Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 24 November 2022 [1]

Case C-575/21

WertInvest Hotelbetriebs GmbH
v
Magistrat der Stadt Wien,
joined party:
Verein Alliance for Nature

(Request for a preliminary ruling from the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria))

(Reference for a preliminary ruling – Environment – Directive 2011/92/EU – Environmental impact assessment of certain public and private projects – Determination of the need to carry out an environmental impact assessment on the basis of thresholds or criteria set by a Member State – Urban development project in an area classified by UNESCO as a World Heritage Site – National legislation making the environmental impact assessment conditional on the attainment of thresholds for land surface occupied and for gross floor area)

I. Introduction

1. Vienna is a city with a rich historical, cultural and architectural heritage. What began as a Celtic settlement became the strategic Roman garrison town of Vindobona. In 1857, the walls and other defences that had been erected around the city in the 13th century were razed and replaced by the Ringstraße, which opened in 1865 and along which many large public buildings were erected in an eclectic historicism style, sometimes called Ringstraßenstil, using elements of Classical, Gothic, Renaissance and Baroque architecture. UNESCO has designated the historic centre of Vienna, including the Ringstraße, as a World Heritage Site.

2. A private company seeks to carry out the 'ICV Heumarkt Neu – Neubau Hotel InterContinental, Wiener Eislaufverein WEV' (New ICV Haymarket – rebuilding of the InterContinental Hotel, Vienna Ice Sports Club; 'the New Haymarket project') approximately 250 m from that part of the Ringstraße named Schubertring. [2] The New Haymarket project involves demolishing the existing InterContinental Hotel and replacing it with several new structures, including a 19-storey tower building for hotel, commercial, conference, residential

[1] Original language: English.

[2] Am Heumarkt street forms the south-east border of the site; it is reputed to be one of the oldest streets in Vienna.

and office use with an underground ice rink, a sports hall, a swimming pool and a car park with 275 parking spaces. It is anticipated that the New Haymarket project will occupy around 1.55 ha with a gross floor area of around 89 000 m^2.

3. The project has given rise to some controversy due to its proximity to the centre of Vienna, a UNESCO World Heritage Site, and the alleged impact of the height of the proposed tower building on the city skyline. This reference for a preliminary ruling from the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) essentially asks whether a Member State, which chooses to determine that projects are to be subject to an environmental impact assessment by reference to thresholds or criteria that it has adopted may be required to make that determination by way of an individual examination of a project that does not meet those prescribed thresholds or criteria but is likely to have significant effects on the environment.

II. Relevant legal provisions

A. European Union law

4. The preamble 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,[3] as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014,[4] sets out, inter alia, the following principles:

'(7) Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.

(8) Projects belonging to certain types have significant effects on the environment and those projects should, as a rule, be subject to a systematic assessment.

(9) Projects of other types may not have significant effects on the environment in every case and those projects should be assessed where the Member States consider that they are likely to have significant effects on the environment.

(10) Member States may set thresholds or criteria for the purpose of determining which of such projects should be subject to assessment on the basis of the significance of their environmental effects. Member States should not be required to examine projects below those thresholds or outside those criteria on a case-by-case basis.

(11) When setting such thresholds or criteria or examining projects on a case-by-case basis, for the purpose of determining which projects should be subject to assessment on the basis of their significant environmental effects, Member States should take account of the relevant selection criteria set out in this Directive. In accordance with the subsidiarity principle, the Member States are in the best position to apply those criteria in specific instances.'

[3] OJ 2012 L 26, p. 1.

[4] OJ 2014 L 124, p. 1.

5. Article 1(1) of Directive 2011/92 provides that it shall apply to the assessment of the environmental effects of the public and private projects [5] which are likely to have significant effects on the environment.

6. Under Article 2(1) of Directive 2011/92:

'Member States shall adopt all measures necessary to ensure that, before development 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 on the environment. Those projects are defined in Article 4.'

7. Article 3(1) of Directive 2011/92 provides that:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

(a) population and human health;

(b) biodiversity, with particular attention to species and habitats protected under [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)] and 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)];

(c) land, soil, water, air and climate;

(d) material assets, cultural heritage and the landscape;

(e) the interaction between the factors referred to in points (a) to (d).'

8. According to Article 4 of Directive 2011/92:

'…

(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).

[5] Article 1(2) defines 'project' for the purposes of Directive 2011/92 as, inter alia, 'the execution of construction works or of other installations or schemes'.

(3) Where 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. Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an environmental impact assessment, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5.

…'

9. Annex II to Directive 2011/92 is entitled 'Projects referred to in Article 4(2)'. Point 10 thereof provides that 'infrastructure projects' include 'urban development projects, including the construction of shopping centres and car parks'.

10. Annex III to Directive 2011/92 is entitled 'Selection criteria referred to in Article 4(3) (Criteria to determine whether the projects listed in Annex II should be subject to an environmental impact assessment)'. Its point 1 establishes that the characteristics of projects must be considered, with particular regard to (a) the size and design of the whole project; (b) cumulation with other existing and/or approved projects; (c) use of natural resources, in particular land, soil, water and biodiversity; (d) waste production; (e) pollution and nuisances; (f) the risk of major accidents and/or disasters relevant to the project, including those caused by climate change, in accordance with scientific knowledge; and (g) risks to human health.

11. So far as appears to be relevant to the issues arising in this reference for a preliminary ruling, point 2 of Annex III to Directive 2011/92, entitled 'Location of projects', provides that the environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to (a) existing and approved land use; (b) the relative abundance, availability, quality and regenerative capacity of natural resources in the area and its underground; and (c) the absorption capacity of the natural environment, paying particular attention to, inter alia, densely populated areas and landscapes and sites of historical, cultural or archaeological significance.

12. In point 3 of Annex III to Directive 2011/92, entitled 'Type and characteristics of the potential impact', the likely significant effects of projects on the environment must be considered in relation to criteria set out in points 1 and 2 of Annex III, with regard to the impact of the projects on the factors specified in Article 3(1) of that directive, taking into account its (a) magnitude and spatial extent; (b) nature; (c) transboundary nature; (d) intensity and complexity; (e) probability; (f) expected onset, duration, frequency and reversibility; (g) cumulation with the impact of other existing and/or approved projects; and (h) possibility of being effectively reduced.

B. Austrian law

13. Paragraph 1 of the Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz) (Federal Environmental Impact Assessment Act; 'the EIAA'), of 14 October 1993,[6] is entitled 'Purpose of environmental impact assessment and public participation', in the version applicable to the main proceedings,[7] and states that:

'(1) The purpose of the environmental impact assessment (EIA) shall be, with public participation and on a basis of expertise,

1) to identify, describe and assess the direct and indirect effects that a project will or may have

   a) on humans and biological diversity, including animals, plants and their habitats,

   b) on land and soil, water, air, and climate,

   c) on the landscape, and

   d) on material assets and the cultural heritage,

   including any interactions between several effects

…'

14. By Paragraph 3 of the EIAA, entitled 'Object of the environmental impact assessment':

'(1) Projects listed in Annex 1 and modifications to such projects shall be subject to an environmental impact assessment in accordance with the following provisions. Projects listed in Columns 2 and 3 of Annex 1 shall be assessed by the simplified procedure. …

(2) In the case of projects in Annex 1, which do not reach the thresholds or meet the criteria laid down in that annex but which, when combined with other projects, reach the threshold or fulfil the criterion in question, the authority shall declare, on a case-by-case basis, whether the cumulative effects are likely to result in significant harmful, undesirable or adverse effects on the environment and whether an environmental impact assessment must therefore be carried out for the proposed project. For cumulation, account shall be taken of other similar and geographically related projects, which are already in existence or have obtained consent, or projects which have previously been submitted to a public authority with a full application for consent or for which consent has previously been applied for in accordance with Paragraphs 4 or 5. A case-by-case examination need not be carried out if the proposed project has a capacity of less than 25% of the threshold. When deciding on a case-by-case basis, account shall be taken of the criteria in points 1 to 3 of paragraph 5 and paragraphs 7 and 8 shall be applied. The environmental impact assessment shall be carried out by the simplified procedure. A case-by-case examination is not required if the project applicant applies for an environmental impact assessment to be carried out.

…

6 BGBl. No 697/1993.

7 BGBl. I No 80/2018.

(4) In the case of projects for which a threshold value is defined for certain protected areas in Column 3 of Annex 1, where this criterion is fulfilled, the authority shall decide on a case-by-case basis, taking into consideration the extent and lasting effects of the environmental impact, whether significant adverse effects are to be expected for the protected habitat (Category B of Annex 2) or for the objective of protection for which the protected area has been established (Categories A, C, D and E of Annex 2). For the purpose of this examination, protected areas of Categories A, C, D or E of Annex 2 shall only be taken into account if, on the day of initiation of the procedure, they have already been designated or included in the list of Sites of Community Importance (Category A of Annex 2). If significant adverse effects are to be expected, an environmental impact assessment shall be performed. When deciding on a case-by-case basis, account shall be taken of the criteria in points 1 to 3 of paragraph 5 and paragraphs 7 and 8 shall be applied. A case-by-case examination is not required if the project applicant applies for an environmental impact assessment to be carried out.

(4a) In the case of projects for which special conditions other than those identified in paragraph 4 are laid down in Column 3 of Annex 1 and if these conditions are met, the authority shall determine on a case-by-case basis, in application of paragraph 7, whether significant harmful or adverse effects on the environment are to be expected, as defined in subparagraph 1 of Paragraph 1(1). If the authority finds that such effects are to be expected, the environmental impact assessment shall be carried out by the simplified procedure. A case-by-case examination is not required if the project applicant applies for an environmental impact assessment to be carried out.

(5) When taking the decision on a case-by-case basis, the authority shall take into consideration the following criteria, where relevant:

1. Characteristics of the project (size of the project, use of natural resources, production of waste, environmental pollution and nuisances, vulnerability of the project to risks of major accidents and/or natural disasters, including those caused by climate change, in accordance with scientific knowledge, risks to human health);

2. Location of the project (environmental sensitivity taking into account existing or approved land use, abundance, quality and regenerative capacity of natural resources in the area and its underground, absorption capacity of the natural environment, where appropriate taking into account the areas listed in Annex 2);

3. Characteristics of the potential impact of the project on the environment (type, magnitude and spatial extent of the impact), transboundary nature of the impact, the intensity and complexity of the impact, the expected onset, probability of the impact, duration, frequency and reversibility of the impact, possibility to effectively avoid or reduce the impact) as well as the change in the environmental impact resulting from the implementation of the project as compared with the situation without the implementation of the project.

In the case of projects listed in Column 3 of Annex 1, the variation of the impact shall be assessed with regard to the protected area. …

(6) Consent for projects subject to an assessment in accordance with paragraphs 1, 2 or 4 shall not be issued before completion of the environmental impact assessment or the case-by-case examination. Any notices given shall have no legal effect before completion of the environmental

impact assessment. Consent issued in breach of the present provision may be declared null and void within three years by the competent authority pursuant to Paragraph 39(3).

(7) Upon request by the project applicant, by a co-operating authority or by the environmental ombudsman, the authority shall declare whether an environmental impact assessment is to be carried out for a project in accordance with this Act and which of the criteria laid down in Annex 1 or in Paragraph 3a(1) to (3) that project satisfies. That declaration can also be made on the authority's own motion. …

…

(9) If the authority decides pursuant to paragraph 7 that a project shall not be subject to an environmental impact assessment, an environmental organisation recognised in accordance Paragraph 19(7) or a neighbour in accordance with point 1 of Paragraph 19(1) shall have the right to bring an action before the Federal Administrative Court. As from the day of publication on the internet, such environmental organisation or such neighbour shall be given access to the administrative file. For the purpose of the *locus standi* of the environmental organisation, the geographical area of activity stated in the administrative order of recognition pursuant to Paragraph 19(7) shall be decisive.

…'

15. Annex 1 to the EIAA sets out in detail the projects that are subject to an environmental impact assessment. Column 1 lists the projects subject to a regular environmental impact assessment. Column 2 contains projects subject to a simplified environmental impact assessment; and Column 3 contains those projects with respect to which the need to conduct a simplified environmental impact assessment is to be examined on a case-by-case basis. Urban development projects[8] with a land surface use of at least 15 ha and a gross floor area exceeding 150 000 m^2 appear in Column 2 of that annex.[9] Column 3 of Annex 1 to the EIAA provides that 'Paragraph 3(2) thereof shall apply to [urban development projects], with the proviso that the sum of the capacities that have obtained consent in the last 5 years, including the capacity or capacity expansion applied for, is to be taken into account'.

16. Annex 2 to the EIAA defines the categories of protected areas to which Column 3 also refers. UNESCO World Heritage Sites listed pursuant to Article 11(2) of the Convention concerning the Protection of the World Cultural and Natural Heritage[10] are 'special protection areas' for the purposes of Category A of those protected areas.

III. The dispute in the main proceedings and the request for a preliminary ruling

17. On 17 October 2017, WertInvest Hotelbetriebs GmbH applied to the Wiener Landesregierung (Government of the Province of Vienna, Austria) for a declaration that an environmental impact assessment was not required for the New Haymarket project.

8 Footnote 3a to Annex 1 to the EIAA defines urban development projects as 'projects for integrated multifunctional development, with at least residential and commercial buildings, including the access roads and utilities provided for those buildings, and with a catchment area that extends beyond the site of the project. Once completed, urban development projects or parts of such projects shall no longer be regarded as urban development projects within the meaning of this footnote'.

9 Point 18(b) of Annex 1 to the EIAA.

10 Adopted by the General Conference and signed in Paris on 17 December 1975.

18. On 16 October 2018, the Wiener Landesregierung (Government of the Province of Vienna) decided that the New Haymarket project did not require an environmental impact assessment. It took the view that that project did not exceed the thresholds described in point 18(b) of Annex 1 to the EIAA and that the cumulation provision in Paragraph 3(2) of the EIAA did not apply because the project had a capacity of less than 25% of the threshold applicable.

19. On 30 November 2018, WertInvest Hotelbetrieb applied to the Magistrat der Stadt Wien (Vienna City Administration, Austria) for a building permit for the New Haymarket project.

20. Several neighbours and an environmental organisation commenced proceedings challenging the decision of 16 October 2018 before the Bundesverwaltungsgericht (Federal Administrative Court, Austria). In the course of these proceedings, WertInvest Hotelbetrieb withdrew its application for a declaration that the project did not require an environmental impact assessment. Notwithstanding that withdrawal, on 9 April 2019 the Bundesverwaltungsgericht (Federal Administrative Court) ruled of its own motion that the New Haymarket project be subject to a simplified environmental impact assessment. It took the view that the Austrian legislature had failed to take sufficient account of the need to safeguard the protected areas included in Category A of Annex 2 to the EIAA in the procedure leading to the authorisation of urban development projects.[11] It added that the New Haymarket project demonstrated that projects that did not reach the thresholds set in Column 2 of Annex 1 to the EIAA could have significant effects on a protected UNESCO World Heritage Site. For those reasons, the Bundesverwaltungsgericht (Federal Administrative Court) concluded that Directive 2011/92 had been incorrectly transposed into Austrian law and that it thus was necessary to examine the need to carry out an environmental impact assessment by reference to the New Haymarket project itself.

21. WertInvest Hotelbetrieb and the Wiener Landesregierung (Government of the Province of Vienna) appealed against that decision to the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). On 25 June 2021, the Verwaltungsgerichtshof (Supreme Administrative Court) set aside the judgment of the Bundesverwaltungsgericht (Federal Administrative Court), holding that, since WertInvest Hotelbetrieb had withdrawn its application for a declaration that the project did not require an environmental impact assessment, the Bundesverwaltungsgericht (Federal Administrative Court) had no jurisdiction to rule on the matter. On 15 July 2021, the Bundesverwaltungsgericht (Federal Administrative Court) held that, in view of the withdrawal of the aforesaid application for a declaration, the decision of the Wiener Landesregierung (Government of the Province of Vienna) of 16 October 2018 was null and void.

22. During the course of those legal proceedings, WertInvest Hotelbetrieb's application for a building permit was pending before the Magistrat der Stadt Wien (Vienna City Administration). Since that administration had not taken a decision with respect to that application within six months of its submission, on 12 March 2021 WertInvest Hotelbetrieb commenced an action for failure to act before the Verwaltungsgericht Wien (Administrative Court, Vienna) to require the Magistrat der Stadt Wien (Vienna City Administration) to issue that building permit, since an environmental impact assessment was not required in order to take that decision.

23. In order to rule on whether the Magistrat der Stadt Wien (Vienna City Administration) had failed to act, the Verwaltungsgericht Wien (Administrative Court, Vienna) considers it necessary to establish whether the New Haymarket project required that an environmental impact

[11] Point 18(b) of Annex 1 to the EIAA.

assessment be carried out, referring to the project as one of the most significant urban development projects to be carried out in Vienna since the end of World War II. It further observes that, on 10 October 2019, the European Commission sent a letter of formal notice to the Austrian Government [12] raising a number of issues regarding the transposition of Directive 2011/92 into Austrian law, [13] notably laying down inappropriate thresholds which in practice exclude the need to carry out environmental impact assessments for all significant urban development projects (for instance, the New Haymarket project).

24. In those circumstances, the Verwaltungsgericht Wien (Administrative Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does [Directive 2011/92] preclude a national rule by which the assessment of the environmental effects of urban development projects is made conditional both on the attainment of thresholds for land take of at least 15 ha and for gross floor area of more than 150 000 m^2 and on the development project in question being a project for entirely multifunctional development with at least residential and commercial buildings, including the access roads and utilities intended for those buildings, and with a catchment area that extends beyond the area covered by the project? In this regard, is it relevant that national law imposes special conditions for:

– theme parks or amusement parks, sports stadia or golf courses (above a certain land take or a certain number of parking spaces);

– industrial or trading estates (above a certain land take);

– shopping centres (above a certain land take or a certain number of parking spaces);

– accommodation establishments, such as hotels or holiday villages, and ancillary facilities (above a certain number of beds or a certain land take, limited to the area outside enclosed settlements); and

– car parks or garages accessible to the public (above a certain number of parking spaces)?

(2) Does [Directive 2011/92] require lower thresholds or criteria with lower thresholds (than those referred to in the first question) to be set for areas of particular historical, cultural, urban-design or architectural significance, such as UNESCO World Heritage Sites, having regard, in particular, to the rule in point 2(c)(viii) of Annex III [of that directive], according to which "landscapes and sites of historical, cultural or archaeological significance" are also to be taken into account when deciding whether an environmental impact assessment must be carried out for the projects listed in Annex II [thereof]?

(3) Does [Directive 2011/92] preclude a national rule according to which, when assessing an "urban development project" as referred to in the first question, aggregation (cumulation) with other similar and geographically related projects is restricted in such a way that only the sum of the capacities approved in the last five years, including the capacity or capacity expansion applied for, is to be taken into account; urban development projects or parts of such projects are no longer to be regarded conceptually as urban development projects once

[12] C(2019) 6680 final.

[13] INFR(2019)2224.

they have been carried out; and the assessment to be carried out on a case-by-case basis of whether an accumulation of effects is likely to result in significant harmful, undesirable or adverse effects on the environment, thus requiring an environmental impact assessment to be carried out for the proposed project, is not carried out if the capacity of the proposed project is less than 25% of the threshold?

(4) If the answer to Question 1 and/or 2 is in the affirmative:

Can the examination to be carried out on a case-by-case basis in the event that the discretion accorded to the national authorities of the Member States (in conformity with the provisions of Article 2(1) and Article 4(2) and (3) of [Directive 2011/92], which are directly applicable in this case) is exceeded, in order to determine whether the project is likely to have significant effects on the environment and must therefore be made subject to an environmental impact assessment, be limited to certain aspects of protection, such as the protection objective of a particular area, or must all of the criteria set out in Annex III to [Directive 2011/92] be taken into account in that case?

(5) Does [Directive 2011/92], having regard in particular to the principles of judicial protection laid down in Article 11 of that directive, permit the assessment referred to in the fourth question to be carried out first by the referring court (in a building consent procedure and as part of the verification of its own jurisdiction) in the proceedings of which national law accords the "public" only extremely limited status as a party and against the decisions of which members of the "public concerned" have only extremely limited judicial protection within the meaning of Article 1(2)(d) and (e) of [Directive 2011/92]? Is it relevant to the answer to that question that – apart from the possibility for an authority to make a declaration of its own motion – only the project applicant, a participating authority or the environmental ombudsman is permitted under national law to request a separate declaration to establish whether the project is subject to the requirement to carry out an environmental impact assessment?

(6) Does [Directive 2011/92] permit building permits for individual construction measures which form part of "urban development projects" pursuant to point 10(b) of Annex II to [that] directive to be granted before, or alongside, a necessary environmental impact assessment, or before the completion of a case-by-case assessment of the environmental effects intended to clarify the need for an environmental impact assessment, without carrying out a comprehensive assessment of the environmental effects within the meaning of [Directive 2011/92] as part of the building consent procedure, and while according the public only limited status as a party?'

25. WertInvest Hotelbetrieb, the Austrian Government and the Commission submitted written observations. At the hearing of 14 September 2022, those parties, together with the Magistrat der Stadt Wien (Vienna City Administration) and the Verein Alliance for Nature, presented oral argument and replied to the Court's questions.

26. In line with the Court's request, my Opinion examines the first four questions raised by the referring court.

IV. Assessment

A. Admissibility

27. WertInvest Hotelbetrieb submits that the present reference for a preliminary ruling should be rejected as inadmissible since the New Haymarket project is not an urban development project for the purposes of Directive 2011/92. It contends that, with the exception of the tower building, all of the other buildings on the site already exist and will merely be refurbished. Further, or in the alternative, the third question is purely hypothetical. The order for reference does not indicate the presence of any similar projects in the area of the New Haymarket project, by reason of which that question is inadmissible.

28. According to settled case-law, in the context of the cooperation for which Article 267 TFEU provides, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions it submits to the Court. Consequently, where questions submitted by a national court concern the interpretation of EU law, the Court is, in principle, bound to give a ruling. [14] The Court may thus refuse to rule on a question referred by a national court for a preliminary ruling only 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, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted. [15]

29. WertInvest Hotelbetrieb claims that the New Haymarket project is not an urban development project within the meaning of Directive 2011/92. Since the argument advanced on behalf of WertInvest Hotelbetrieb is grounded upon its interpretation of provisions of EU law, it is hardly surprising that the referring court finds itself in a position whereby it seeks the Court's assistance in order to respond thereto. There thus appears to be little doubt that the instant reference for a preliminary ruling is admissible.

30. As for the admissibility of the third question, whilst the order for reference does not identify other similar projects that are planned or carried out in the same area, given the location of the New Haymarket project and its cumulation with other existing and/or approved projects within the meaning of points 1(b) and 3(g) of Annex III to Directive 2011/92, that question cannot be considered as purely hypothetical within the meaning of the aforecited case-law.

31. I therefore propose that the Court answer the first four questions in the order for reference.

B. The first and second questions

32. By its first and second questions, which can be answered together, the referring court asks, in essence, whether Article 4(2) and (3) of Directive 2011/92, read in conjunction with point 10(b) of Annex II and point 2(c)(viii) of Annex III thereto, prevents national legislation providing that urban development projects shall be subject to an environmental impact assessment only when

[14] See judgment of 13 January 2022, *Regione Puglia* (C-110/20, EU:C:2022:5, paragraph 23 and the case-law cited).

[15] See judgment of 13 January 2022, *Regione Puglia* (C-110/20, EU:C:2022:5, paragraph 24 and the case-law cited).

they occupy at least 15 ha and have a gross floor area in excess of 150 000 m^2, without taking account of the location of such projects on sites of historical, cultural or archaeological significance, such as UNESCO World Heritage Sites.

33. WertInvest Hotelbetrieb recalls that Directive 2011/92 confers upon Member States a wide margin of discretion to establish the thresholds or criteria that trigger an obligation to subject urban development projects to an environmental impact assessment. The relevant thresholds in the EIAA do not exceed the limits of that discretion. According to WertInvest Hotelbetrieb, urban development projects which do not meet thresholds such as those prescribed by the EIAA are unlikely to have significant environmental effects. In particular, such projects do not require an examination on a case-by-case basis in order to determine whether an environmental impact assessment is required, even where they are located on a UNESCO World Heritage Site.

34. Due to the infringement procedure referred to in point 23 of the present Opinion, the Austrian Government submitted no observations on the first and second questions.

35. At the hearing, the Magistrat der Stadt Wien (Vienna City Administration) submitted that the New Haymarket project could not be regarded as an urban development project within the meaning of Directive 2011/92 as transposed by Austrian legislation. However, it admitted that even a small-scale project can have significant effects on the environment, in particular when it is located on a UNESCO World Heritage Site. Although it claimed that the New Haymarket project would not have any significant effects on the environment, in reply to the questions from the Court, it admitted that, in the absence of an environmental impact assessment, the possibility of environmental effects cannot be excluded.

36. The Commission observes that Directive 2011/92 does not define the term 'urban development projects'. However, point 10(b) of Annex II thereto gives the construction of shopping centres and car parks as examples of such projects. Having regard to the aim of that directive, the term 'urban development projects' thus refers to buildings and public spaces which, in view of their nature, size or location, have effects on the environment comparable to those of shopping centres and car parks. It makes two points in support of that submission.

37. First, while the Commission recognises that Directive 2011/92 grants Member States a wide margin of discretion to determine the classes of urban development projects subject to an environmental impact assessment, Article 2(1) thereof requires Member States to ensure that projects likely to have significant effects on the environment by virtue of their nature, size or location are subject to such an assessment. A Member State that establishes thresholds without taking account of the nature, size or location of urban development projects capable of having significant effects on the environment exceeds the limits of its discretion.

38. The Commission submits that, by reference to factors such as fauna and flora, soil, water, climate or cultural heritage, even a small-scale project can have significant effects on the environment when it is located in a sensitive area. In that context, it refers to Annex III to Directive 2011/92, relating to the selection criteria to determine whether projects should be subject to an environmental impact assessment pursuant to Article 4(3) thereof. Point 2(c)(viii) of Annex III to that directive, concerning the 'location of projects', establishes that consideration must be given to the environmental sensitivity of geographical areas likely to be affected by projects, with particular regard being had to the absorption capacity of the natural environment, including landscapes and sites of historical, cultural or archaeological significance. In this respect,

the Commission contends that a project consisting in the construction of a high-rise building in a site of historical value may have a serious impact on the environment, even if that project occupies a relatively modest area.

39. In view of the foregoing, the Commission considers that, in so far as the EIAA does not take into consideration the location of urban development projects, in particular on sites of historical or cultural significance, such as the project at issue in the main proceedings, it is inconsistent with Directive 2011/92.

40. Second, the Commission submits that thresholds established by national legislation cannot, in practice, exclude the obligation to carry out an environmental impact assessment with respect to certain categories of projects, as appears to be the case with the EIAA. The Commission points out that, under that legislation, the Austrian authorities have indicated that, between 2005 and 2019, 53 out of 59 urban development projects did not require an environmental impact assessment.

41. In my view, the referring court's first and second questions raise two main issues: the meaning of the term 'urban development project' in a context where certain buildings that make up part of that project are *in situ* prior to it being commenced; and whether national legislation that makes the need to carry out an environmental impact assessment conditional upon a project attaining certain thresholds by reference to the land surface occupied and gross floor area is consistent with Directive 2011/92.

42. As regards the first of those issues, Article 1(2)(a) of Directive 2011/92 defines 'project' as the execution of construction works or of other installations or schemes. Whilst that directive does not define 'urban development project' as such, point 10(b) of Annex II thereto provides, in a non-exhaustive list, two examples of urban development projects, namely the construction of shopping centres and car parks. According to a Commission document on the interpretation of definitions of project categories of Annexes I and II to Directive 2011/92, [16] the category of urban development projects should be interpreted broadly to include projects such as bus garages or train depots, housing developments, hospitals, universities, sports stadia, cinemas, theatres, concert halls and other cultural centres. [17] In keeping with that approach, the Court has held that building a leisure centre which includes a cinema complex is an urban development project. [18]

43. The Court has frequently observed that the scope of Directive 2011/92 is wide and that its purpose is very broad. [19] Its case-law indicates that the word 'project' includes works to modify an existing structure. [20] Moreover, it appears contrary to the objectives of that directive that the concept of a project is limited to the construction of infrastructure so as to exclude works to improve or to extend existing structures. Such a limited interpretation would have the consequence that all works that modify existing structures, regardless of their extent, could be carried out in disregard of the obligations resulting from Directive 2011/92, thereby preventing the application of its provisions in those circumstances. [21]

[16] *Interpretation of definitions of project categories of annex I and II of the EIA Directive*, dated 2015, pp. 49 and 50; available online at https://ec.europa.eu/environment/eia/pdf/cover_2015_en.pdf.

[17] Ibid. p. 51.

[18] Judgment of 16 March 2006, *Commission* v *Spain* (C-332/04, not published, EU:C:2006:180, paragraphs 83 to 87).

[19] Judgments of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, paragraph 32), and of 31 May 2018, *Commission* v *Poland* (C-526/16, not published, EU:C:2018:356, paragraph 54).

[20] See judgments of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, paragraphs 23 and 33), and of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154, paragraph 27).

[21] Judgment of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, paragraph 32).

44. It follows from those observations that demolition works must also be 'projects' for the purposes of Directive 2011/92. Urban development projects often involve the demolition of existing structures of historical or cultural significance. In order to assess the impact of such projects on, inter alia, cultural heritage, they cannot escape the application of the environmental impact assessment process that Directive 2011/92 stipulates. [22] An integrated multifunctional development project consisting in residential and commercial buildings is therefore an urban development project for the purposes of that directive, including where that project consists of both the refurbishment of existing structures and the erection of new buildings.

45. As for the second issue that I have identified, namely whether national legislation may make the carrying out of an environmental impact assessment conditional upon a project attaining certain thresholds based on land surface occupied and gross floor area, Article 4(2) of Directive 2011/92 establishes that, for projects listed in Annex II thereto, Member States shall determine whether they shall be subject to an assessment in accordance with Articles 5 to 10 thereof. Member States may make that determination by way of a case-by-case examination or by laying down thresholds or criteria. According to Article 4(3) of Directive 2011/92, where a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2 of that article, the relevant selection criteria in Annex III are taken into account. [23]

46. According to settled case-law, although Article 4(2) of Directive 2011/92 confers on Member States a measure of discretion when identifying the types of projects that are to be subject to an assessment or establishing the criteria and/or thresholds to apply for that purpose, that discretion is limited by the overarching obligation in Article 2(1) thereof that projects likely to have significant effects on the environment by virtue of their nature, size or location are to be subject to an impact assessment. [24]

47. Having regard to the precautionary principle, which is one of the foundations of the high level of protection that the European Union seeks to pursue in the field of environmental law, and by reference to which Directive 2011/92 falls to be interpreted, a risk of significant effects on the environment arises where it cannot be excluded, on the basis of objective information, that a project is likely to have such significant effects. [25]

48. The criteria and thresholds in Article 4(2) of Directive 2011/92 are designed to facilitate the examination of the actual characteristics of any given project in order to determine whether it is to be subject to an environmental impact assessment. [26] A Member State that establishes criteria and/or thresholds at a level such that, in practice, all projects of a certain type are exempt from the requirement of an environmental impact assessment exceeds the limits of the discretion that Articles 2(1) and 4(2) of Directive 2011/92 confer upon it, unless the entire category of the projects so excluded can be regarded, on the basis of objective information, as being unlikely to have significant effects on the environment. [27]

22 Judgment of 3 March 2011, *Commission* v *Ireland* (C-50/09, EU:C:2011:109, paragraphs 97 to 100).

23 Details of which are reproduced in points 10 to 12 of the present Opinion.

24 Judgments of 21 September 1999, *Commission* v *Ireland* (C-392/96, EU:C:1999:431, paragraph 64); of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, paragraph 37); of 15 October 2009, *Commission* v *Netherlands* (C-255/08, not published, EU:C:2009:630, paragraph 32); of 11 February 2015, *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 40); and of 31 May 2018, *Commission* v *Poland* (C-526/16, not published, EU:C:2018:356, paragraph 60).

25 Judgment of 31 May 2018, *Commission* v *Poland* (C-526/16, not published, EU:C:2018:356, paragraph 67).

26 Judgments of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraph 30), and of 11 February 2015, *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 41).

27 Judgments of 21 September 1999, *Commission* v *Ireland* (C-392/96, EU:C:1999:431, paragraph 75); of 15 October 2009, *Commission* v *Netherlands* (C-255/08, not published, EU:C:2009:630, paragraph 42); and of 31 May 2018, *Commission* v *Poland* (C-526/16, not published, EU:C:2018:356, paragraph 61).

49. According to Article 4(3) of Directive 2011/92, Member States are moreover obliged to take account of the selection criteria set out in Annex III thereto when they lay down the criteria and/or thresholds to which Article 4(2) thereof refers.[28] It follows that a Member State, which establishes criteria and/or thresholds that take account of the size of projects only, without also taking their nature and location into consideration, exceeds the limits of its discretion under Articles 2(1) and 4(2) of Directive 2011/92.[29] Even a small-scale project can have significant effects on the environment if it is located where the environmental factors set out in Article 3 of that directive, which include cultural heritage, are sensitive to even slight alteration.[30] Similarly, a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size.[31] Where a Member State has recourse to thresholds to assess the need to carry out an environmental impact assessment it is also necessary that it take account of factors such as the nature or the location of projects, for example by setting a number of thresholds that correspond to varying project sizes and apply by reference to the nature or location of the project.[32]

50. The Court's case-law thus confirms what one might have thought was the uncontroversial assertion that there is no reason to assume that the environmental impact of urban development projects carried out in urban areas is low or non-existent, in particular bearing in mind the list of factors relevant to such an assessment.[33]

51. From the order for reference it appears that urban development projects, as defined by the EIAA, are subject to an environmental impact assessment only when they occupy at least 15 ha and have a gross floor area in excess of 150 000 m^2. Point 18(b) of Annex 1 to the EIAA does not set any thresholds or criteria in Column 2 relating to the location or nature of urban development projects that would trigger an obligation to carry out an environmental impact assessment.

52. Moreover, Column 3 in that point, which concerns the examination of the need to carry out an environmental impact assessment on a case-by-case basis, does not mention Category A in Annex 2 thereto, which relates to special protection areas such as UNESCO World Heritage Sites. The EIAA does not, accordingly, contemplate an examination on a case-by-case basis of the need to carry out an environmental impact assessment for an urban development project in an area listed as a UNESCO World Heritage Site.

53. In the light of the foregoing, I propose that the Court reply to the referring court's first and second questions that Article 4(2) and (3) of Directive 2011/92, read in conjunction with point 10(b) of Annex II and point 2(c)(viii) of Annex III thereto, prevents national legislation establishing that urban development projects shall be subject to an environmental impact assessment only when they occupy at least 15 ha and have a gross floor area in excess of 150 000

[28] Judgments of 15 October 2009, *Commission* v *Netherlands* (C-255/08, not published, EU:C:2009:630, paragraph 33); of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraph 32); and of 28 February 2018, *Comune di Castelbellino* (C-117/17, EU:C:2018:129, paragraph 38). These criteria are set out in points 10 to 12 of the present Opinion.

[29] Judgments of 21 September 1999, *Commission* v *Ireland* (C-392/96, EU:C:1999:431, paragraph 65); of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, paragraph 38); and of 15 October 2009, *Commission* v *Netherlands* (C-255/08, not published, EU:C:2009:630, paragraph 35). See also, to that effect, judgment of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraph 35).

[30] Judgments of 21 September 1999, *Commission* v *Ireland* (C-392/96, EU:C:1999:431, paragraph 66), and of 26 May 2011, *Commission* v *Belgium* (C-538/09, EU:C:2011:349, paragraph 55). See also, to that effect, judgment of 15 October 2009, *Commission* v *Netherlands* (C-255/08, not published, EU:C:2009:630, paragraph 30).

[31] Judgment of 21 September 1999, *Commission* v *Ireland* (C-392/96, EU:C:1999:431, paragraph 67).

[32] Ibid., paragraph 70.

[33] Judgment of 16 March 2006, *Commission* v *Spain* (C-332/04, not published, EU:C:2006:180, paragraph 80).

m^2, without taking their location into account, thereby excluding a case-by-case examination of the need to carry out an environmental impact assessment for urban development projects on sites of historical, cultural or archaeological significance, such as UNESCO World Heritage Sites.

C. The third question

54. By its third question, the referring court inquires as to whether Article 4(3) of Directive 2011/92, read in conjunction with Annex III thereto, precludes national legislation according to which, when assessing whether an environmental impact assessment is necessary due to the cumulative effects of an urban development project with other projects, only similar urban development projects are to be taken into consideration provided that they have been approved in the last five years but have not yet been carried out and that the urban development project envisaged accounts for at least 25% of the relevant threshold.

55. WertInvest Hotelbetrieb considers that the third question is purely hypothetical and therefore made no observations with regard to it.

56. The Austrian Government submits that the EIAA correctly transposes the obligation to take account of the cumulation of projects. First, within its margin of discretion, the Austrian legislature established that only projects that reached at least 25% of the relevant thresholds may trigger the need to carry out an examination of their cumulative effects together with other projects. That rule aims at excluding small-scale projects with insignificant effects on the environment. Second, the Austrian Government suggests that it is appropriate to apply the rule on cumulation only to projects that were approved during the previous five years but that have not yet been carried out because those that have already been carried out are part of the pre-existing urban architectural heritage.

57. The Commission claims that, when ascertaining whether a project should be subject to an environmental impact assessment, the obligation to take into account the cumulative impact is not limited to projects that are of the same kind or belong to the same category. What is relevant is whether the project in question is likely to have significant effects on the environment because of the presence of other existing or approved projects. In that context, national legislation cannot exclude taking into consideration projects that were carried out or that received approval more than five years beforehand.

58. Annex III to Directive 2011/92, entitled 'Selection criteria referred to in Article 4(3)', contains the criteria to determine whether the projects listed in Annex II to that directive are subject to an environmental impact assessment. Point 1 and point 3(g) of Annex III thereto require that cumulation with other existing and/or approved projects be examined with regard to both the characteristics of projects and their impact.

59. The Court's case-law demonstrates that it may be necessary to take account of the cumulative effect of projects in order to avoid circumvention of the objective pursued by EU legislation by splitting up projects which, when taken together, are likely to have significant effects on the environment within the meaning of Article 2(1) of Directive 2011/92. [34]

[34] Judgments of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, paragraph 27); of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154, paragraph 36); and of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraph 37).

60. It follows that, when ascertaining whether a project is to be subject to an environmental impact assessment, a national authority must examine its potential to create significant effects on the environment in the context of other projects. The scope of that assessment is not limited to projects of the same kind, since such cumulative effects may arise from projects belonging to the same category as well as from projects of a different nature, such as an urban development project and the construction of transport infrastructure. National authorities must thus consider whether the environmental effects of a project under consideration may be greater than they would be in the absence of the impact of other projects. [35]

61. Despite the margin of discretion Member States enjoy when transposing a directive, and notably when laying down the criteria and thresholds to which Article 4(2) of Directive 2011/92 refers, it follows from the case-law cited in point 49 of the present Opinion that even a small-scale project can have significant effects on the environment. Directive 2011/92 therefore precludes national legislation that excludes the examination of cumulative effects until the project envisaged reaches a certain size, such as that at issue here, which requires that it reaches at least 25% of the applicable thresholds.

62. It also follows from the text of Annex III to Directive 2011/92 that Member States are obliged to take into account cumulative effects with 'other existing and/or approved projects'. Member States may, however, disregard projects that have not been carried out or at least have not commenced despite having been approved years prior since, in the absence of administrative or legal proceedings, the passage of a significant period of time may suggest that such projects are unlikely to be executed. In contrast, Directive 2011/92 clearly requires Member States to take into consideration the cumulative effects of other existing projects, irrespective as to when they were completed.

63. I therefore propose that the Court reply to the referring court's third question that Article 4(3) of Directive 2011/92, read in conjunction with Annex III thereto, precludes national legislation according to which, when assessing whether an environmental impact assessment is necessary due to the cumulative effects of an urban development project with other projects, only similar urban development projects are to be taken into consideration, excluding existing projects and provided that the urban development project envisaged accounts for at least 25% of the relevant threshold. In the absence of pending administrative or legal proceedings, Directive 2011/92 does not prevent Member States from excluding from that examination projects in respect of which the works have not begun and which are unlikely to be carried out due to the period of time that has passed since their final approval. A period of five years is, in principle, sufficient to ensure that such conditions are fulfilled.

D. The fourth question

64. The fourth question asks whether, in circumstances where a Member State's authorities exceed the discretion that Article 2(1) and Article 4(2) and (3) of Directive 2011/92 confer upon them, those authorities are required to examine the need to carry out an environmental impact assessment on a case-by-case basis and, if so, whether that examination is limited to the protection objectives applicable to the area in question or whether all the criteria set out in Annex III to Directive 2011/92 must be taken into account.

[35] Judgment of 11 February 2015, *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 45).

65. WertInvest Hotelbetrieb, the Austrian Government and the Commission consider that a case-by-case examination of the need to carry out an environmental impact assessment is required in those circumstances. While WertInvest Hotelbetrieb emphasises that any such case-by-case examination should be limited to a study of the effects of the project upon the relevant protection objectives – in this case, that of protecting sites of historical, cultural or archaeological significance – the Austrian Government takes the view that account should be taken of all the selection criteria in Annex III to Directive 2011/92, although it would be appropriate to focus on the protection objectives of the relevant site. For its part, the Commission argues that national authorities must take account of all the relevant selection criteria mentioned in Annex III to Directive 2011/92 when they conduct a case-by-case examination of the need to carry out an environmental impact assessment.

66. In accordance with the Court's case-law, where a Member State exceeds the discretion that Article 4(2) of Directive 2011/92, read in conjunction with Articles 2(1) and 4(3) thereof, confers upon it, because the thresholds it establishes constitute an incorrect transposition of that directive, it is for the authorities of that Member State to take all of the measures necessary to ensure that projects are examined on a case-by-case basis 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. [36]

67. When conducting that case-by-case examination, account is to be taken of the selection criteria in Annex III to Directive 2011/92, without prejudice to the fact that some may be more relevant than others in the context of an individual case. The need to protect sites of historical, cultural or archaeological significance appears to be particularly relevant in the context of an urban development project envisaged for a UNESCO World Heritage Site.

68. I therefore propose that the Court reply to the referring court's fourth question that, in circumstances where a Member State's authorities exceed the discretion that Article 2(1) and Article 4(2) and (3) of Directive 2011/92 confer upon them, those authorities are required to examine the need to carry out an environmental impact assessment on a case-by-case basis, taking into account all of the criteria set out in Annex III to that directive.

V. Conclusion

69. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) as follows:

(1) Article 4(2) and (3) 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, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, read in conjunction with point 10(b) of Annex II and point 2(c)(viii) of Annex III thereto,

is to be interpreted to the effect that

[36] See, to that effect, judgment of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraphs 41 to 43). See also, to that effect, judgments of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraphs 59 and 60), and of 16 September 1999, *WWF and Others* (C-435/97, EU:C:1999:418, paragraphs 70 and 71).

it prevents national legislation establishing that urban development projects shall be subject to an environmental impact assessment only when they occupy at least 15 ha and have a gross floor area in excess of 150 000 m^2, without taking their location into account, thereby excluding a case-by-case examination of the need to carry out an environmental impact assessment for urban development projects on sites of historical, cultural or archaeological significance, such as UNESCO World Heritage Sites.

(2) Article 4(3) of Directive 2011/92, read in conjunction with Annex III thereto,

is to be interpreted to the effect that

it precludes national legislation according to which, when assessing whether an environmental impact assessment is necessary due to the cumulative effects of an urban development project with other projects, only similar urban development projects are to be taken into consideration, excluding existing projects and provided that the urban development project envisaged accounts for at least 25% of the relevant threshold. In the absence of pending administrative or legal proceedings, Directive 2011/92 does not prevent Member States from excluding from that examination projects in respect of which the works have not begun and which are unlikely to be carried out due to the period of time that has passed since their final approval. A period of five years is, in principle, sufficient to ensure that such conditions are fulfilled.

(3) Article 2(1) and Article 4(2) and (3) of Directive 2011/92

are to be interpreted to the effect that,

in circumstances where a Member State's authorities exceed the discretion conferred upon them by those provisions, those authorities are required to examine the need to carry out an environmental impact assessment on a case-by-case basis, taking into account all of the criteria set out in Annex III to that directive.