

JUDGMENT OF THE COURT (Second Chamber)

15 October 2009*

In Case C-263/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Högsta domstolen (Sweden), made by decision of 29 May 2008, received at the Court on 19 June 2008, in the proceedings

Djurgården-Lilla Värtans Miljöskyddsförening

v

Stockholms kommun genom dess marknämnd,

THE COURT (Second Chamber),

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

* Language of the case: Swedish.

Advocate General: E. Sharpston,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2009,

after considering the observations submitted on behalf of:

- Djurgården-Lilla Värtans Miljöskyddsförening, by P. Schönning and G. Högberg Björck, jur kand,

- the Swedish Government, by A. Falk, K. Petkovska, C. Meyer-Seitz and S. Johannesson, acting as Agents,

- the Commission of the European Communities, by J.-B. Laignelot and P. Dejmek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 July 2009,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of provisions 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 1985 L 156, p. 17) ('Directive 85/337').

- ² The reference was made in the course of proceedings between the Djurgården-Lilla Värtans Miljöskyddsförening (the Djurgården-Lilla Värtans association for environmental protection) ('the Miljöskyddsförening') and Stockholms kommun genom dess marknämnd (Municipality of Stockholm).

Legal background

Community law

Directive 2003/35

3 Article 1 of Directive 2003/35 is worded as follows:

‘The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention [on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1)], in particular by:

- (a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

- (b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.’

Directive 85/337

4 Article 1(2) of Directive 85/337 provides:

‘For the purposes of this Directive:

...

“the public” means:

one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

“the public concerned” means:

the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.’

5 Under Article 2 of Directive 85/337:

‘1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

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

...

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

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- (b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it.

...'

6 Article 4 of Directive 85/337 provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

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

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

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

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.’

7 Point 11 in Annex I to Directive 85/337 mentions ‘[g]roundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres’.

8 Point 10 of Annex II to the directive, entitled ‘Infrastructure projects’, mentions in subparagraph (l) ‘[g]roundwater abstraction and artificial groundwater recharge schemes not included in Annex I’.

9 Article 6 of Directive 85/337 is worded as follows:

‘...

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

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

(a) any information gathered pursuant to Article 5;

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

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [OJ 2003 L 41, p. 26], information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

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

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.'

10 Article 10a of Directive 85/337 provides:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

National law

- ¹¹ The drawing off of groundwater and supply of water to increase the amount of groundwater, and the construction of installations for that purpose, constitute water works requiring development consent under Paragraphs 2 and 9 of Chapter 11 of the

Environment Act. At first instance, requests for development consent in this specific area are examined by Environmental Chambers in accordance with Paragraph 9(b) of that Act. The decisions of the Environmental Chambers may be appealed before the Environmental Appeal Chambers whose judgments may in turn be subject to appeal before the Högsta domstolen (Supreme Court), pursuant to Paragraphs 1 and 9 of Chapter 23 that act.

- 12 The provisions relating to environmental impact assessments appear in Chapter 6 of the Environment Act. They provide in particular that a party wishing to carry out works subject to development consent is to consult the länsstyrelsen (regional authority), the supervisory body, and individuals who may be assumed to be particularly affected. The regional authority is then required to take a position on whether the planned works are to be assumed to entail significant effects on the environment. If the regional authority decides that this is the case, works are to be assumed to entail such an effect, consultations are also to be held with other national authorities, municipalities, the public and organisations which may be assumed to be affected.
- 13 The right of appeal against judgments and decisions is governed by Paragraphs 12 and 13 of Chapter 16 of the Environment Act. The right of appeal for parties to an action and for certain organisations and authorities is covered in Paragraph 12 et seq. of Chapter 16. Paragraph 13 provides that a non-profit making association, on certain conditions set out in the provision, may appeal against judgments and decisions on development consent, approval and exemption under the Environment Act.
- 14 Paragraph 13 requires the association to fulfil three conditions, namely that the statutes of the association must state that its purpose is the protection of nature and the environment, the association must have been active in Sweden for at least three years and it must have at least 2 000 members.

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

- 15 The Municipality of Stockholm concluded a contract with an electricity company for the construction of a tunnel approximately one kilometre in length through the hills between the areas of Hjorthagen and Fisksjöäng in North Djurgården in order to house electric cables replacing overground high tension cables.
- 16 The implementation of that project required, first, the abstraction of groundwater leaking into the power cable tunnel and access tunnel and, second, the construction on certain sites in the area concerned of facilities designed to drain off water and recharge it into the ground or rock in order to counteract any reduction in the amount of groundwater.
- 17 By decision of 27 May 2004, the länsstyrelsen i Stockholms län (Stockholm Regional Authority), giving its decision after an examination under Chapter 6 of the Environment Act, concluded, on the basis of the environmental impact assessment carried out for that project, that the works concerned were likely to have significant effects on the environment particularly with respect to groundwater.
- 18 By judgment of 13 December 2006, the miljödomstolen vid Stockholms tingsrätt (Environmental Chamber of the District Court of Stockholm) granted the Municipality of Stockholm development consent to carry out the works at issue, pursuant to Chapter 11 of the Environment Act.
- 19 The Miljöskyddsförening appealed against that decision before the Miljööverdomstolen of the Svea Hovrätt (Environmental Appeal Chamber of the Svea Court of Appeal), but that appeal was held to be inadmissible on the ground that the Miljöskyddsförening had not fulfilled the condition laid down in Paragraph 13 of

Chapter 16 of the Environmental Act that it must have at least 2 000 members to be entitled to appeal against judgments and decisions covered by that act.

20 The Miljöskyddsförening brought an appeal against that decision before the Högsta domstolen.

21 Before the Högsta domstolen, the question arose as to whether the project at issue fell within the scope of Directive 85/337 as a project included in Annex II, point 10(I) thereto, as that point might, in the Swedish version of the directive, be limited to the drawing off of groundwater for a profitable purpose. Furthermore, the question also arose as to the exact scope of the right of appeal provided for by the Aarhus Convention, and whether the conditions laid down by Swedish law from that point of view, were too restrictive.

22 Accordingly, the Högsta domstolen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is point 10 of Annex II to Directive 85/337 to be interpreted as meaning that it encompasses water-related works which involve the drawing-off from a tunnel for power cables of groundwater leaking into it and infiltration (supply) of water into the ground or hill to compensate for any reduction in the groundwater, and the construction and maintenance of installations for the drawing-off and infiltration?

(2) If the answer to Question 1 is affirmative: Does the provision in Article 10a of Directive 85/337 — that under certain circumstances the public concerned is to have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural

legality of a decision — imply that there is also a requirement that the public concerned is to be entitled to challenge a decision of a court in planning consent proceedings in a case where the public concerned has had the opportunity of participating in the court's examination of the question of planning consent and of submitting its views to that court?

- (3) If the answers to Questions 1 and 2 are affirmative: Are Articles 1(2), 6(4) and 10a of Directive 85/337 to be interpreted as meaning that different national requirements can be laid down with regard to the public concerned referred to in Articles 6(4) and 10a, with the result that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Article 6(4) in respect of projects which may have significant effects on the environment in the area where the association is active but do not have a right of appeal such as is referred to in Article 10a?

The questions referred for a preliminary ruling

The first question

²³ By its first question, the referring court asks essentially whether a project of the type at issue in the main proceedings must be regarded as being covered by 'groundwater abstraction and artificial groundwater recharge schemes not included in Annex I' to Directive 85/337 mentioned in point 10(l) of Annex II to that directive.

²⁴ According to the referring court, the Swedish version of point 10(l) of Annex II may cover just projects for abstracting groundwater with a view to the subsequent use of that water.

- 25 It is clear from settled case-law that the need for an application, and hence a uniform interpretation, of the provisions of Community law requires that, in cases of doubt, the text of a provision must not be considered in isolation in one of its versions, but, on the contrary, should be interpreted and applied in the light of the versions existing in the other official languages (Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 20, and Case C-311/06 *Consiglio Nazionale degli Ingegneri* [2009] ECR I-415, paragraph 53).
- 26 Furthermore, the need for such an interpretation requires that in the case of divergence between the various language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, to that effect, Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28).
- 27 As far as concerns point 10(l) of Annex II to Directive 85/337, it is clear from an examination of the various language versions and, in particular, the Dutch, English, Finnish, French, German, Italian, Polish, Portuguese and Spanish versions, that that provision covers groundwater abstraction and artificial groundwater recharge schemes not included in Annex I to that directive, irrespective of the purpose for which those works must be carried out and, in particular, of the subsequent use of the water thereby abstracted or recharged into the ground.
- 28 In addition, point 11 in Annex I to that directive does not mention any further criteria as regards groundwater abstraction or groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.
- 29 Finally, it is clear from settled case-law that the scope of Directive 85/337 is wide and its purpose very broad (see, Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paragraph 32 and the case-law cited).

30 Consequently, the provisions of point 10(l) of Annex II to Directive 85/337 must be interpreted as meaning that they cover all groundwater abstraction and artificial groundwater recharge schemes not included in Annex I to that directive, irrespective of their purpose, which means that they also cover schemes which do not involve the subsequent use of that groundwater.

31 Having regard to the foregoing, the answer to the first question is that a project such as that at issue in the main proceedings, concerning abstraction of water leaking into a tunnel which houses electric cables and its recharging into the ground or rock in order to compensate for any reduction in the amount of groundwater, and the construction and maintenance of facilities for the abstraction and recharge, are covered by point 10(l) in Annex II to Directive 85/337, irrespective of the ultimate destination of the groundwater and, in particular, of whether or not it is put to a subsequent use.

The second question

32 By its second question, the referring court asks essentially whether Article 10a of Directive 85/337 implies that members of the public concerned are to have access to a review procedure to challenge a decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent even where they had the opportunity to participate in the court's examination of the question of development consent and to express their views.

33 Article 10a of Directive 85/337, taking account of the amendments introduced by Directive 2003/35 which is intended to implement the Aarhus Convention, provides for members of the public concerned who fulfil certain conditions to have access to a review procedure before a court of law or another independent body in order to challenge the substantive or procedural legality of decisions, acts or omissions which fall within its scope.

34 Thus, according to the wording of that provision, persons who are members of the public concerned and either have sufficient interest, or if national law so requires, maintain that one of the projects covered by Directive 85/337 impairs their rights, are to have access to a review procedure.

35 It is also apparent therefrom that any non-governmental organisations which promote environmental protection and meet the conditions which may be required by national law satisfy the criteria, with respect to the public concerned who may bring an appeal, laid down in Article 1(2) of Directive 85/337 read in conjunction with Article 10a.

36 Furthermore, Article 6(4) of Directive 85/337 guarantees the public concerned effective participation in environmental decision-making procedures as regards projects likely to have significant effects on the environment.

37 The fact that development consent for housing electric cables and groundwater abstraction such as that at issue in the main proceedings, which is a decision within the meaning of Article 10a of Directive 85/337, is given by a court exercising administrative powers does not prevent an association fulfilling the conditions set out in paragraph 35 of this judgment, and in accordance with the detailed rules laid down by national law, from exercising its right of access to a review procedure in order to challenge that decision.

38 First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.

39 Accordingly, the answer to the second question is that the members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.

The third question

40 By its third question, the referring court asks essentially whether, in the context of the implementation of Articles 6(4) and 10a of Directive 85/337, Member States may provide that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Article 2(2) of that directive but no right of access to a review procedure to challenge the decision adopted at the end of that procedure.

41 It is clear from the order for reference, the file submitted to the Court, and the arguments put forward at the hearing, that the reason for that question is the existence in the relevant national legislation of the rule that only an association with at least 2 000 members may bring an appeal against a decision adopted on an environmental matter.

42 It is clear from Directive 85/337 that it distinguishes between the public concerned by one of the projects falling within its scope in a general manner and, on the other hand, a sub-group of natural or legal persons within the public concerned who, in view of their particular position vis-à-vis the project at issue, are, in accordance with Article 10a, to be entitled to challenge the decision which authorises it.

- 43 The directive leaves it to national law to determine the conditions for the admissibility of the action. Those conditions may be having 'sufficient interest' or 'impairment of a right', and national laws generally use one or other of those two concepts.
- 44 As regards non-governmental organisations which promote environmental protection, Article 1(2) of Directive 85/337, read in conjunction with Article 10a thereof, requires that those organisations 'meeting any requirements under national law' are to be regarded either as having 'sufficient interest' or as having a right which is capable of being impaired by projects falling within the scope of that directive.
- 45 While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.
- 46 From that point of view, a national law may require that such an association, which intends to challenge a project covered by Directive 85/337 through legal proceedings, has as its object the protection of nature and the environment.
- 47 Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members

required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope.

48 In that connection, it must be stated that, although Directive 85/337 provides that members of the public concerned who have a sufficient interest in challenging projects or have rights which may be impaired by projects are to have the right to challenge the decision which authorises it, that directive in no way permits access to review procedures to be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision-making procedure established by Article 6(4) thereof.

49 Thus, the fact relied on by the Kingdom of Sweden, that the national rules offer extensive opportunities to participate at an early stage in the procedure in drawing up the decision relating to a project is no justification for the fact that judicial remedies against the decision adopted at the end of that procedure are available only under very restrictive conditions.

50 Furthermore, Directive 85/337 does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with. As the Advocate General notes, in point 78 of her Opinion, the rule of the Swedish legislation at issue is such as to deprive local associations of any judicial remedy.

51 The Swedish Government, which acknowledges that at present only two associations have at least 2 000 members and thereby satisfy the condition laid down in Paragraph 13 of Chapter 16 of the Environment Act, has in fact submitted that local associations could contact one of those two associations and ask them to bring an appeal. However, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 as, first, the associations entitled to bring an appeal might not have the same interest in

projects of limited size and, second, they would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review. Finally, such a system would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the directive which, as stated in paragraph 33 of this judgment, is intended to implement the Aarhus Convention.

- 52 Accordingly, the answer to the third question is that Article 10a of Directive 85/337 precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2 000 members.

Costs

- 53 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 to the Court, other than the costs of those parties, are not recoverable.

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

1. **A project such as that at issue in the main proceedings, concerning abstraction of water leaking into a tunnel which houses electric cables and its recharging into the ground or rock in order to compensate for any reduction in the amount of groundwater, and the construction and maintenance of facilities for the abstraction and recharging, are covered by point 10(1) in Annex II to 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, irrespective of the ultimate destination of the groundwater and, in particular, of whether or not it is put to a subsequent use.

- 2. Members of the ‘public concerned’ within the meaning of Article 1(2) and 10a of Directive 85/337, as amended by Directive 2003/35, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.**

- 3. Article 10a of Directive 85/337, as amended by Directive 2003/35, precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive, as amended, solely to environmental protection associations which have at least 2 000 members.**

[Signatures]