



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 21 October 2021<sup>1</sup>

**Case C-463/20**

**Namur-Est Environnement ASBL**

**v**

**Région wallonne,**

**Intervening party:**

**Cimenteries CBR SA**

(Request for a preliminary ruling from the Conseil d'État (Council of State, Belgium))

(Request for a preliminary ruling – Environment – Directive 2011/92/EU – Assessment of the effects of certain public and private projects on the environment – Project for the exploitation of a quarry – Obligation to involve the public before development consent is granted for the project – Concept of development consent – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Directive 2009/147/EC – Conservation of wild birds – Protection of animal, bird and plant species – Decision on a derogation)

## I. Introduction

1. Under the EIA Directive,<sup>2</sup> certain projects require development consent and, prior to that, an environmental impact assessment – that is to say, a report on any significant effects that they may have on the environment – and public participation. If the project may affect strictly protected species under the Habitats Directive<sup>3</sup> or the Birds Directive,<sup>4</sup> such effects must be taken into account in the environmental impact assessment.

2. In the context of the reopening of a quarry in the Belgian region of Wallonia, the present proceedings raise the question as to whether the competent authorities may nevertheless authorise derogations from the protection of strictly protected species even before the environmental impact assessment is carried out. Neither the Habitats Directive nor the Birds Directive nor the applicable Belgian or Walloon law provides for an environmental impact assessment or public participation in respect of decisions on derogations from species protection.

<sup>1</sup> Original language: German.

<sup>2</sup> 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; 'the EIA Directive').

<sup>3</sup> 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), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193) ('the Habitats Directive').

<sup>4</sup> 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), last amended by Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 193) ('the Birds Directive').

However, the referring court takes the view that the development consent under species protection law at issue is a practically necessary precondition for the realisation of a project within the meaning of the EIA Directive, with the result that the latter might preclude such a preliminary decision.

## II. Legal framework

### A. *The EIA Directive*

3. Recital 2 of the EIA Directive specifies the objective of the environmental impact assessment:

‘... Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.’

4. Article 1(2)(c) of the EIA Directive defines the term ‘development consent’ as ‘the decision of the competent authority or authorities which entitles the developer to proceed with the project’.

5. Article 2(1) to (3) of the EIA Directive governs the status of the environmental impact assessment in the development consent procedure:

‘1. 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.

2. The environmental impact assessment may be integrated into the existing procedures for development consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3. Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of [the IPPC Directive<sup>5</sup>].’

6. The environmental impact assessment is described in greater detail in Article 3 of the EIA Directive:

‘The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:

- (a) human beings, fauna and flora;
- (b) soil, water, air, climate and the landscape;
- (c) material assets and the cultural heritage;
- (d) the interaction between the factors referred to in points (a), (b) and (c).’

<sup>5</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8; ‘the IPPC Directive’).

7. Pursuant to Article 4(1) of, and point 19 of Annex I to, the EIA Directive, quarries where the surface of the site exceeds 25 hectares are always to be regarded as projects likely to have significant effects on the environment. Therefore, their effects on the environment must be assessed in accordance with the directive.

8. Article 5(1) of, and point 3 of Annex IV to, the EIA Directive require the developer to supply in an appropriate form a description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, fauna and flora.

9. Article 6 of the EIA Directive contains the fundamental provisions concerning public participation:

‘1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. ...

2. The public shall be informed ... of the following matters early ... and, at the latest, as soon as information can reasonably be provided:

- (a) the request for development consent;
- (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;
- (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
- (d) the nature of possible decisions or, where there is one, the draft decision;
- (e) an indication of the availability of the information gathered pursuant to Article 5;
- (f) an indication of the times and places at which, and the means by which, the relevant information will be made available;
- (g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

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

- (a) any information gathered pursuant to Article 5;
- (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of [Directive 2003/4/EC<sup>6</sup>], information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. ...'

10. The importance of the environmental impact assessment for the development consent procedure is laid down in Article 8 of the EIA Directive:

'The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.'

11. Article 11 of the EIA Directive lays down rules on actions brought against decisions which are subject to public participation under the EIA Directive:

'1. 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.

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

3. 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. ...'

<sup>6</sup> Directive of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (O) 2003 L 41, p. 26).

## ***B. Directive 2014/52/EU***

12. The new version of Article 2(3) of the EIA Directive, introduced by Directive 2014/52,<sup>7</sup> which is not yet applicable in the present proceedings, is also of interest:

‘3. In the case of projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and from [the Habitats Directive] and/or [the Birds Directive], Member States shall, where appropriate, ensure that coordinated and/or joint procedures fulfilling the requirements of that Union legislation are provided for.

In the case of projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and Union legislation other than the Directives listed in the first subparagraph, Member States may provide for coordinated and/or joint procedures.

Under the coordinated procedure referred to in the first and second subparagraphs, Member States shall endeavour to coordinate the various individual assessments of the environmental impact of a particular project, required by the relevant Union legislation, by designating an authority for this purpose, without prejudice to any provisions to the contrary contained in other relevant Union legislation.

Under the joint procedure referred to in the first and second subparagraphs, Member States shall endeavour to provide for a single assessment of the environmental impact of a particular project required by the relevant Union legislation, without prejudice to any provisions to the contrary contained in other relevant Union legislation.

The Commission shall provide guidance regarding the setting up of any coordinated or joint procedures for projects that are simultaneously subject to assessments under this Directive and [the Habitats Directive, the Water Framework Directive,<sup>8</sup> the Birds Directive and Directive 2010/75/EU<sup>9</sup>].’

## ***C. Protection of species***

13. Articles 12 and 13 of, and Annex IV to, the Habitats Directive require the establishment of a system of strict protection for certain species of flora and fauna, prohibiting many forms of detriment caused to those species. Article 16 allows derogation from those protective provisions under certain conditions.

14. Articles 5 and 9 of the Birds Directive provide similar rules for all European bird species.

<sup>7</sup> Directive of the European Parliament and of the Council of 16 April 2014 amending the EIA Directive (OJ 2014 L 124, p. 1).

<sup>8</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1; ‘the Water Framework Directive’).

<sup>9</sup> Directive of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

### III. Facts and request for a preliminary ruling

15. On 4 November 2008, the public limited company Sagrex applied for a single permit to resume working of the Bossimé quarry, to dig a tunnel between the Bossimé and Lives-sur-Meuse quarries, to install a conveyor belt in the Lives-sur-Meuse quarry and to develop a riverside loading quay for barges on the Meuse in the Walloon Region of Belgium. The project covers an area of over 50 hectares.

16. On 12 May 2010, the Département de la nature and des forêts (Department of Nature and Forests) of the Walloon Region issued an unfavourable opinion, on the ground that the project did not take into account the obligations of species protection.

17. On 15 April 2016, Sagrex made an application for a derogation from the species protection measures, to which it attached a study entitled ‘Destruction of environments and relocation of plant species in order to work the Bossimé quarry’. On 27 June 2016, the Inspector General of the Department of Nature and Forests granted the derogation sought, and it accordingly authorised Sagrex to cause detriment to various plant and animal species, on the condition that it applies certain mitigating measures. This is the contested measure.

18. On 30 September 2016, Sagrex filed amended plans and a corresponding supplementary impact study in support of its application for a single permit.

19. A public inquiry into the amended project was held from 21 November to 21 December 2016 and generated a large number of objections.

20. On 21 December 2016, the Department of Nature and Forests issued a favourable opinion on the application for a single permit, subject to conditions. That opinion was based on the following reasons, among others:

‘Whereas by means of the recommendations set out in the application file, the obligations arising from the derogation of 27 June 2016 and the conditions set out below, the significant nature conservation impacts of this project can be reduced to an acceptable level, in particular in the light of the compensatory measures; ...’

21. On 25 September 2017, the competent minister of the Walloon Region nevertheless refused the single permit. Sagrex’s parent company, Cimenteries CBR SA, brought an action for annulment against that decision, which, however, was dismissed by judgment of 14 May 2020.

22. Nevertheless, by application lodged on 18 January 2017, the non-profit association Namur-Est Environnement had already applied to the Conseil d’État (Council of State, Belgium) for annulment of the decision of 27 June 2016 granting the derogations from the measures to protect plant and animal species laid down in the loi sur la conservation de la nature (Law on nature conservation, Belgium). Cimenteries CBR intervened in those proceedings.

23. In the request for a preliminary ruling, the Conseil d’État (Council of State) submits that the sole purpose of the decision on derogation is to authorise the disturbance of animals and degradation of the areas of habitat of those species. By contrast, the principal decision entitling the developer to proceed with its project is the single permit which may, following a public inquiry, be refused or made subject to stricter conditions than those laid down by the contested measure. The authority responsible for issuing single permits must examine all the planning and

environmental aspects of the project for working the quarry. Accordingly, the authority may assess the effects of that working more strictly in the light of the parameters set by the body that issued the contested measure. Indeed, in the present case, the authority refused to grant the single permit to work the quarry.

24. Therefore, the Conseil d'État (Council of State) addresses the following questions to the Court:

- '(1) Do a decision “authorising the disturbance of animals and degradation of the areas of habitat of those species for the working of a quarry” and the decision authorising or refusing that working (single permit) form a single development consent (within the meaning of Article 1(2)(c) of the EIA Directive) relating to a single project (within the meaning of Article 1(2)(a) of that directive) where, first, that working cannot take place without the first of those decisions and, second, the authority responsible for issuing single permits retains the ability to determine the environmental effects of that working more strictly having regard to the parameters set by the body that issued the first decision?
- (2) If the answer to that first question is in the affirmative, are the requirements laid down by that directive, specifically in Articles 2, 5, 6, 7 and 8, sufficiently met where the public participation phase takes place after adoption of the decision “authorising the disturbance of animals and degradation of the areas of habitat of those species for the working of a quarry” but before adoption of the principal decision entitling the developer to proceed to work the quarry?'

25. Written observations have been submitted by Namur-Est Environnement, Cimenteries CBR, the Kingdom of Belgium, the Czech Republic and the European Commission. With the exception of the Czech Republic, they also took part in the hearing held on 9 September 2021.

#### **IV. Legal assessment**

26. The request for a preliminary ruling seeks to clarify the relationship between two authorisations that relate to the same project. The authorisations concerned are, on the one hand, the permit initially granted to derogate from the rules on the protection of certain animal and plant species in the implementation of the project (permit under species protection law) and, on the other hand, the ‘global authorisation’ for the project as a whole, which was the subject of an environmental impact assessment after the development consent under species protection law had been granted, but that permit was ultimately refused.

27. In that context, the starting point for the request for a preliminary ruling is an action brought against the permit under species protection law. The applicant NGO, Namur-Est Environnement, takes the view that the EIA Directive precludes provisional authorisation for derogations from the rules on species protection granted independently of the environmental impact assessment.

28. The first question seeks to ascertain whether the two authorisations together constitute a development consent within the meaning of the EIA Directive. If that is the case, the issue to be discussed in relation to the second question is whether it is compatible with that directive for the permit under species protection law to be granted before the environmental impact assessment has been carried out.

29. Article 2(1) of the EIA Directive provides that 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, 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. Development consent is defined in Article 1(2)(c) as the decision which entitles the developer to proceed with the project.

30. This means that, first, the projects referred to must be made subject to a requirement for development consent and, second, the effects of the projects on the environment must be assessed before such development consent is granted.

31. It is common ground that the quarry project at issue is subject to those requirements. Pursuant to Article 4(1) of, and point 19 of Annex I to, the EIA Directive, quarries where the surface of the site exceeds 25 hectares are always to be regarded as projects likely to have significant effects on the environment. The project in question covers an area of over 50 hectares, with the result that an environmental impact assessment is necessary.

32. However, it needs to be clarified whether the authorisation for the project must include the permit under species protection law and – if so – whether it is permissible for the permit under species protection law to be granted even before the environmental impact assessment has been carried out.

#### ***A. Admissibility of the first question***

33. The Kingdom of Belgium submits that the first question is inadmissible because it is based on the incorrect assumption that the permit under species protection law is a precondition for the granting of the global authorisation. If that objection is well founded, there would be no need to answer the second question because it is asked only in the event that the first question is answered in the affirmative.

34. It is true that the Court may refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose,<sup>10</sup> as claimed by the Kingdom of Belgium in relation to the first question.

35. However, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law.<sup>11</sup> Therefore, it is not for the Court to rule on the interpretation of provisions of national law

<sup>10</sup> Judgments of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 27), and of 14 October 2020, *Sappi Austria Produktion and Wasserverband 'Region Gratkorn-Gratwein'* (C-629/19, EU:C:2020:824, paragraph 26).

<sup>11</sup> Judgments of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraph 47), and of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU:C:2021:89, paragraph 29).



or to decide whether the referring court's interpretation of them is correct.<sup>12</sup> Therefore, the Court must take account of the factual and legal context of requests for preliminary rulings, as described in the order for reference.<sup>13</sup>

36. Although, in what follows, the relationship between the permit under species protection law and the global authorisation must be examined from the perspective of EU law, the starting point is a question of national law. It is therefore necessary in that respect to proceed on the basis of the view taken by the Conseil d'État (Council of State), as set forth in the request for a preliminary ruling and on which the question referred to the Court is predicated.

37. Moreover, the Kingdom of Belgium's submission is also not convincing in terms of content, since the permit under species protection law was expressly applied for in relation to the implementation of the quarry project. According to the observations submitted in the hearing, detriment caused to protected species is accordingly permissible only within the framework of the project, and therefore requires, at least in practice, the approval of the project as a whole. A further reason why such a link with the project appears to be necessary under EU law is that only the objectives of the measure concerned, in this case the project, can justify a derogation from the obligations of species protection in accordance with Article 16 of the Habitats Directive<sup>14</sup> and Article 9 of the Birds Directive.<sup>15</sup>

38. Therefore, the Kingdom of Belgium's objections regarding the admissibility of the first question and thus of the request for a preliminary ruling as a whole are unfounded.

### ***B. The response to the reference for a preliminary ruling***

39. In my view, however, the two questions asked by the Conseil d'État (Council of State) must be answered *together*. Ultimately, the issue cannot be whether the two authorisations together formally constitute development consent under the EIA Directive, but only whether that directive allows certain environmental effects of a project to be decided on before the environmental impact assessment is carried out.

40. However, the rules of the EIA Directive and the relevant case-law on the integration of decisions on certain environmental aspects of a project into the environmental impact assessment seem to provide contradictory guidance for answering that question.

41. The starting point is the objective of a comprehensive assessment of all environmental effects in the environmental impact assessment (see section 1).

42. However, the EIA Directive contains provisions on the coordination of authorisation procedures, which suggest that it is not necessary to decide on all the environmental effects of a project in a single procedure (see section 2). Furthermore, the Court has recognised the possibility of consent procedures comprising several stages which require an environmental

<sup>12</sup> Judgments of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 25); of 7 October 2010, *Santos Palhota and Others* (C-515/08, EU:C:2010:589, paragraph 18); and of 26 September 2013, *Texdata Software* (C-418/11, EU:C:2013:588, paragraph 28).

<sup>13</sup> Judgments of 25 October 2001, *Ambulanz Glöckner* (C-475/99, EU:C:2001:577, paragraph 10); of 26 September 2013, *Texdata Software* (C-418/11, EU:C:2013:588, paragraph 29); and of 15 April 2021, *État belge (Circumstances subsequent to the transfer decision)* (C-194/19, EU:C:2021:270, paragraph 26).

<sup>14</sup> See judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraph 41 et seq.).

<sup>15</sup> See judgment of 17 March 2021, *One Voice and Ligue pour la protection des oiseaux* (C-900/19, EU:C:2021:211, paragraph 37 et seq. and paragraph 61).

impact assessment only at certain stages (see section 3). It might be inferred from this that the permit under species protection law can be granted independently of and prior to the environmental impact assessment.

43. However, final decisions on certain environmental effects taken before the environmental impact assessment has been carried out ultimately run counter to important fundamental principles of environmental impact assessment. This is because, first, public participation must take place at an early stage, when all options are open; second, the findings of the environmental impact assessment must be taken into account in the decision on the project; and, third, comprehensive legal protection against that decision must be available (see section 4).

#### *1. Protection of species in the environmental impact assessment*

44. The environmental impact assessment covers all significant environmental effects, including, where relevant, significant effects on protected species.<sup>16</sup> According to Article 3(a) of the EIA Directive, it is to identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect effects of a project on, inter alia, fauna and flora. In accordance with Article 5(1) and point 3 of Annex IV, such effects must therefore be described by the developer. No exceptions are provided for certain environmental effects.

45. It is not always easy in practice to delineate the effects that could be significant and must therefore be the subject of the environmental impact assessment. However, the assessment must cover at least the information necessary to assess the compatibility of the project with the applicable environmental law.

46. In that respect, the Court has ruled that the information to be provided must contain the data that are necessary in order to assess the effects of a project on the status of the bodies of water concerned in the light of the criteria and requirements laid down in, inter alia, Article 4(1) of the Water Framework Directive,<sup>17</sup> the so-called ban on deterioration.<sup>18</sup>

47. Accordingly, as submitted by Cimenteries CBR, derogations from the rules of EU law on the protection of species, that is to say, from the prohibitions under Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive, must also be described. This is because such derogations from the requirements of EU environmental law are significant by their very nature, irrespective of whether they should ultimately be justified under Article 16 of the Habitats Directive or Article 9 of the Birds Directive. However, derogations from purely national rules on species protection can also be significant.

48. Such information must be made available to the public under Article 6(3)(a) of the EIA Directive<sup>19</sup> and is therefore the subject of public participation. Moreover, in accordance with Article 6(1), the authorities responsible for species protection must also be involved.

49. Therefore, Member States may not exclude certain environmental effects and, in particular, adverse effects on species protected under EU law from the environmental impact assessment.

<sup>16</sup> See, to that effect, judgments of 24 November 2011, *Commission v Spain (Alto Sil)* (C-404/09, EU:C:2011:768, paragraph 86); and of 7 November 2018, *Holohan and Others* (C-461/17, EU:C:2018:883, paragraphs 57 to 59); and my Opinion in the latter case (EU:C:2018:649, points 84 to 87).

<sup>17</sup> Cited in footnote 8.

<sup>18</sup> Judgment of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraph 81).

<sup>19</sup> See, to that effect, judgment of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraph 83).

## 2. *Coordination of different procedures*

50. In the light of the comprehensive environmental impact assessment, the definition of development consent in Article 1(2)(c) of the EIA Directive suggests, at first glance, that that consent must also include all environmental effects of the project. This is because, according to that provision, such development consent is a single decision of the competent authority or authorities which entitles the developer to proceed with the project. This could mean that not only must the authorities responsible for various environmental effects be involved in the environmental impact assessment in accordance with Article 6(1), but the development consent must also comprehensively regulate those effects.

51. However, it follows in particular from Article 2(3) of the EIA Directive that the procedure for the environmental impact assessment and the consent granted on that basis does not have to combine all authorisations related to the project, or even all authorisations under environmental law. Rather, that provision *allows* Member States to provide for a single procedure in order to fulfil the requirements of the EIA Directive and the IPPC Directive<sup>20</sup> (now Directive 2010/75 on industrial emissions<sup>21</sup>). It follows *a contrario* that it is equally permissible under that provision to apply *different* procedures for the implementation of the two directives and to grant *separate* authorisations.

52. This is confirmed by Article 2(2) of the EIA Directive, which provides that the environmental impact assessment may be integrated into the existing procedures for consent to projects or, failing this, into other procedures or into procedures to be established to comply with the aims of the directive.

53. It should also be noted that the new version of Article 2(3) of the EIA Directive, which was created by Directive 2014/52 and is not yet applicable in the present proceedings, does not change this at all, but only requires coordination with regard to impact assessments in connection with protected areas under the Habitats Directive and the Birds Directive, which are not relevant in the present case.

54. The Member States therefore have a certain margin of discretion.<sup>22</sup> In particular, they do not have to provide for a single procedure in which all the environmental effects of a project are decided upon by means of a single authorisation.

55. Therefore, the EIA Directive does not preclude, in principle, the granting of specific authorisations in respect of certain environmental effects, such as species protection, in relation to projects requiring an environmental impact assessment.

## 3. *Temporal coordination of different proceedings*

56. However, it is still not clear whether it is permissible for certain environmental effects of a project to be finally decided upon *before* the environmental impact assessment is carried out.

<sup>20</sup> Cited in footnote 5.

<sup>21</sup> Cited in footnote 9.

<sup>22</sup> Judgment of 3 March 2011, *Commission v Ireland* (C-50/09, EU:C:2011:109, paragraph 75).

57. In that context, various parties have discussed the case-law on authorisation procedures comprising several stages. With that case-law, the Court seeks to optimise the two objectives of an environmental impact assessment which is both comprehensive and early, while respecting the procedural autonomy of the Member States.

58. In accordance with that case-law, national law may provide that the procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision. In such a case, the effects which the project may have on the environment must (as a rule) be identified and assessed at the time of the procedure relating to the principal decision.<sup>23</sup>

59. However, a comprehensive assessment would not be possible at that stage if the environmental effects can be identified only in the procedure relating to the implementing decision. In such a case, the assessment must be carried out only in the procedure relating to that second decision, that is to say, at a later stage.<sup>24</sup>

60. The Court has even held that a rule under which an environmental impact assessment can be carried out only at the initial stage, and not at the later stage relating to authorisation for matters not yet dealt with, is contrary to the EIA Directive.<sup>25</sup> This is in line with the objective of a comprehensive environmental impact assessment, which would be undermined if the assessment had to be carried out at a time when it is not yet possible to establish all the effects of the project.

61. As submitted by the Kingdom of Belgium and the Czech Republic, it is doubtful that the permit under species protection law is a principal decision on the project within the meaning of that case-law, as it concerns only one aspect of the project. It rather appears, on the face of it, to be an attempt to remove a specific obstacle before making further onerous efforts towards obtaining the global authorisation, or to ascertain whether this is possible at all. The reason for this is that development consent for the project was still precluded by species protection in 2010. Cimenteries CBR nevertheless categorises the permit under species protection law in that capacity as one stage of a consent procedure comprising several stages.

62. However, the main point of interest for the present case is the fact that, in accordance with that case-law, the EIA Directive allows certain issues to be decided upon before the environmental impact assessment has been carried out. However, if ‘principal decisions’, which by their nature may relate to many environmental effects of the project, are permissible without an environmental impact assessment, provisional decisions on specific aspects with limited environmental effects should a fortiori be permissible.

<sup>23</sup> Judgments of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraph 52); of 4 May 2006, *Barker* (C-290/03, EU:C:2006:286, paragraph 47); of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, paragraph 26); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 86).

<sup>24</sup> See the references in footnote 22.

<sup>25</sup> Judgment of 4 May 2006, *Commission v United Kingdom* (C-508/03, EU:C:2006:287, paragraph 105).

#### 4. Importance of the results of the environmental impact assessment for the development consent and legal protection

63. However, the case-law on authorisation procedures comprising several stages is based on the original version of the EIA Directive and does not yet take into account the changes<sup>26</sup> brought about by the Aarhus Convention.<sup>27</sup> In that respect, attention should be drawn, in particular, to Article 6(4) of the EIA Directive. Accordingly, the public should be able to make its views known at an early stage and in an effective manner when all options are open and before the decision on the request for development consent is taken.

64. Those requirements prohibit the taking of final decisions on certain environmental effects of a project before the public has had the opportunity to express its view on those effects in the environmental impact assessment. This is because all options would no longer be open in that case.

65. Furthermore, Article 8 of the EIA Directive provides that the results of consultations and the information gathered pursuant to Articles 5, 6 and 7 are to be taken into account in the development consent procedure. In accordance with recital 2 and settled case-law, this means that the competent authority is to take account of the 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.<sup>28</sup>

66. However, if the authorities decide on certain environmental effects before the environmental impact assessment has been carried out, they obviously cannot yet take into account the results of the consultations and the information gathered.<sup>29</sup>

67. Finally, the legal protection to be guaranteed under Article 11 of the EIA Directive, a provision that also implements the Aarhus Convention, must also be taken into account in that context. In accordance with that provision, the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive may be challenged under certain conditions.

68. The development consent for a project under Article 2(1) of the EIA Directive is a decision that may be challenged under Article 11 thereof.

69. It is true that the EIA Directive does not specify what the consequences of certain findings of the environmental impact assessment are for that consent.<sup>30</sup> Rather, those consequences are laid down in other legislation, for instance, in the case of species protection, in the Habitats Directive or the Birds Directive, and in the relevant laws transposing such legislation into national law.

<sup>26</sup> Article 3 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 (OJ 2003 L 156, p. 17).

<sup>27</sup> Convention on access to information, public participation in decision-making and access to justice in environmental matters of 1998 (OJ 2005 L 124, p. 4), approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

<sup>28</sup> Judgments of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraph 51); of 12 November 2019, *Commission v Ireland (Derrybrien Wind Farm)* (C-261/18, EU:C:2019:955, paragraph 73); and of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraph 78).

<sup>29</sup> See judgment of 3 March 2011, *Commission v Ireland* (C-50/09, EU:C:2011:109, paragraphs 81, 84 and 85).

<sup>30</sup> See my Opinion in *Leth* (C-420/11, EU:C:2012:701, point 48).

70. Therefore, the legality of the development consent under Article 2(1) of the EIA Directive, which is granted on the basis of the environmental impact assessment, depends on whether the project at issue respects those other provisions of environmental law. If it has become apparent in the context of the environmental impact assessment that the project is incompatible with environmental requirements of other legislation, the granting of such consent is excluded.<sup>31</sup>

71. Therefore, judicial review under Article 11 of the EIA Directive includes at least the rules of national law implementing EU environmental law and the rules of EU environmental law having direct effect.<sup>32</sup>

72. Moreover, since the right of action under Article 11 of the EIA Directive is linked to the comprehensive environmental impact assessment, it is to be exercised on the basis of the findings made in that assessment. This is because those findings make it possible to identify environmental objections that can support such an action, or they can show that there are no grounds for an action.

73. It would be incompatible with this to take *final* decisions on certain environmental effects before the environmental impact assessment has even been carried out. Even if it were possible for such a decision on certain aspects to be challenged separately, such an action would generally have to be brought without the findings of the environmental impact assessment.

74. Therefore, a preliminary decision on certain environmental effects of a project which is subject to environmental impact assessment can be only *provisional* in nature. Final decisions may be taken only on the basis of that assessment and therefore necessarily after it. Furthermore, it must be possible for them to be challenged in full, and independently of the provisional decision, in accordance with Article 11 of the EIA Directive.

75. Therefore, the provisional decision cannot establish full legal certainty for the developer with regard to its subject matter and outcome, but it may provide guidance as to whether, on the basis of the information available, certain environmental effects may stand in the way of the project.

76. According to the information in the request for a preliminary ruling and the submissions of Cimenteries CBR, it cannot be ruled out that Belgian law satisfies those requirements. Under that law, the authority responsible for issuing single permits retains the ability to determine the environmental effects of the working of a quarry more strictly having regard to the parameters set by the body that issued the first decision. If that is the case, when granting the development consent under Article 2(1) of the EIA Directive, that authority would be able to give due consideration to any conflicts with species protection which became apparent only in the course of the environmental impact assessment. However, various parties argued at the hearing that the permit under species protection law can nevertheless become final independently of the environmental impact assessment, thereby calling the comprehensive legal protection under Article 11 into question.

<sup>31</sup> See, to that effect, judgment of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraphs 75 and 76), concerning the Water Framework Directive.

<sup>32</sup> Judgments of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, EU:C:2011:289, paragraph 48); of 15 October 2015, *Commission v Germany* (C-137/14, EU:C:2015:683, paragraph 92); and of 8 November 2016, *Lesoochrannárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 59).

## V. Conclusion

77. I therefore propose that the Court give the following answer to the request for a preliminary ruling:

It is compatible 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 to take a provisional decision to authorise adverse effects on protected species in a project even before the adoption of the principal decision entitling the developer to proceed with its project and before public participation in the environmental impact assessment of that project.

However, the environmental impact assessment must include the effects of the project on protected species in accordance with Articles 3, 5, 6 and 7 of Directive 2011/92, even if a provisional decision has already been taken on those effects. Furthermore, irrespective of the decision taken in advance, the competent authorities must refuse the development consent provided for in Article 2(1) of the directive in so far as the assessment shows that the project is incompatible with the provisions of EU law on species protection. Lastly, the authorisation to derogate from the requirements of species protection in relation to the project must be challengeable on the basis of the environmental impact assessment in accordance with Article 11 of the directive.