JUDGMENT OF THE COURT (Second Chamber)

10 December 2009 *

In Case C-205/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Umweltsenat (Austria), made by decision of 2 April 2008, received at the Court on 15 May 2008, in the proceedings

Umweltanwalt von Kärnten

v

Kärntner Landesregierung,

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting for the President of the Second Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris (Rapporteur) and L. Bay Larsen, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Umweltanwalt von Kärnten, by U. Scheuch, Landesrat,

— Alpe Adria Energia SpA, by M. Mendel, Rechtsanwalt,

— the European Commission, by J.-B. Laignelot and B. Kotschy, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17, 'Directive 85/337').

2 The reference was made in the context of an action between Umweltanwalt von Kärnten (Environment ombudsman of Carinthia, 'the Umweltanwalt') and the Kärntner Landesregierung (Government of the Province of Carinthia) concerning a decision which the latter adopted on 11 October 2007 ('the contested decision') in regard to Alpe Adria Energia SpA ('Alpe Adria').

Legal context

Community legislation

3 According to the first recital in its preamble, Directive 85/337 seeks to prevent pollution and other damage to the environment by making certain public and private projects subject to prior assessment of their environmental effects.

4 As is clear from the fifth recital, to that end, the Directive introduces general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.

5 The eighth and eleventh recitals in the preamble to Directive 85/337 state that certain types of projects have significant effects on the environment and must as a rule be subject to systematic assessment in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

6 Article 1(1) of Directive 85/337 provides as follows:

'This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.'

7 Article 2(1) of the Directive is worded as follows:

'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. These projects are defined in Article 4'.

8 Article 4 of the Directive provides that:

'… projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.'

9 Article 7(1) of Directive 85/337 provides:

'Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken,

and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.'

10 Point 20 of Annex I to the Directive refers to 'Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km'.

National legislation

11 Article 11(7) of the Bundesverfassungsgesetz (Federal Law on the Constitution, 'BVG') provides that it is for the Umweltsenat (Environment Tribunal) to take decisions concerning the assessment of the environmental effects of those projects which are likely to have significant effects on the environment once levels of executive review in each province have been exhausted.

12 According to that article, the Umweltsenat is an independent body composed of the chairman, judges and other legally qualified members, and is instated at the competent Federal Ministry. The establishment, responsibilities and procedure of the Umweltsenat are to be regulated by federal law. Its decisions are not be open to annulment or variation on appeal; an application to the Verwaltungsgerichtshof (Higher Administrative Court) is admissible.

13 Article 20(2) of the BVG reads as follows:

'Where, by means of Federal law or the law of a Province, a collegiate authority comprising at least one member of the judiciary is established to decide matters at last instance and it is provided by law that its decisions may not be annulled or varied by administrative procedure, the other members of the authority are also not bound by any directions in the performance of their duties.'

14 Article 133(4) of the BVG provides for an exception to the rule conferring jurisdiction in general on the Verwaltungsgerichtshof to hear appeals against decisions adopted by the various public administrations, to the effect that independent bodies may hear such appeals in specified domains. The Umweltsenat is one such body.

15 Paragraph 1 of the Bundesgesetz über den Umweltsenat 2000 (Federal Law on the Umweltsenat 2000; 'USG 2000') provides as follows:

'(1) An Umweltsenat shall be set up at the Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Ministry of Agriculture, Forestry, the Environment and Water Management).

(2) The Umweltsenat shall consist of 10 judges and a further 32 legally qualified members.

…'

16 Paragraph 2 of the USG 2000 provides that the members are to be appointed by the Federal President upon proposal of the Federal Government for a term of six years and may be re-appointed. In addition, the Federal Government is bound by certain proposals for appointment.

17 According to Paragraph 4 of the USG 2000:

'Members of the Umweltsenat shall carry out their functions independently and are not bound by any directions.'

18 Paragraph 5 of the USG 2000 provides:

'The Umweltsenat shall rule on appeals in matters set out in the first and second chapters of the Law on environmental impact assessments 2000 (Umweltverträglichkeitsprüfungsgesetz 2000 (BGBl No 697/1993), last amended by BGBl I 149/2006, "UVP-G 2000") …'

19 Paragraph 6 of the USG 2000 states:

'Decisions handed down by the Umweltsenat may not be annulled or varied by administrative action. An application to the Verwaltungsgerichtshof shall be admissible.'

20 According to Paragraph 2(2) of the UVP-G 2000, which transposed Directive 85/337 into Austrian law, a 'project' is defined as:

'the construction of an installation or other intervention in the natural surroundings and landscape including all measures connected in geographical and factual terms …'.

21 Paragraph 3(1) of the UVP-G 2000 provides that:

'The projects listed in Annex I … shall undergo an environmental impact assessment in accordance with the following provisions. The simplified procedure shall be applied to projects that are listed in columns 2 and 3 of Annex I …'

22 Paragraph 3(7) of the UVP-G 2000 provides that:

'On application of the candidate for the project, an authority with which it is cooperating or the environment ombudsman [Umweltanwalt], the authority shall determine whether an environmental impact assessment is to be carried out for a particular project under this federal law and what objective in Annex I or Paragraph 3a (1) to (3) is attained by the project. That finding may also be made of the authority's own motion. The decision shall be adopted by notice within six weeks, both at first and at second instance. The candidate for the project, the cooperating authority, the environment ombudsman and the municipality concerned shall be considered parties. The water planning body shall be heard before the decision is adopted. The essential content of, and grounds for, decisions shall be published by the authority in an adequate fashion or be open to consultation by the public. The municipality concerned may bring an action against the decision before the Verwaltungsgerichtshof. The environment ombudsman and the cooperating authority have no obligation to reimburse expenses.'

23 Annex I to the UVP-G 2000 sets out the projects for which an environmental impact assessment is required under Paragraph 3 thereof. They are divided into three groups (columns). Projects in the first two groups (columns) always require an environmental impact assessment if the thresholds are reached and the criteria laid down are fulfilled. Projects in the third group (column) must be assessed individually once the minimum threshold stated has been reached.

24 Point 16(a) of Annex I to the UVP-G 2000 refers, in column 1, to '[o]verhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km'.

25 Point 16(b) of Annex I to the UVP-G 2000 refers, in column 3, to '[o]verhead electrical power lines in category A [special conservation areas] or B [Alpine regions] protected areas with a voltage of 110 kV or more and a length of more than 20 km'.

The main proceedings and the question referred to the Court

26 The order for reference indicates that Alpe Adria is an Italian undertaking which is seeking to construct a 220 kV power line with a power rating of 300 MVA to connect the Italian Rete Elettrica Nazionale SpA network and the Austrian VERBUND-Austrian Power Grid AG network.

27 To that end, by letter of 12 July 2007, Alpe Adria applied to the Kärntner Landesregierung for the issue of a determination under Paragraph 3(7) of the UVP-G 2000 for the construction and operation of that project. In Austrian territory, the project comprises an overhead power line approximately 7.4 kilometres long with a switching substation to be constructed in Weidenburg extending up to the State border through the Kronhofgraben via the Kronhofer Törl. The length of the project on Italian territory is approximately 41 kilometres.

28 The Kärntner Landesregierung determined, in the contested decision, that no environmental impact assessment was required for the project at issue because the length of the Austrian part of the project did not reach the minimum 15 kilometre threshold stipulated in the UVP-G 2000.

29 It added that, if a project is likely to have significant effects on the environment in another Member State, Article 7 of Directive 85/337 requires the Member States in whose territory the project is intended to be carried out to include that other Member State in the environmental impact assessment procedure. However, that article applied only to projects situated entirely in the territory of one Member State and did not apply to transboundary projects.

30 Consequently, in the absence of any specific provision concerning transboundary projects in Directive 85/337, each Member State was required to assess, on the basis solely of its national law, whether a project was subject to Annex I of the Directive.

31 The Kärntner Landesregierung went on to state that the UVP-G 2000 did not contain any provision according to which the entire length of transboundary power line routes and other line-based projects was to be taken into consideration.

32 By application lodged at the Umweltsenat on 18 December 2007, the Environment ombudsman brought an action seeking the annulment of the contested decision.

33 It is against that background that the Umweltsenat decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is Council Directive 85/337... to be interpreted as meaning that a Member State must provide for an obligation to carry out an assessment in the case of types of projects listed in Annex I to the directive, in particular in point 20 (construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km), where the proposed scheme is to extend over the territory of two or more Member States, even if the threshold giving rise to the obligation to carry out an assessment (here, a length of 15 km) is not reached or exceeded by the part of the scheme situated on its national

territory but is reached or exceeded by adding the parts of the scheme proposed to be situated in a neighbouring State?'

Admissibility of the question referred

The status of the Umweltsenat as a court or tribunal

34 As a preliminary point, it must be established whether the Umweltsenat is a court or tribunal for the purposes of Article 234 EC and, therefore, whether its question is admissible.

35 According to settled case-law, in order to determine whether the body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter parties, whether it applies rules of law and whether it is independent (Case 61/65 *Vaasen-Göbbels* [1966] ECR 261 at 273, and Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 19 and the case-law cited).

36 In that regard, it must be pointed out, first, that it is indisputably clear from the provisions of Articles 11(7), 20(2) and 133(4) of the BVG and of Paragraphs 1, 2, 4 and 5 of the USG 2000 that the Umweltsenat meets the criteria that it be established by law, be permanent and have compulsory jurisdiction, apply rules of law and be independent.

37 It must also be pointed out, as the Advocate General did in points 58 and 59 of his Opinion, that the procedure before the Umweltsenat ensures that the right of appeal rests with anyone who participated in the administrative proceedings and with the institutions referred to in the UVP-G 2000. The Umweltsenat may hold a hearing of its own motion or at the request of one of the parties and any party appearing may be represented by a lawyer. The Umweltsenat's decisions have the force of *res judicata*, they must state reasons and are delivered in open court.

38 It should also be noted that the provisions of the USG 2000 and the UVP-G 2000, read in combination with the provisions of Article 133(4) of the BVG, guarantee the inter parties nature of the proceedings before the Umweltsenat, which rules on the basis of the general provisions of the Law on administrative procedure (Verwaltungsverfahrensgesetz).

39 It is apparent from the foregoing that the Umweltsenat has to be considered to be a court or tribunal for the purposes of Article 234 EC and so its question is admissible.

The question referred

40 Alpe Adria argues that the questions of Community law which have been raised are purely hypothetical in the present case. They are not objectively necessary in order to settle the dispute in the main proceedings and bear no relation to the dispute before the national court.

41 In this respect, it must be recalled that, according to the settled case-law of the Court, it is solely for the national court before which the 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 which it submits to the Court (Case C-545/07 *Apis-Hristovich* [2009] ECR I-1627, paragraph 28 and the case-law cited).

42 Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (*Apis-Hristovich*, paragraph 29 and the case-law cited).

43 In the present case, the Court has been asked to provide the national court with criteria for interpreting Directive 85/337 so as to permit it to assess whether, under Community law, the project at issue is subject to the procedural obligations laid down in the Directive, notwithstanding the fact that national law does not lay down such procedural obligations for that project.

44 Under those circumstances, the reference for a preliminary ruling must be regarded as admissible.

Substance

45 By its question, the national court is asking, essentially, whether Articles 2(1) and 4(1) of Directive 85/337 are to be interpreted as meaning that the authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even though the project is transboundary in nature and less than 15 km of it is located in the territory of that Member State.

46 First of all, it must be pointed out that a project which concerns the construction of a 220 kV electrical power line with a nominal power rating of 300 MVA and a length of 48.4 km is one of the projects covered by point 20 of Annex I to the Directive which are to be the subject of an obligatory environmental impact assessment pursuant to Articles 2(1) and 4(1) of the Directive.

47 Next, in order to answer the question put by the national court, it must be ascertained whether the Directive is to be interpreted as meaning that that obligation also applies to a transboundary project such as the one at issue in the main proceedings.

48 It must be borne in mind that, according to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must be given throughout the Community an autonomous and uniform interpretation, which must take into account the context of the provision and the purpose of the legislation in question (Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-290/03 *Barker* [2006] ECR I-3949, paragraph 40).

49 In that regard, Article 2(1) of Directive 85/337 imposes an obligation on the Member States to require that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are the subject of an assessment.

50 The Court has already held, in regard to the obligation to assess effects on the environment, that the wording of Directive 85/337 indicates that its scope is wide and its purpose very broad (Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraphs 31 and 39).

51 It must also be pointed out that Directive 85/337 adopts an overall assessment of the effects of projects on the environment (Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 39 and the case-law cited) irrespective of whether the project might be transboundary in nature.

52 In addition, the Member States must implement Directive 85/337 in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be the subject of an assessment with regard to their effects (see, to that effect, *Ecologistas en Acción-CODA*, paragraph 33).

53 Moreover, the Court has held that the purpose of Directive 85/337 cannot be circumvented by the splitting of projects and that the failure to take account of the cumulative effect of several projects must not mean in practice that they all cease to be covered by the obligation to carry out an assessment, when, taken together, they are likely to have 'significant effects on the environment' within the meaning of Article 2(1) of Directive 85/337 (see, to that effect, *Ecologistas en Acción-CODA*, paragraph 44).

54 It follows that projects listed in Annex I to Directive 85/337 which extend to the territory of a number of Member States cannot be exempted from the application of the Directive solely on the ground that it does not contain any express provision in regard to them.

55 Such an exemption would seriously interfere with the objective of Directive 85/337. Its effectiveness would be seriously compromised if the competent authorities of a Member State could, when deciding whether a project must be the subject of an environmental impact assessment, leave out of consideration that part of the project which is located in another Member State (see, by analogy, Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 53).

56 As the Advocate General pointed out in point 81 of his Opinion, that finding is strengthened by the terms of Article 7 of Directive 85/337, which provide for inter-State cooperation when a project is likely to have significant effects on the environment in another Member State.

57 It must be stated that the fact that the section located in Austria has a length of less than 15 km cannot, in itself, cause the project to be exempt from the assessment procedure laid down in Directive 85/337. The Member State concerned must carry out an environmental impact assessment of the project in its own territory which takes account of the specific effects of that project.

58 In the light of the foregoing, Articles 2(1) and 4(1) of Directive 85/337 are to be interpreted as meaning that the competent authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even where the project is transboundary in nature and less than 15 km of it is situated on the territory of that Member State.

Costs

59 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 (Second Chamber) hereby rules:

Articles 2(1) and 4(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, are to be interpreted as meaning that the competent authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even where the project is transboundary in nature and less than 15 km of it is situated on the territory of that Member State.

[Signatures]