



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

24 November 2016*

(Reference for a preliminary ruling — Environment — Assessment of the effects of certain public and private projects on the environment — Directive 2011/92/EU — Project subject to assessment — Annex I, point 7 — European Agreement on Main International Traffic Arteries (AGR) — Widening of a road with four lanes over a length of less than 10 km)

In Case C-645/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bayerischer Verwaltungsgerichtshof (Bavarian Higher Administrative Court, Germany), made by decision of 27 October 2015, received at the Court on 3 December 2015, in the proceedings

Bund Naturschutz in Bayern eV,

Harald Wilde

v

Freistaat Bayern,

Joined party:

Stadt Nürnberg,

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot (Rapporteur), acting as President of the Chamber, A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Bund Naturschutz in Bayern eV and Harald Wilde, by A. Lehnert, Rechtsanwalt,
- Freistaat Bayern, by A. Meyer, Oberlandesanwalt, and W. Durner, Rechtsanwalt,
- Stadt Nürnberg, by U. Hösch, Rechtsanwalt,

* Language of the case: German.

— the European Commission, by A. Becker and C. Zadra, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).
- 2 The request has been made in proceedings between (i) the Bund Naturschutz in Bayern eV and Mr Harald Wilde and (ii) Freistaat Bayern (the *Land* of Bavaria, Germany) concerning the legality of the decision taken by the latter to approve the development of certain parts of a road within the municipal area of the Stadt Nürnberg (City of Nuremberg, Germany), without having carried out an assessment of the effects of that development on the environment.

Legal context

Directive 2011/92

- 3 According to recital 1 thereof, Directive 2011/92 codifies Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, which has been substantially amended several times.
- 4 Directive 2011/92 also includes the following recitals:

‘...

(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.

...’
- 5 According to Article 4(1) and (2) of that directive:

‘1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

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).'

- 6 Point 7 of Annex I to Directive 2011/92 mentions, *inter alia*, in respect of the projects referred to in Article 4(1) thereof:

‘ ...

(b) Construction of motorways and express roads [For the purposes of this directive “express road” means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.];

(c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road or realigned and/or widened section of road would be 10 km or more in a continuous length.’

- 7 Point 24 of Annex I to Directive 2011/92 also mentions, as projects referred to in Article 4(1) of the directive:

‘Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.’

- 8 In Annex II to Directive 2011/92, point 10, which is entitled ‘Infrastructure projects’, mentions, *inter alia*, as projects referred to in Article 4(2) of the directive:

‘ ...

(e) Construction of roads ...;

...’

- 9 Point 13 of Annex II to Directive 2011/92 also mentions, as projects referred to in Article 4(2) of Directive 2011/92:

‘(a) Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I);

(b) Projects in Annex I, undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years.’

The AGR

- 10 The European Agreement on Main International Traffic Arteries (AGR), signed in Geneva on 15 November 1975, contains, in Annex II (entitled ‘Conditions to which the main international traffic arteries should conform’), the following provision at point I.1:

‘The fundamental characteristics of the construction or improvement of the main international traffic arteries, hereafter designated “international roads”, are dealt with in the following provisions, which are based on modern concepts of road construction technology. They do not apply in built-up areas. The latter shall be by-passed if they constitute a hindrance or a danger.’

Title II of Annex II, which is entitled ‘Categories of international roads’, contains the following definition at point II.3:

‘Express roads

Roads reserved for automobile traffic, accessible only from interchanges or controlled junctions and on which, in particular, stopping and parking are prohibited.’

German law

- 11 According to Article 37 (entitled ‘Environmental Impact Assessment’) of the Bayerisches Straßen- und Wegegesetz (Bavarian Law on Roads and Byways), in the version published on 5 October 1981, as most recently amended by the Law of 22 May 2015:

‘In the case of regional and district roads, roads linking municipalities and local roads, an environmental impact assessment must be carried out:

1. when roads with four or more lanes are built or existing roads are widened or realigned so as to provide four or more lanes, where such new road section or widened and/or realigned road section:
 - (a) has a continuous length of 10 km or more; or
 - (b) has a continuous length of at least 5 km and, for a stretch of over 5% of this, crosses habitats ... with an area of over 1 hectare, or crosses areas of conservation designated 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)] or [Council] Directive [79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), national parks ... or nature conservation areas ..., or
2. when one-, two- or three-lane roads are built where the newly-constructed section of the road is at least 10 km in continuous length and, for a stretch of over 5%, crosses areas or habitats referred to in point 1(b), or
3. if not already covered by point 1, when roads are widened by at least one further lane over a continuous length of at least 10 km and at least 5% of the section of the road to be altered crosses areas or habitats referred to in point 1(b).’

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

- 12 By decision of 28 June 2013, the competent authorities of the Freistaat Bayern (*Land* of Bavaria) approved plans authorising the development of certain stretches of district road No 4 in the municipal area of Stadt Nürnberg (City of Nuremberg).
- 13 The development in question concerns two sections of that road, which has two lanes in each direction. On the first section, which is 1.8 km in length, the plan is to add a third lane on one side of the road and to erect noise barriers over a stretch of around 1.3 km. On the second section, which is 2.6 km in length, a road tunnel of approximately 1.8 km is to be built, existing ‘flat junctions’ are to be turned into ‘split-level junctions’ and a new access road is to be provided from the centre of the City of Nuremberg. The two sections concerned are located in urban areas.

- 14 Each of the applicants in the main proceedings brought an action before the Bayerisches Verwaltungsgericht Ansbach (Administrative Court, Ansbach, Germany) for annulment of the decision of 28 June 2013, *inter alia* on the ground that the decision was not preceded by an environmental impact assessment.
- 15 Those actions were dismissed by judgments of 14 July 2001. By orders of 23 June 2015, the referring court, the Bayerischer Verwaltungsgerichtshof (Bavarian Higher Administrative Court, Germany), gave the applicants in the main proceedings leave to appeal against those judgments.
- 16 In its examination of the appeal, the referring court has raised a question about the obligation to make the project at issue subject to an environmental impact assessment on the basis of point 7(b) and (c) of Annex I to Directive 2011/92. In particular, it is uncertain about whether those provisions apply to a development that is less than 10 km in length and asks whether such a development amounts to ‘construction’ within the meaning of those provisions.
- 17 In those circumstances the Bayerischer Verwaltungsgerichtshof (Bavarian Higher Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Should point 7(c) of Annex I to Directive 2011/92 ... be interpreted as covering also the development of existing roads with four or more lanes?
- (2) If Question 1 is answered in the affirmative:
- Is point 7(c) of Annex I to Directive 2011/92 more specific than point 7(b) of Annex I to that directive and does it for that reason take priority in application?
- (3) If Question 1 or Question 2 is answered in the negative:
- Does the term “express road” in point 7(b) of Annex I to Directive 2011/92 presuppose that the road section in question is a main international traffic artery within the meaning of the [AGR]?
- (4) If Questions 1, 2 or 3 are answered in the negative:
- Does the term “construction” in point 7(b) of Annex I to Directive 2011/92 apply to a road development under which the existing route of the road does not undergo any significant alteration?
- (5) If Question 4 is answered in the affirmative:
- Does the term “construction” in point 7(b) of Annex I to Directive 2011/92 presuppose a minimum length with regard to the road section in question? If so, must this involve a continuous section of road? If so, is the minimum length more than a continuous length of 2.6 km or, where the lengths of multiple separate sections of road are to be added together, more than a total of 4.4 km?
- (6) If Question 5 is answered in the negative:
- Does the second reference in point 7(b) of Annex I to Directive 2011/92 (construction of express roads) apply to a measure for the development of a road in a built-up area within the meaning of the [AGR]?’

Consideration of the questions referred for a preliminary ruling

Question 1

- 18 By Question 1 the referring court asks, in essence, whether point 7(c) of Annex I to Directive 2011/92 must be interpreted to the effect that it covers a road development project which, whilst it concerns, as in the case before the referring court, a stretch of road that is under 10 km in length, consists in the widening or development of an existing road with four or more lanes.
- 19 It should be observed in that regard that, according to recitals 8 and 9 of Directive 2011/92, the EU legislature sought to draw a distinction between (i) certain types of project which have significant effects on the environment and which should, as a rule, be subject to a systematic assessment and (ii) other types of project which may not have such effects in every case and which should be assessed where the Member States consider that they are likely to have significant effects on the environment.
- 20 Consequently, Article 4 of Directive 2011/92 distinguishes between, under paragraph 1, projects, listed in Annex I to the directive, which the Member States must make subject to an environmental impact assessment and, under paragraph 2, projects, listed in Annex II to the directive, in respect of which it falls to the Member States to determine whether they must be made subject to such an assessment.
- 21 Point 7(b) of Annex I to Directive 2011/92 mentions the construction of motorways and express roads and point 7(c) refers to the construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a continuous length.
- 22 It is clear from point 7(c) of Directive 2011/92 that the EU legislature intended to restrict the Member States' obligation to make certain road development projects subject to a systematic environmental impact assessment solely to those projects which concern road sections of a significant length, in the present case a length of at least 10 km.
- 23 Although the scope of Directive 2011/92 — like that of Directive 85/337 — is wide and its purpose very broad (see to that effect, inter alia, judgments of 28 February 2008, *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 32, and of 25 July 2008, *Ecologistas en Acción-CODA*, C-142/07, EU:C:2008:445, paragraph 28), a purposive interpretation of the first-mentioned directive nevertheless cannot disregard the clearly expressed intention of the EU legislature (see, to that effect, judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others*, C-275/09, EU:C:2011:154, paragraph 29).
- 24 Therefore, a road development project which, as in the case in the main proceedings, concerns a stretch of road that is under 10 km in length is not, solely because of its nature, among the projects covered by point 7(c) of Annex I to Directive 2011/92, even though it consists in the widening or development of an existing road with four or more lanes.
- 25 This consideration is, however, without prejudice to the application, in the case before the referring court, of Article 4(2) of, and Annex II to, Directive 2011/92 should the case arise.
- 26 In view of the foregoing, the answer to Question 1 is that point 7(c) of Annex I to Directive 2011/92 cannot be interpreted to the effect that it covers a road development project which, whilst it concerns, as in the case before the referring court, a stretch of road that is under 10 km in length, consists in the widening or development of an existing road with four or more lanes.

Question 2

- 27 Having regard to the answer given to Question 1, there is no need to reply to Question 2.

Questions 3 and 6

- 28 By Questions 3 and 6, which it is appropriate to consider together, the referring court enquires, in essence, about the scope of the concept of ‘express roads’, whose construction must, according to point 7(b) of Annex I to Directive 2011/92, be subject to an environmental impact assessment.
- 29 Point 7(b) of Annex I to Directive 2011/92 defines express roads by means of a reference to the definition of express roads given in the AGR, as set out in paragraph 10 of the present judgment.
- 30 In the first place, it should be noted that point 7(b) of Annex I to Directive 2011/92 and the reference to the AGR were couched in the same terms in Directive 85/337. As regards the application of the latter, the Court has already held that, since not all the Member States are party to that agreement, that reference concerned the version of the agreement in force when Directive 85/337 was adopted, namely the version of 15 November 1975 (see, to that effect, judgment of 25 July 2008, *Ecologistas en Acción-CODA*, C-142/07, EU:C:2008:445, paragraph 30).
- 31 Since (i) Directive 2011/92 was limited to merely codifying Directive 85/337, (ii) not all the Member States are parties to the AGR and (iii) nothing suggests that the EU legislature, at the time when Directive 2011/92 was adopted, intended to allude, by its reference to that agreement, to the amended or revised versions thereof rather than to the original version, the AGR must continue to be referred to in the version in force at the date of its signature, namely 15 November 1975.
- 32 In the second place, it should be recalled that, according to the reference to the AGR made by point 7(b) of Annex I to Directive 2011/92, ‘express road’ means, for the purposes of the directive, a road which complies with the definition in that agreement. It thus follows from the actual wording of that provision that, by referring to such a definition rather than to roads which fall within the scope of the AGR, the directive covers roads whose technical characteristics are those mentioned in that definition rather than roads which are, pursuant to that definition, classified as ‘main international traffic arteries’ for the purposes of the AGR. Therefore, the construction of a road with the technical characteristics of express roads, as defined in the AGR, falls within the scope of point 7(b) of Annex I to Directive 2011/92, even if that road does not form part of the network of main international traffic arteries.
- 33 As regards the obligations laid down in Directive 2011/92, no relevance attaches to the fact that, according to point I.1 of Annex II to the AGR, the provisions of that annex ‘do not apply in built-up areas’, which ‘shall be by-passed if they constitute a hindrance or a danger’. Such a restriction of the AGR’s scope does not, in itself, call in question the applicability, for the purposes of Directive 2011/92, of the technical characteristics specific to express roads, as defined in that agreement.
- 34 In the third place, an express road is, according to that definition, a road reserved for automobile traffic accessible only from interchanges or controlled junctions and on which stopping and parking are prohibited. It does not follow from that definition that roads sited in urban areas would a priori be excluded. On the contrary, unless roads in built-up areas are expressly excluded, the words ‘express roads’ cover urban roads which have the characteristics set out in Annex II to the AGR (judgment of 25 July 2008, *Ecologistas en Acción-CODA*, C-142/07, EU:C:2008:445, paragraph 31).
- 35 Accordingly, the answer to Questions 3 and 6 is that point 7(b) of Annex I to Directive 2011/92 must be interpreted as meaning that ‘express roads’ for the purposes of that provision are roads whose technical characteristics are those set out in the definition in point II.3 of Annex II to the AGR, even if those roads do not form part of the network of main international traffic arteries or are located in urban areas.

Questions 4 and 5

- 36 By Questions 4 and 5, which it is appropriate to consider together, the referring court asks, in essence, about the scope of the concept of ‘construction’ within the meaning of point 7(b) of Annex I to Directive 2011/92.
- 37 As the referring court has pointed out, the Court of Justice has given a broad interpretation of the provisions of point 7(b) and (c) of Annex I to Directive 85/337 (which have been restated in identical terms in point 7(b) and (c) of Annex I to Directive 2011/92), holding that a project for refurbishment of a road which would be equivalent, by its scale and the manner in which it is carried out, to construction may be regarded as a construction project for the purposes of those provisions (see, to that effect, judgments of 25 July 2008, *Ecologistas en Acción-CODA*, C-142/07, EU:C:2008:445, paragraph 36, and of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others*, C-275/09, EU:C:2011:154, paragraph 27).
- 38 Using that analysis as its starting point, the referring court enquires whether a project which, as in the case before it, involves the refurbishment, on a considerable scale, of a road, but over a length of less than 10 km and without any significant alteration of the route of the road, may be regarded as ‘construction’ for the purposes of point 7(b) of Annex I to Directive 2011/92.
- 39 It must be noted that the word ‘construction’ used in point 7(a) of Annex I to Directive 2011/92 is in no way ambiguous and is to be understood as having its normal meaning, namely as referring to the carrying-out of works not previously existing or to the physical alteration of existing installations (see, to that effect, judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others*, C-275/09, EU:C:2011:154, paragraph 26).
- 40 It can hardly be disputed that a project for the refurbishment of pre-existing roads by civil engineering work on a significant scale, in particular by the construction of a tunnel, amounts to such an alteration, even if the works are to be carried out on the road’s existing route and over a length of less than 10 km.
- 41 In that regard, it must be stated that, unlike point 7(a) and (c) of Annex I to Directive 2011/92, point 7(b) does not prescribe a minimum length for the roads that it covers. It is also clear from the wording of point 7(b) that the EU legislature placed the construction of motorways and express roads in the category of projects which are as a matter of course subject to an environmental impact assessment, without requiring such a construction project to be of a minimum length.
- 42 Moreover, it is possible that a road development, even one of limited length, may, by its very nature, be so extensive as to have significant effects on the environment. Accordingly, the concept of ‘construction’ within the meaning of point 7(b) of Annex I to Directive 2011/92 does not presuppose that the section of road concerned be of a particular length. It is the task of the national court, under the conditions set out in paragraph 37 of the present judgment, to determine on a case-by-case basis whether, on account of all its characteristics, and not solely on account of its length, the road development in question is on such a scale that it must be classified as ‘construction’ for the purposes of that directive.
- 43 Consequently, the answer to Questions 4 and 5 is that the concept of ‘construction’ for the purposes of point 7(b) of Annex I to Directive 2011/92 must be interpreted as referring to the carrying-out of works not previously existing or to the physical alteration of existing installations. In order to determine whether such an alteration may be regarded as equivalent, because of its scale and the manner in which it is carried out, to such construction, the referring court must take account of all the characteristics of the work concerned and not only of its length or of the fact that its initial route is retained.

Costs

- ⁴⁴ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Point 7(c) of Annex I to 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 cannot be interpreted to the effect that it covers a road development project which, whilst it concerns, as in the case before the referring court, a stretch of road that is under 10 km in length, consists in the widening or development of an existing road with four or more lanes.**
2. **Point 7(b) of Annex I to Directive 2011/92 must be interpreted as meaning that ‘express roads’ for the purposes of that provision are roads whose technical characteristics are those set out in the definition in point II.3 of Annex II to the European Agreement on Main International Traffic Arteries (AGR), signed in Geneva on 15 November 1975, even if those roads do not form part of the network of main international traffic arteries or are located in urban areas.**
3. **The concept of ‘construction’ for the purposes of point 7(b) of Annex I to Directive 2011/92 must be interpreted as referring to the carrying-out of works not previously existing or to the physical alteration of existing installations. In order to determine whether such an alteration may be regarded as equivalent, because of its scale and the manner in which it is carried out, to such construction, the referring court must take account of all the characteristics of the work concerned and not only of its length or of the fact that its initial route is retained.**

[Signatures]