Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

17 November 2016*

(Reference for a preliminary ruling — Assessment of the effects of certain public and private projects on the environment — Directive 85/337/EEC — Directive 2011/92/EU — Scope — Concept of 'specific act of national legislation' — No environmental impact assessment — Definitive authorisation — Legislative regularisation a posteriori of the lack of environmental impact assessment — Principle of cooperation — Article 4 TEU)

In Case C-348/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 25 June 2015, received at the Court on 10 July 2015, in the proceedings

Stadt Wiener Neustadt

v

Niederösterreichische Landesregierung,

intervening party:

.A.S.A. Abfall Service AG,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, J.-C. Bonichot (Rapporteur), A. Arabadjiev and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Stadt Wiener Neustadt, by E. Allinger, Rechtsanwalt,

— A.S.A. Abfall Service, by H. Kraemmer, Rechtsanwalt,

— the European Commission, by L. Pignataro-Nolin and C. Hermes, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 8 September 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(5) 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 Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/377'), Article 1(4) 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) and the principles of legal certainty and protection of legitimate expectations.

2 The request has been made in proceedings between the Stadt Wiener Neustadt (city of Wiener Neustadt, Austria) and the Niederösterreichische Landesregierung (Government of the Land of Lower Austria), concerning the lawfulness of the decision by which the latter took the view that the operation by .A.S.A. Abfall Service of a substitute fuel treatment plant should be regarded as authorised.

Legal context

EU law

3 Article 1(1) of Directive 85/337, the tenor of which has been repeated in Article 1(1) of Directive 2011/92, provides:

'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.'

4 Article 1(2) of Directive 85/337, the tenor of which has been repeated in Article 1(2) of Directive 2011/92, provides:

'For the purposes of this Directive:

…

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

…'

5 Article 1(5) of Directive 85/337, the tenor of which has been essentially repeated in Article 1(4) of Directive 2011/92, provides:

'This directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this directive, including that of supplying information, are achieved through the legislative process.'

6 Article 2(1) of Directive 85/337 reads 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.’

Austrian law

7 Paragraph 3(6) of the Umweltverträglichkeitsprüfungsgesetz (UVP-G 2000) (Law of 2000 on the environmental impact assessment), BGBl. 697/1993, in the version applicable to the facts of the main proceedings (‘the UVP-G 2000’) provides:

‘Consents for projects subject to an assessment as provided for in subparagraphs 1, 2 or 4 shall not be granted before the completion of the environmental impact assessment or the case-by-case assessment, and notices given under administrative provisions shall have no legal effect before the completion of the environmental impact assessment. Consents granted in breach of this provision may be annulled within a period of three years by the authority competent in accordance with Paragraph 39(3).’

8 Paragraph 46(20)(4) of the UVP-G 2000 provides that:

‘The following shall apply to the entry into force of provisions amended or inserted by the Federal Law published in BGBl. I, 87/2009 and to the transition to the new legal framework:

…

4. Projects the consent for which is no longer at risk of annulment under Paragraph 3(6) at the time of entry into force of the Federal Law promulgated in BGBl. I, 87/2009 shall be regarded as having been granted consent under the present Federal Law.’

9 It is apparent from the order for reference that the version of Paragraph 46(20)(4) of the UVP-G 2000, as referred to in paragraph 8 of this judgment, results from the Bundesgesetz, mit dem das Umweltverträglichkeitsprüfungsgesetz 2000 geändert wird (UVP-G-Novelle 2009) (Federal Law amending the UVP-G 2000 (UVP-G-Novelle 2009), BGBl. I, 87/2009), which entered into force on 19 August 2009.

The facts of the dispute in the main proceedings and the question referred for a preliminary ruling

10 On the territory of the city of Wiener Neustadt, .A.S.A. Abfall Service operates a substitute fuel processing plant which in essence treats plastic waste by reducing it to small pieces until a fuel is obtained which is mainly intended for the cement industry. That plant thus carries out the physical processing of non-hazardous waste.

11 In 1986 and 1993, the mayor of Wiener Neustadt granted operating consents allowing a processing capacity of 9 900 tonnes per annum.

12 By decision of 10 December 2002, the First Minister for the *Land* of Lower Austria authorised an increase in the maximum processing capacity to 34 000 tonnes per annum under waste management legislation. That increase in capacity was to be achieved by extending the existing processing line and constructing a second processing line.

13 That consent was granted without the extension project having been subject to an environmental impact assessment as provided for in the UVP-G 2000.

14 By letter of 30 April 2014, the Umweltanwalt (Environmental Ombudsman) for the *Land* of Lower Austria asked the regional Government of that *Land* to determine whether that plant should be subject to an environmental impact assessment in accordance with the UVP-G 2000.

15 By decision of 27 June 2014, the Government of that *Land* replied to that question in the negative, considering that the plant should be regarded as authorised by virtue of Paragraph 46(20)(4) of the UVP-G 2000.

16 The city of Wiener Neustadt applied to the Bundesverwaltungsgericht (Administrative Court, Austria) for the annulment of that decision.

17 By a judgment of 12 September 2014, that court dismissed the action as unfounded.

18 The Bundesverwaltungsgericht (Federal Administrative Court) took the view that there were no grounds to examine whether the increase in processing capacity, as authorised by the decision of 10 December 2002, should first have been subject to an environmental impact assessment, since Paragraph 46(20)(4) of the UVP-G 2000 allowed the view to be taken that such an authorisation was deemed to have been lawfully granted for the operation at issue in the main proceedings. Furthermore, that provision was not contrary to EU law.

19 The city of Wiener Neustadt brought an appeal on a point of law against that judgment before the Verwaltungsgerichtshof (Administrative Court, Austria). It argues that Paragraph 46(20)(4) of the UVP-G 2000 runs counter to EU law. It is of the view, in particular, that the conditions under national law for exclusion of a project from the scope of Directive 85/337 or that of Directive 2011/92 are not satisfied in the main proceedings.

20 In those circumstances, the Verwaltungsgerichtshof (Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does EU law, in particular Directive 2011/92 and in particular Article 1(4) thereof, or Directive 85/337 and in particular Article 1(5) thereof, preclude a provision of national law whereby projects subject to an obligation to carry out an environmental impact assessment, which have not been granted a consent under the UVP-G 2000 but only consents under various sectoral laws (such as the Abfallwirtschaftsgesetz (Law on Waste Management)) which, since 19 August 2009 …, can no longer be annulled as a result of the expiry of the three-year time limit laid down in national law (Paragraph 3(6) of the UVP-G 2000), are regarded as approved under the UVP-G 2000, or is such a provision consistent with the principles of legal certainty and the protection of legitimate expectations established in EU law?’

Consideration of the question referred

21 As a preliminary point, it is necessary to note that the project to increase the processing capacity of the plant at issue in the main proceedings, having regard to the date on which it was authorised under the waste management legislation, namely 10 December 2002, was likely to fall under EU law and, on that basis, to be subject to an environmental impact assessment. However, that is not the case of the operating consents granted during 1986 and 1993, that is to say before the accession of the Republic of Austria to the European Union.

22 It must also be stated that it is for the referring court to assess whether such a project ought to have been subject to an environmental impact assessment in accordance with Article 2(1) of Directive 85/337 and, if necessary, as the operator submits, whether the sectoral consent granted by the decision of 10 December 2002 on the basis of the waste management legislation enabled, in practice, the environmental requirements laid down in that directive to be met.

23 Finally, it must be pointed out that, having regard to the date of the decisions at issue in the main proceedings, it is not necessary to refer to Directive 2011/92.

24 Accordingly, the view must be taken that, by its question, the referring court asks, in essence, whether Article 1(5) of Directive 85/337 must be interpreted as meaning that it covers a legislative provision such as Paragraph 46(20)(4) of the UVP-G 2000, by virtue of which a project which has been the subject of a decision taken in breach of the obligation to assess its effects on the environment, in respect of which the time limit for an action for annulment has expired, must be regarded as lawfully authorised.

25 More generally, the referring court also wishes to know, secondly, whether such a legislative provision may be justified in EU law by the principles of legal certainty and legitimate expectations.

26 With regard to the first aspect of the question referred, it follows from the settled case-law of the Court that Article 1(5) of Directive 85/337 makes the exclusion of a project from the scope of that directive subject to two conditions. Firstly, the details of the project must be adopted by a specific act of legislation. Secondly, the objectives of the directive, including that of supplying information, must be achieved through the legislative process (judgments of 16 September 1999, *WWF and Others*, C-435/97, EU:C:1999:418, paragraph 57, and of 18 October 2011, *Boxus and Others*, C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 37).

27 The first condition means that the legislative act displays the same characteristics as a consent within the meaning of Article 1(2) of Directive 85/337. It must, in particular, grant the developer the right to carry out the project and must include, like a development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment (see, to that effect, judgments of 16 September 1999, *WWF and Others*, C-435/97, EU:C:1999:418, paragraphs 58 and 59, and of 18 October 2011, *Boxus and Others*, C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraphs 38 and 39). The legislative act must therefore demonstrate that the objectives of Directive 85/337 have been achieved as regards the project in question (see, to that effect, judgment of 18 October 2011, *Boxus and Others*, C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 39 and the case-law cited).

28 That is not the case where the act does not include the elements necessary to assess the environmental impact of the project (see, to that effect, judgments of 16 September 1999, *WWF and Others*, C-435/97, EU:C:1999:418, paragraph 62, and of 18 October 2011, *Boxus and Others*, C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 40).

29 The second condition means that the objectives of Directive 85/337 are achieved through the legislative process. It follows from Article 2(1) of that directive that the fundamental objective of the directive is to ensure that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their environmental effects 'before consent is given' (see judgment of 18 October 2011, *Boxus and Others*, C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 41 and the case-law cited).

30 Consequently, the legislature must have sufficient information at its disposal at the time when the project is adopted. In that regard, the minimum information to be supplied by the developer is to include a description of the project comprising information on the site, design and size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant

adverse effects, and the data required to identify and assess the main effects which the project is likely to have on the environment (see judgment of 18 October 2011, *Boxus and Others*, C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 43).

31 Although it is for the national court to ascertain whether those conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates (see judgment of 18 October 2011, *Boxus and Others*, C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 47), it appears, nonetheless, that a legislative provision such as Paragraph 46(20)(4) of the UVP-G 2000 does not meet those requirements.

32 It is apparent from the file placed before the Court that that provision does not, as regards the projects which it covers, have the same characteristics as a consent within the meaning of Article 1(2) of Directive 85/337.

33 Nor does it appear that the objectives of that directive may be achieved through Paragraph 46(20)(4) of the UVP-G 2000, since the national legislature, when it adopted that provision, did not have information on the effects on the environment of projects which the provision is likely to cover and, in any event, that provision is intended to apply to projects already completed.

34 In consequence, a legislative provision such as Paragraph 46(20)(4) of the UVP-G 2000 does not appear to satisfy the conditions laid down in Article 1(5) of Directive 85/337, such that it could not have the effect of excluding the operations which it covers from the scope of that directive. Nevertheless, it is for the referring court to ascertain that fact, in the light of all the characteristics of the national law and of the precise scope which should be given to the provision at issue.

35 With regard to the second aspect of the question referred, concerning the possibility of justifying in EU law, by the principles of legal certainty and the protection of legitimate expectations, a legislative provision such as that at issue in the main proceedings, the following statements must be made.

36 EU law does not preclude national legislation which, in certain cases, permits the regularisation of operations or measures which are unlawful in the light of EU law. However, such a possibility is subject to the condition that it does not offer the persons concerned the opportunity to circumvent EU law or dispense with applying it, and that it should remain the exception (see judgment of 3 July 2008, *Commission* v *Ireland*, C-215/06, EU:C:2008:380, point 57).

37 Accordingly the Court held that legislation which gives regularisation permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning consent disregards the requirements of Directive 85/337. Projects for which an environmental impact assessment is required must, by virtue of Article 2(1) of that directive, be identified and then — before the grant of development consent and, therefore, necessarily before they are carried out — must be subject to an application for development consent and to such an assessment (judgment of 3 July 2008, *Commission* v *Ireland*, C-215/06, EU:C:2008:380, paragraph 61).

38 The same is true of a legislative measure, such as Paragraph 46(20)(4) of the UVP-G 2000, which appears to allow, which it is for the referring court to ascertain, without even requiring a later assessment and even where no exceptional circumstances are proved, a project which ought to have been subject to an environmental impact assessment, within the meaning of Article 2(1) of Directive 85/337, to be deemed to have been subject to such an assessment.

39 It is true that the provision at issue in the main proceedings concerns only ‘projects the consent for which is no longer at risk of annulment’ due to the expiry of the period for annulment actions of three years provided for in Paragraph 3(6) of the UVP-G 2000.

40 Nevertheless, that fact alone cannot alter the above conclusion. It is indeed settled case-law of the Court that, in the absence of EU rules in the field, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).

41 The Court also considers that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty, which protects both the individual and the administrative authority concerned. In particular, it finds that such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (see, to that effect, judgments of 15 April 2010, *Barth*, C-542/08, EU:C:2010:193, paragraph 28, and of 16 January 2014, *Pohl*, C-429/12, EU:C:2014:12, paragraph 29).

42 Consequently, EU law, which does not lay down any rules on the time limits for bringing proceedings against the consents issued in breach of the obligation first to assess the effects on the environment, set out in Article 2(1) of Directive 85/377, does not preclude, in principle and subject to compliance with the principle of equivalence, the Member State concerned from setting a time limit of three years for bringing proceedings, such as that provided for in Paragraph 3(6) of the UVP-G 2000, to which Paragraph 46(20)(4) of the UVP-G 2000 refers.

43 However, a national provision under which projects in respect of which the consent can no longer be subject to challenge before the courts, because of the expiry of the time limit for bringing proceedings laid down in national legislation, are purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment, which it is for the referring court to ascertain, is not compatible with that directive

44 As the Advocate General noted, in essence, in points 42 to 44 of her Opinion, Directive 85/337 already precludes, as such, a provision of that nature, if only because that provision has the legal effect of relieving the competent authorities of the obligation to have regard to the fact that a project within the meaning of that directive has been carried out without its effects on the environment having been assessed and to ensure that such an assessment is made, where works or physical interventions connected with that project require subsequent consent (see, to that effect, judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others*, C-275/09, EU:C:2011:154, paragraph 37).

45 Furthermore, it is the Court's settled case-law that the Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 66).

46 To that end, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 68).

47 In that regard, it must be stated that, although the conditions for such an action for a remedy, in particular those concerning whether the unlawfulness in its entirety must be regarded as wrongful and those concerning the conditions for establishing a causal link, in the absence of any provision of EU law, stem from national law and although such an action may, as is clear from the settled case-law of the Court, be restricted to a certain period, provided that the principles of equivalence and effectiveness are observed, the fact remains that that action must, by virtue of the principle of effectiveness, be able to be carried out on reasonable conditions.

48 It follows from the foregoing that, if a national provision prevents, on expiry of a given time limit, any action for a remedy of a breach of the obligation to assess effects on the environment set out in Article 2(1) of Directive 85/337 while the time limit for bringing proceedings placed on the action for a remedy has not expired, it would be incompatible with EU for that reason as well.

49 Consequently, the answer to the question referred is that Article 1(5) of Directive 85/337 must be interpreted as meaning that it covers a project subject to a legislative provision such as that at issue in the main proceedings, under which a project which has been the subject of a decision taken in breach of the obligation to assess its effects on the environment, in respect of which the time limit for an action for annulment has expired, must be regarded as lawfully authorised. EU law precludes such a legislative provision insofar as it provides that a prior environmental impact assessment must be deemed to have been carried out for such a project.

Costs

50 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 (First Chamber) hereby rules:

Consequently, the answer to the question referred is that Article 1(5) 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 Council Directive 97/11/EC of 3 March 1997, must be interpreted as meaning that it covers a project subject to a legislative provision such as that at issue in the main proceedings, under which a project which has been the subject of a decision taken in breach of the obligation to assess its effects on the environment, in respect of which the time limit for an action for annulment has expired, must be regarded as lawfully authorised. EU law precludes such a legislative provision insofar as it provides that a prior environmental impact assessment must be deemed to have been carried out for such a project.

[Signatures]