Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

19 April 2012*

((Directive 1999/31/EC — Landfill of waste — Directive 85/337/EEC — Assessment of the effects of certain public and private projects on the environment — Decision relating to the carrying on of operations at an authorised landfill site, in the absence of an Environmental Impact Assessment — Concept of 'consent'))

In Case C-121/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Belgium), made by decision of 24 February 2011, received at the Court on 8 March 2011, in the proceedings

Pro-Braine ASBL and Others

v

The Commune of Braine-le-Château,

intervener:

Veolia es treatment SA,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G. Arestis, T. von Danwitz and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 15 December 2011,

after considering the observations submitted on behalf of:

— Pro-Braine ASBL and Others, by J. Sambon, avocat,

— Veolia es treatment SA, by B. Deltour, avocat,

— the Belgian Government, by T. Materne and C. Pochet, acting as Agents,

— the Austrian Government, by A. Posch and G. Holley, acting as Agents,

* Language of the case: French.

— the European Commission, by P. Oliver, A. Marghelis and M. Verheij, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 14(b) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1) and of Article 1(2) 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 has been made in proceedings between Pro-Braine ASBL and Others ('Pro-Braine') and the local authority of Braine-le-Château concerning Pro-Braine's action for the annulment of the decision authorising the carrying on of operations at the 'Cour-au-Bois Nord' landfill site until the end of the existing authorisation period, that is, 27 December 2009, repealing the previous conditions of operation and imposing new conditions of operation.

Legal context

European Union legislation

3 Article 1 of Directive 85/337 provides:

'1. 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.

2. For the purposes of this Directive:

"project" means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

…

"development consent" means:

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

…'

4 Under Article 4(2) of Directive 85/337:

‘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).’

5 Annex II to Directive 85/337 lists the projects which are subject to Article 4(2) of that Directive. Point 11 of that Annex, entitled ‘Other projects’, mentions in that regard, inter alia, ‘[i]nstallations for the disposal of waste (projects not included in Annex I)’.

6 Also included in the projects referred to in that Annex, according to point 13 thereof, is ‘[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I)’.

7 Article 8 of Directive 1999/31, entitled ‘Conditions of the permit’, provides:

‘Member States shall take measures in order that:

(a) the competent authority does not issue a landfill permit unless it is satisfied that:

(i) without prejudice to Article 3(4) and (5), the landfill project complies with all the relevant requirements of this Directive, including the Annexes;

(ii) the management of the landfill site will be in the hands of a natural person who is technically competent to manage the site; professional and technical development and training of landfill operators and staff are provided;

(iii) the landfill shall be operated in such a manner that the necessary measures are taken to prevent accidents and limit their consequences;

(iv) adequate provisions, by way of a financial security or any other equivalent, on the basis of modalities to be decided by Member States, has been or will be made by the applicant prior to the commencement of disposal operations to ensure that the obligations (including after-care provisions) arising under the permit issued under the provisions of this Directive are discharged and that the closure procedures required by Article 13 are followed. This security or its equivalent shall be kept as long as required by maintenance and after-care operation of the site in accordance with Article 13(d). Member States may declare, at their own option, that this point does not apply to landfills for inert waste;

(b) the landfill project is in line with the relevant waste management plan or plans referred to in Article 7 of Directive 75/442/EEC;

(c) prior to the commencement of disposal operations, the competent authority shall inspect the site in order to ensure that it complies with the relevant conditions of the permit. This will not reduce in any way the responsibility of the operator under the conditions of the permit.’

8 Under Article 14 of Directive 1999/31, entitled 'Existing landfill sites':

'Member States shall take measures in order that landfills which have been granted a permit, or which are already in operation at the time of transposition of this Directive, may not continue to operate unless the steps outlined below are accomplished as soon as possible and within eight years after the date laid down in Article 18(1) at the latest:

(a) within a period of one year after the date laid down in Article 18(1), the operator of a landfill shall prepare and present to the competent authorities, for their approval, a conditioning plan for the site including the particulars listed in Article 8 and any corrective measures which the operator considers will be needed in order to comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1;

(b) following the presentation of the conditioning plan, the competent authorities shall take a definite decision on whether operations may continue on the basis of the said conditioning plan and this Directive. Member States shall take the necessary measures to close down as soon as possible, in accordance with Articles 7(g) and 13, sites which have not been granted, in accordance with Article 8, a permit to continue to operate;

(c) on the basis of the approved site-conditioning plan, the competent authority shall authorise the necessary work and shall lay down a transitional period for the completion of the plan. Any existing landfill shall comply with the requirements of this Directive with the exception of the requirements in Annex I, point 1 within eight years after the date laid down in Article 18(1);

…'

National legislation

9 Article 180, subparagraph 4 et seq., of the Decree of 11 March 1999 on environmental authorisation (*Moniteur belge* of 8 June 1999), as amended by the Decree of 19 September 2002 (*Moniteur belge* of 27 September 2002), ('the Decree of 11 March 1999') provides:

'… authorisations for operation of a landfill site granted before this Decree came into force shall remain valid for the term established, subject to the following conditions.

Within a period of three months from the date of this Decree coming into force, the operator of a landfill site authorised before this Decree came into force must submit a conditioning plan for that site to the competent authority, including, inter alia, the following information:

1. The description of the compliance of the landfill site and of its annexes in relation to the relevant legislation and, if appropriate, a description of the corrective measures which should be taken;

2. Information on his professional, technical and financial ability to continue to operate the landfill site and to meet his post-operation site management obligations.

On the basis of the conditioning plan for the site submitted by the operator, the competent authority:

1. shall take a decision regarding the carrying on of operations at the landfill site, by amending or supplementing the conditions of operation as appropriate;

2. shall establish post-operation site management obligations in accordance with Article 59a;

3. shall determine the necessary measures with a view to closing down as soon as possible any landfill site which has not been granted authorisation to carry on its operations.

…'

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

10 Operations at the Cour-au-Bois Nord landfill site situated in the Commune of Braine-le-Château were authorised by the Royal Decree of 7 March 1979, as amended by the Royal Decree of 27 December 1979, for a period of thirty years for the purposes of storing non-toxic industrial waste.

11 That authorisation to operate was also amended on 29 September 1988, for the purposes of enabling the site to admit other types of waste (such as household waste and inert waste), leading to the classification of that site as a Class 2 and 3 landfill site. The authorisation to operate at that landfill site, as amended, was transferred to successive operators.

12 On 30 October 2002, the Walloon waste office invited Biffa Waste Services SA ('Biffa Waste Services'), the company operating the landfill at the Cour-au-Bois Nord site at that time, to submit a conditioning plan for that site, in accordance with Article 180 of the Decree of 11 March 1999.

13 In 2006, Veolia es treatment SA acquired Biffa Waste Services.

14 On the basis of the conditioning plan submitted by Biffa Waste Services, the local authority of Braine-le-Château, by decision of 14 May 2008, authorised the carrying on of operations at the landfill site until 27 December 2009, repealed the existing conditions of operation and replaced them with new conditions of operation.

15 On 18 July 2008, Pro-Braine brought an action before the Conseil d'État for annulment of the decision of 14 May 2008.

16 In its action, the applicant in the main proceedings complains, in essence, that the local authority of Braine-le-Château adopted that decision without having first submitted the application for operation of that classified installation to a system for assessing the effects on the environment and, more specifically, without having required the completion of an Environmental Impact Assessment or having observed the accompanying substantive and procedural formalities.

17 According to the applicant in the main proceedings, the decision of 14 May 2008 is irregular because the decision to carry on operations, adopted in implementation of Article 180 of the Decree of 11 March 1999, constitutes a 'consent' as referred to in Article 1(2) of Directive 85/337 and because Class 2 landfill sites constitute an installation as mentioned in point 11(b) of Annex II to Directive 85/337 which is automatically subject to an impact assessment, applying Article 2 of the Walloon Government Decree of 4 July 2002 establishing the list of projects subject to an impact assessment and of classified installations and activities.

18 In the light of those considerations, the Conseil d'État decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the definitive decision on the carrying on of operations at an authorised or already operational landfill site taken on the basis of Article 14(b) of Directive 1999/31 … constitute a "consent" as referred to in Article 1(2) of Directive 85/337 …?'

Consideration of the question referred

19 By its question, the referring court asks whether the definitive decision authorising the carrying on of operations at an existing landfill site, taken on the basis of a conditioning plan submitted by the operator, pursuant to Article 14(b) of Directive 1999/31, constitutes a 'consent' within the meaning of Article 1(2) of Directive 85/337.

20 It is clear from the wording of Article 14 of Directive 1999/31 — entitled 'Existing landfill sites' — that, regarding landfills which have been granted a permit, or which are already in operation at the time of transposition of that Directive, Member States must take measures in order that those landfills may not continue to operate unless their operators comply with the requirements of that Directive.

21 To that end, the operators of those landfills are to prepare and present to the competent authorities, for their approval, a conditioning plan for the site in which each landfill is situated which includes the requirements listed in Article 8 of Directive 1999/31 and any corrective measures which the operators consider will be needed in order to comply with the requirements of that Directive, with the exception of the requirements in point 1 of Annex I thereto.

22 According to Article 14(b) of Directive 1999/31, the competent authorities, following the presentation of the conditioning plan, are to take a definite decision — on the basis of that conditioning plan and that Directive — on whether operations may continue.

23 The order for reference states that operations at the landfill at the Cour-au-Bois Nord site were authorised by the Royal Decree of 7 March 1979, as amended by the Royal Decree of 27 December 1979, for a period of thirty years, that is, until 27 December 2009. The case-file also states that, at the time of the dispute in the main proceedings, that landfill had been continuously in operation since that initial authorisation and that the authorisation to operate had not expired.

24 On 23 May 2003, the operator of that landfill — Biffa Waste Services — submitted a conditioning plan pursuant to Article 180 of the Decree of 11 March 1999 to the local authority of Braine-le-Château, fulfilling the requirements of Article 14 of Directive 1999/31.

25 On the basis of that conditioning plan, the local authority of Braine-le-Château, in a resolution dated 14 May 2008, authorised the carrying on of operations at the Cour-au-Bois Nord landfill site until the end of the existing authorisation period, namely 27 December 2009, repealed the existing conditions of operation, and replaced them with new conditions.

26 It is, therefore, necessary to examine whether that decision constitutes a 'consent' within the meaning of Article 1(2) of Directive 85/337.

27 In that regard, it should be borne in mind that the concept of 'consent' is defined in Article 1(2) of Directive 85/337 as being 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Accordingly, there can only be 'consent', within the meaning of that Directive, where a 'project' is to be carried out.

28 The definition of the concept of a 'project' set out in Article 1(2) of Directive 85/337 does not specify whether changes to or extensions of existing projects may themselves be considered 'projects'.

29 However, inter alia, the installations and sites listed in Annex II to Directive 85/337, to which reference is made in Article 4(2) thereof, are 'projects' within the meaning of that Directive. Point 11 of Annex II, entitled 'Other projects', mentions in particular in that regard '[i]nstallations for the disposal of waste (projects not included in Annex I)' — a category which includes landfill sites. Point 13 of that Annex includes in the list of projects referred to '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment …'.

30 It follows from those provisions that any change to or extension of a landfill site, such as the one at issue in the main proceedings, may constitute a 'project' within the meaning of Directive 85/337 where it may have significant adverse effects on the environment.

31 As has been established by the Court, the term 'project' refers to works or interventions involving alterations to the physical aspect of the site (Case C-275/09 *Brussels Hoofdstedelijk Gewest and Others* [2011] ECR I-1753, paragraphs 20, 24 and 38).

32 Thus, the mere renewal of an existing permit to operate a landfill site cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' within the meaning of Article 1(2) of Directive 85/337.

33 Accordingly, if the 'conditioning plan' which is the subject of a 'definitive decision' adopted in accordance with Article 14(b) of Directive 1999/31 does involve a change to or extension of such a landfill site through works or interventions involving alterations to its physical aspect, and if it may have significant adverse effects on the environment, that decision can be considered to be a 'consent' within the meaning of Article 1(2) of Directive 85/337.

34 As regards the case in the main proceedings, the Court does not have sufficient evidence to assess the implications of the decision of the local authority of Braine-le-Château of 14 May 2008 regarding the landfill at Cour-au-Bois Nord, an assessment which must in any event be carried out by the referring court.

35 Thus, it is for the referring court to ascertain whether the definitive decision relating to the conditioning plan submitted by the operator in the main proceedings, pursuant to Article 14(b) of Directive 1999/31, authorises a change to or extension of the installation or site at issue, through works or interventions involving alterations to its physical aspect, which may have significant adverse effects on the environment and, hence, may constitute a 'project' within the meaning of Article 1(2) of Directive 85/337 and the first indent of point 13 of Annex II thereto.

36 In the context of assessing the existence of significant adverse effects on the environment, it should be taken into account that the conditioning plan approved by that definitive decision has as its objective — in accordance with recital 26 in the preamble to Directive 1999/31 — the adoption of the necessary measures for adapting an existing landfill site to that Directive and that that decision therefore forms part of a policy for the protection of the environment.

37 Accordingly, the answer to the question referred is that the definitive decision relating to the carrying on of operations at an existing landfill site, taken on the basis of a conditioning plan, pursuant to Article 14(b) of Directive 1999/31, does not constitute a 'consent' within the meaning of Article 1(2) of Directive 85/337 unless that decision authorises a change to or extension of that installation or site, through works or interventions involving alterations to its physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to Directive 85/337 and thus constitute a 'project' within the meaning of Article 1(2) of that Directive.

Costs

38 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 (Third Chamber) hereby rules:

The definitive decision relating to the carrying on of operations at an existing landfill site, taken on the basis of a conditioning plan, pursuant to Article 14(b) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, does not constitute a 'consent' within the meaning of Article 1(2) 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, unless that decision authorises a change to or extension of that installation or site, through works or interventions involving alterations to its physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to Directive 85/337, and thus constitute a 'project' within the meaning of Article 1(2) of that Directive.

[Signatures]