recalled that Article 2(1) of Directive 2011/92 requires that projects likely to have significant effects on the environment, for the purpose of Article 4 of that directive, read in conjunction with Annexes I or II thereto, must be subject to such an assessment before consent is granted (see, to that effect, judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 42, and of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 32).

25 As the Court has previously held, the requirement for such an assessment to be carried out as a preliminary step is justified by the fact it is necessary for the competent authority to take into account effects on the environment at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects (see, to that effect, judgments of 3 July 2008, *Commission* v *Ireland*, C-215/06, EU:C:2008:380, paragraph 58, and of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 33).

26 Article 4(1) of Directive 2011/92 states that, subject to Article 2(4) of that directive, the projects listed in Annex I thereto are to be made subject to assessment in accordance with Articles 5 to 10.

27 For the projects listed in Annex II to Directive 2011/92, Article 4(2) of that directive states that Member States are to determine whether the project is to be made subject to an EIA through a case-by-case examination or through thresholds or criteria set by the Member State concerned.

28 Article 4(3) of Directive 2011/92 adds that when a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III to that directive are to be taken into account.

29 However, Directive 2011/92 does not specify the legal consequences which follow breach of those provisions.

30 Nevertheless, it should be borne in mind that the Court has previously held, in paragraph 43 of the judgment of 26 July 2017, *Comune di Corridonia and Others* (C-196/16 and C-197/16, EU:C:2017:589), that, in the event of failure to carry out an EIA required by EU law, Member States must nullify the unlawful consequences of that failure, and that EU law does not preclude regularisation through the conducting of an impact assessment after the plant concerned has been constructed and has entered into operation, subject to the twofold condition that, first, national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and second, an assessment carried out for regularisation purposes is not conducted solely in respect of the plant's future environmental impact, but also takes into account its environmental impact from the time of its completion.

31 In paragraph 42 of the judgment of 26 July 2017, *Comune di Corridonia and Others* (C-196/16 and C-197/16, EU:C:2017:589), the Court also noted that the facts — first, that the undertakings in question in the case giving rise to that judgment took the necessary steps to arrange for an EIA to be carried out, if necessary, second, that the refusal of the competent authorities to accede to those

requests was based on national rules, the incompatibility of which with EU law was only subsequently established, and, third, that the activities of the plants at issue in that case were suspended — appeared to indicate that the regularisations carried out in that case were not permitted under national law in conditions similar to those in the case leading to the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380, paragraph 61), and did not attempt to circumvent rules of EU law.

32 As a result, under those conditions, where a project has not been subject to a preliminary assessment of the need for an EIA pursuant to provisions incompatible with Directive 2011/92, EU law does not preclude the competent authorities carrying out an assessment of the project, even after its completion, for the purpose of establishing whether or not it must undergo an EIA, where appropriate, on the basis of new national legislation, provided that legislation is compatible with the directive.

33 The national authorities required to make a decision in this context must also take into account the impact on the environment caused by the plant since the completion of the works and there is nothing to prevent them concluding, following that assessment, that an EIA is not required.

34 While it is for the referring court to assess whether the conditions are satisfied in the main proceedings, in the light of the content of the national provisions and the information available to it, the Court nevertheless considers that it may be useful to give the following guidance.

35 First of all, it should be noted that a project for a plant for the production of electricity from biogas with a nominal power rating of less than 1 kW does not come within the scope of paragraph 2(a) of Annex I to Directive 2011/92, which covers thermal power stations and other combustion plants with a heat output of at least 300 MW, but within that of paragraph 3(a) of Annex II to that directive, which covers projects for industrial installations for the production of electricity not included in Annex I.

36 Work to increase the capacity of a plant such as that in question in the main proceedings therefore constitutes a project in respect of which the Member States must determine whether it is to be subject to an EIA in accordance with Article 4(2) and (3) of Directive 2011/92.

37 Next, it follows from the settled case-law of the Court that, where Member States have decided to have recourse to the establishment of thresholds or criteria in accordance with Article 4(2) of Directive 2011/92, the limits of the measure of discretion which is thus conferred upon them are to be found in the obligation set out in Article 2(1) of that directive for projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment, to be subject to an impact assessment before consent is given (see, to that effect, judgment of 20 November 2008, *Commission* v *Ireland*, C-66/06, not published, EU:C:2008:637, paragraph 61 and the case-law cited).

38 Pursuant to Article 4(3) of Directive 2011/92, the Member States are under an obligation to take into account, when establishing those criteria or thresholds, the relevant selection criteria set out in Annex III to that directive (see, to that effect, judgment of 20 November 2008, *Commission* v *Ireland*, C-66/06, not published, EU:C:2008:637, paragraph 62).

39 Furthermore, a Member State which established those thresholds or criteria at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement to carry out an assessment, would exceed the limits of that discretion unless all the projects excluded could, when viewed as a whole, be regarded as not likely to have significant effects on the environment (judgment of 20 November 2008, *Commission* v *Ireland*, C-66/06, not published, EU:C:2008:637, paragraph 65 and the case-law cited).

40 Consequently, the fact that provisions of national law, such as those on the basis of which the Marche Region relied in adopting its decision of 3 June 2015, increased the EIA threshold is not sufficient, in itself, for it to be concluded that those provisions do not comply with Directive 2011/92.

41 Nor can such a finding of non-conformity with EU law be made by virtue of the fact, mentioned by the referring court, that if those provisions had not been adopted it would have been necessary for the project at issue in the main proceedings to be subject to a preliminary assessment of the need for an EIA following Judgment No 93/2013 of the Corte costituzionale (Constitutional Court) of 22 May 2013.

42 In the light of the foregoing, the answer to the questions referred is that, where a project to increase the capacity of a plant for the production of electricity, such as the project at issue in the main proceedings, has not been subject to a preliminary assessment of the need to carry out an EIA pursuant to national legislative provisions subsequently declared incompatible with Directive 2011/92 in that regard, EU law requires Member States to nullify the unlawful consequences of that breach and does not preclude that plant from being subject, after completion of the project, to a new assessment by the competent authorities for the purpose of verifying whether it complies with that directive and, where appropriate, to an EIA, on condition that the national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them. The environmental impact of the project from the time of its completion must also be taken into account. Those authorities are entitled to take the view, on the basis of national provisions in force at the time they are required to give a decision, that such an EIA is not required, in so far as those provisions are compatible with that directive.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Where a project to increase the capacity of a plant for the production of electricity, such as the project at issue in the main proceedings, has not been subject to a preliminary examination of the need to carry out an environmental impact assessment pursuant to national legislative provisions subsequently declared incompatible with 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 in that regard, EU law requires Member States to nullify the unlawful consequences of that breach and does not preclude that plant from being subject, after completion of the project, to a new assessment by the competent authorities for the purpose of verifying whether it complies with that directive and, where appropriate, to an environmental impact assessment, on condition that the national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them. The environmental impact of the project from the time of its completion must also be taken into account. Those authorities are entitled to take the view, on the basis of national provisions in force at the time they are required to give a decision, that such an environmental impact assessment is not required, in so far as those provisions are compatible with that directive.

[Signatures]