Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

16 April 2015*

(Reference for a preliminary ruling — Environment — Directive 2011/92/EU — Assessment of the effects of certain public and private projects on the environment — Construction of a retail park — Binding effect of an administrative decision not to carry out an environmental impact assessment — No public participation)

In Case C-570/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 16 October 2013, received at the Court on 6 November 2013, in the proceedings

Karoline Gruber

v

Unabhängiger Verwaltungssenat für Kärnten,

EMA Beratungs- und Handels GmbH,

Bundesminister für Wirtschaft, Familie und Jugend,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 9 October 2014,

after considering the observations submitted on behalf of:

— Ms Gruber, by W. List, Rechtsanwalt,

— EMA Beratungs- und Handels GmbH, by B. Peck, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by G. Wilms and L. Pignataro-Nolin, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 13 November 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 11 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 Ms Gruber, on the one hand, and the Unabhängiger Verwaltungssenat für Kärnten ('UVK'), the EMA Beratungs- und Handels GmbH ('EMA') and the Bundesminister für Wirtschaft, Familie und Jugend (Federal Minister for Economic Affairs, the Family and Youth), concerning a decision authorising the construction and operation of a retail park on land bordering property belonging to Ms Gruber.

Legal context

International law

3 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the 'Aarhus Convention') was approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

4 Article 9(2) of the Aarhus Convention provides:

'2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest; or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 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.'

EU law

5 Recital 5 in the preamble to Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17), provides:

'On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention). Community law should be properly aligned with that Convention with a view to its ratification by the Community.'

6 Article 1(2)(d) and (e) of Directive 2011/92 contains the following definitions:

'For the purposes of this Directive, the following definitions shall apply:

…

(d) "public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

(e) "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.'

7 Article 2 of Directive 2011/92 provides:

'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. Those 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. Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [OJ 2008 L 24, p. 8].

…'

8 Article 4 of Directive 2011/92 is worded as follows:

'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 (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.'

9 Article 11 of Directive 2011/92 provides:

'1. 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.

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

3. 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 that 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 point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. 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.

5. 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.'

Austrian law

10 Paragraph 3(7) of the Law on Environmental Impact Assessments (Umweltverträglichkeitsprüfungsgesetz), in the version applicable to the dispute in the main proceedings (BGBl. I, 87/2009, 'the UVP-G 2000'), provides:

'The authority shall, upon request by the project applicant, by a participating authority or by the ombudsman for the environment [the Umweltanwalt], determine whether a project requires an environmental impact assessment as provided for in this federal law … The decision shall be taken at first and second instance by administrative order within six weeks at each instance. The project applicant, the participating authorities, the ombudsman for the environment and the host municipality shall have the status of parties to the procedure. … The essential substance of the decisions, including the main grounds on which they are based, shall be appropriately disclosed or made available for public inspection by the authority. The host municipality may bring an action against that decision to the Verwaltungsgerichtshof …'

11 The referring court states that, after the facts giving rise to the case pending before it, the UVP-G 2000 was amended by a law (BGBl. I, 77/2012), which added subparagraph 7a to Paragraph 3, granting recognised environmental organisations a right to bring an action against environmental impact assessment declaratory decisions which are negative.

12 Paragraph 74(2) of the Industrial Code ('Gewerbeordnung') of 1994 provides:

'(2) Industrial facilities may be constructed or operated only with the consent of the authority if, on account of the use of machinery and appliances, the manner in which they are operated or equipped or for other reasons, they are capable of:

1. posing a risk to the life or health of neighbours or to the property or other rights *in rem* of neighbours;

2. causing a nuisance to neighbours in the form of smell, noise, smoke, dust, vibration or otherwise.'

13 Pursuant to Paragraph 75(2) of the Gewerbeordnung, neighbours are all persons to whom the construction, continued existence or operation of a facility might pose a risk or a nuisance or whose property or other rights *in rem* might be put at risk in this way.

14 Paragraph 77(1) of the Gewerbeordnung provides that 'the facility shall be granted development consent if it is anticipated that … the foreseeable risks within the meaning of Paragraph 74(2), point 1, will be avoided and any nuisance, prejudice or other adverse effects within the meaning of Paragraph 74(2), points 2 to 5, will be kept to a reasonable level'.

15 Under Paragraph 356(1) of the Gewerbeordnung, where a hearing is fixed, the authority is to notify the neighbours of the subject-matter, time and place of the hearing as well as of the conditions for maintaining their status as parties to the proceedings.

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

16 On 21 February 2012, the UVK granted EMA, pursuant to the Gewerbeordnung, a development consent for the construction and operation of a retail park in Klagenfurt am Wörthersee (Austria), with a total floor space of 11437.58 m2, on land bordering property belonging to Ms Gruber.

17 Ms Gruber brought an action for annulment of that decision before the referring court, on the ground, in particular, that that consent should have been made contingent on an environmental impact assessment ('an EIA') being carried out, pursuant to the UVP-G 2000.

18 In support of that action, she pleaded the unlawfulness of the decision of the Province of Carinthia's government of 21 July 2010, by which that government declared, on the basis of Paragraph 3(7) of the UVP-G 2000, that no EIA needed to be carried out in relation to the project at issue ('the EIA declaratory decision').

19 According to the objections raised by Ms Gruber on 8 March 2011, the EIA declaratory decision is open to challenge in the light of the inaccuracy of the data and measurements used when calculating the absence of a health risk caused by that retail park. In addition, Ms Gruber, who did not have a right to bring an action in her capacity as a neighbour against that type of decision, informed the referring court that a copy of that decision was given to her only after its adoption.

20 The UVK states that the EIA declaratory decision had become final, for want of being challenged within the period for bringing an action by those persons so entitled. According to the UVK, it was bound by that decision, given its binding effect, and could not carry out any assessment of the content of that decision at the stage of the procedure for granting development consent.

21 The referring court states that, although the Gewerbeordnung grants neighbours the right to raise objections during the consent procedure for the construction and operation of a commercial facility or bring an action against the final decision consenting to construction and operation, where that facility endangers their lives, health or property, they do not have the right to bring an action directly against the prior decision of a government not to carry out an EIA in respect of that facility.

22 That court states that Paragraph 3(7) of the UVP-G 2000 reserves the status of parties to the procedure only to the project applicant, the participating authorities, the ombudsman for the environment and the municipality concerned, and, consequently, limits the possibility of intervening in the procedure leading to the adoption of an EIA declaratory decision and of bringing an action against that decision.

23 The referring court explains that, despite the fact that the neighbours of the project, such as Ms Gruber, do not have the status of parties to the procedure leading to the adoption of an EIA declaratory decision, they are bound, like national authorities and courts, by such a decision which has become final.

24 That court asks whether the binding effect of EIA declaratory decisions in subsequent proceedings is compatible with EU law.

25 In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does EU law, in particular Directive 2011/92 …, in particular Article 11 thereof, preclude a provision of national law under which a decision finding that a particular project does not require an [EIA] is also binding on neighbours who did not have the status of parties in the previous proceedings for a declaratory decision and can be relied on as against them in subsequent development consent proceedings even though they have the opportunity to raise their objections to the project in those consent proceedings (the objection in the main proceedings being that the effects of the project will pose a risk to the applicant's life, health or property or represent an unreasonable nuisance to her in the form of smell, noise, smoke, dust, vibration or otherwise)?

(2) If Question 1 is answered in the affirmative: does EU law, in particular Directive 2011/92, if applied directly, require that the binding effect referred to in Question 1 be held to be invalid?'

Consideration of the questions referred

26 At the outset, it should be noted that Ms Gruber has brought an action against the UVK's decision of 21 February 2012. At that time, Directive 2011/92 had already entered into force. Consequently, it is applicable to this case.

27 However, in that action, Ms Gruber contests the merits of the EIA declaratory decision adopted on 21 July 2010 by the Province of Carinthia's government. Accordingly, when assessing Ms Gruber's legal position on that date, the 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 could also be taken into account.

28 In any event, the provisions of Directives 85/337 and 2011/92, which are or could be relevant to this case, are substantially identical. The provisions of Articles 1, 2, 4 and 11 of Directive 2011/92, cited in paragraphs 6 to 9 above, correspond to the provisions of Articles 1, 2, 4 and 10a of Directive 85/337.

29 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 11 of Directive 2011/92 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which an administrative decision declaring that a particular project does not require an EIA, is binding on neighbours, such as Ms Gruber, who were precluded from bringing an action against that administrative decision.

30 It should be recalled that Article 11(1) of Directive 2011/92 provides that Member States are to ensure that, in accordance with the relevant national legal system, members of the 'public concerned' having a sufficient interest, or 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 as regards the decisions, acts or omissions falling within the scope of Directive 2011/92 to challenge their substantive or procedural legality.

31 According to the definition set out in Article 1(2) of Directive 2011/92, 'public concerned' means the public affected or likely to be affected by, or having an interest in, the EIA decision-making procedures.

32 It follows that not all natural persons, legal persons or organisations coming within the notion of 'public concerned' must be entitled to a review procedure within the meaning of Article 11, but only those having a sufficient interest or, as the case may be, maintaining the impairment of a right.

33 Article 11(1) of Directive 2011/92 provides for two possibilities in respect of the conditions for the admissibility of actions of members of the 'public concerned' within the meaning of Article 1(2) of that directive. Thus, the admissibility of an action may be conditional either on the existence of 'a sufficient interest in bringing the action', or on the applicant alleging 'the impairment of a right', depending on which of those conditions is adopted in the national legislation (see, to that effect, judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, EU:C:2011:289, paragraph 38).

34 In order to align Directive 85/337 'properly' with the Aarhus Convention, in accordance with recital 5 in the preamble to Directive 2003/35, the first paragraph of Article 10a of Directive 85/337, which corresponds to Article 11(1) of Directive 2011/92, reproduces in almost identical terms the first paragraph of Article 9(2) of that convention and, therefore, must be interpreted in the light of the objectives of that convention (see, to that effect, judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, EU:C:2011:289, paragraph 41).

35 According to the guidance set out in the Aarhus Convention Implementation Guide, which the Court may take into account when interpreting Article 11(1) of Directive 2011/92 (see, to that effect, judgment in *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 28), the two options concerning the admissibility of the actions referred to in the first paragraph of Article 9(2) of that convention constitute two equivalent mechanisms having regard to the differences between the legal systems of the parties to that convention aiming to achieve the same result.

36 Article 11(3) of Directive 2011/92 provides that Member States are to determine what constitutes a sufficient interest or impairment of a right, consistently with the objective of giving the public concerned wide access to justice. In that regard, the second paragraph of Article 9(2) of the Aarhus Convention provides that a sufficient interest or impairment of a right is to be determined 'according to the provisions of domestic law and in accordance with the objective of giving the public concerned wide access to justice'. In compliance with this objective, the implementation of that condition of admissibility is a matter of national law.

37 It should also be recalled that where, in the absence of EU rules governing the matter, it is for the 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, those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, EU:C:2011:289, paragraph 43).

38 Accordingly, Member States have a significant discretion to determine what constitutes 'sufficient interest' or 'impairment of a right' (see, to that effect, judgments in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, EU:C:2011:289, paragraph 55, and *Gemeinde Altrip and Others*, C-72/12, EU:C:2013:712, paragraph 50).

39 However, it is apparent from the wording of Article 11(3) of Directive 2011/92 and the second paragraph of Article 9(2) of the Aarhus Convention, that that discretion is limited by the need to respect the objective of ensuring wide access to justice for the public concerned.

40 Therefore, although the national legislature is entitled, inter alia, to confine the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 11 of Directive 2011/92 to individual public-law rights, that is to say, individual rights which, under national law, can be categorised as individual public-law rights (see, to that effect, judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, EU:C:2011:289, paragraphs 36 and 45), the provisions of that article relating to the rights to bring actions of members of the public concerned by the decisions, acts or omissions which fall within that directive's scope cannot be interpreted restrictively.

41 In the present case, it appears from the order for reference that Ms Gruber is a 'neighbour', within the meaning of Paragraph 75(2) of the Gewerbeordnung, a concept which includes persons to whom the construction, continued existence or operation of a facility might pose a risk or cause a nuisance or whose property or other rights *in rem* might be put at risk.

42 Having regard to that provision's terms, it appears that persons falling within the concept of 'neighbour' may be part of the 'public concerned', within the meaning of Article 1(2) of Directive 2011/92. Those 'neighbours' can bring an action only against a consent granted for the construction and operation of a facility. Since they are not parties to the procedure examining whether an EIA need be carried out, they cannot challenge that decision in the context of an action against the development consent decision. Thus, by restricting the right to bring an action against decisions examining whether an EIA need be carried out in relation to a project only to the project applicants,

the participating authorities, the ombudsman for the environment (Umweltanwalt) and the municipality concerned, the UVP-G 2000 deprives a large number of individuals from exercising that right to bring an action, including, in particular, 'neighbours' who may meet the conditions laid down in Article 11(1) of Directive 2011/92.

43 That near general exclusion restricts the scope of Article 11(1) and is accordingly incompatible with Directive 2011/92.

44 It follows that an administrative decision not to carry out an EIA taken on the basis of such national legislation cannot prevent an individual, who is part of the 'public concerned' within the meaning of that directive and satisfies the criteria laid down in national law regarding 'sufficient interest' or, as the case may be, 'impairment of a right', from contesting that administrative decision in an action brought against either that decision, or against a subsequent development consent decision.

45 It should be pointed out that the finding that the national legislation at issue in the main proceedings is incompatible with Directive 2011/92 does not limit the right of the Member State to determine what constitutes, in its national legal order, a 'sufficient interest' or 'impairment of a right', even with respect to individuals who are part of the 'public concerned', including neighbours for whom, in principle, it must be possible to bring an action.

46 In order for an action brought by an individual to be admissible, the criteria laid down by national law, in accordance with Directive 2011/92 as regards 'sufficient interest' or 'impairment of a right', must be satisfied and declared as such by the national court. In such a case, the national court must also declare that the administrative decision on the need to carry out for an EIA lacks binding effect.

47 Despite the discretion allowing a Member State, under Article 2(2) of Directive 2011/92, to integrate an EIA into existing procedures for granting consent to projects, or, alternatively, into other procedures which are consistent with the aims of that directive, it must be recalled that a procedure such as that governed, in particular, by Paragraphs 74(2) and 77(1) of the Gewerbeordnung cannot satisfy the requirements of the EU legislation concerning the EIA.

48 It appears that the provisions of the Gewerbeordnung allow neighbours to raise objections during the consent procedure relating to an industrial or commercial facility where the construction of such a facility risks endangering their lives, health, property or may cause them nuisance.

49 However, the primary purpose of such a procedure is to protect the private interests of individuals and it has no specific environmental aims in the interest of society.

50 Although it is possible to integrate the EIA procedure into another administrative procedure, it is important that, as the Advocate General pointed out in points 57 and 58 of her Opinion, all the requirements of Articles 5 to 10 of Directive 2011/92 be fulfilled in that procedure, this being a matter for the referring court to determine. In any event, members of the 'public concerned' who satisfy the criteria laid down by national law concerning 'sufficient interest' or, as the case may be, 'impairment of a right' must be able to bring an action against a decision not to carry out an EIA within the framework of such a procedure.

51 Having regard to the foregoing, the answer to the questions referred is that Article 11 of Directive 2011/92 must be interpreted as precluding national legislation, such as the legislation at issue in the main proceedings, pursuant to which an administrative decision declaring that a particular project does not require an EIA, which is binding on neighbours who were precluded from bringing an action against that administrative decision, where those neighbours, who are part of the 'public concerned' within the meaning of Article 1(2) of that directive, satisfy the criteria laid down by national law

concerning ‘sufficient interest’ or ‘impairment of a right’. It is for the referring court to verify whether that condition is fulfilled in the case before it. Where it is so fulfilled, that court must hold that the administrative decision not to carry out such an assessment is not binding on those neighbours.

Costs

52 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 (Fifth Chamber) hereby rules:

Article 11 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 must be interpreted as precluding national legislation, such as that at issue in the main proceedings pursuant to which an administrative decision declaring that a particular project does not require an environmental impact assessment, which is binding on neighbours who were precluded from bringing an action against that administrative decision, where those neighbours, who are part of the ‘public concerned’ within the meaning of Article 1(2) of that directive, satisfy the criteria laid down by national law concerning ‘sufficient interest’ or ‘impairment of a right’. It is for the referring court to verify whether that condition is fulfilled in the case before it. Where it is so fulfilled, that court must hold that the administrative decision not to carry out such an assessment is not binding on those neighbours.

[Signatures]