OPINION OF ADVOCATE GENERAL MISCHO

delivered on 5 March 1998 *

1. The Municipal Council of Haarlemmerliede en Spaarnwoude adopted the 'Ruigoord 1992' zoning plan on 29 September 1992, and the provincial councillors of North Holland approved it by a decision of 18 May 1993. The plan authorises the construction of a port and an industrial zone over an area of some 6.5 km^2 extending the western port area of Amsterdam to the east of the site in question.

2. The 'Ruigoord 1992' zoning plan replaces the 'Landelijk gebied 1968' zoning plan and their object is the same. The legality of the decision of 18 May 1993 was contested in an action brought by a number of persons before the Netherlands Raad van State (Council of State) (Administrative Section) on the grounds that there was no prior assessment of the environmental consequences of the construction works authorised by this plan, contrary to 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. [1]

3. The Raad van State found that the type of works envisaged in the disputed plan fell within the scope of national regulations requiring an environmental impact assessment, but that none was required in this case, as those regulations specify that that is not compulsory for plans with the same content as earlier plans. It is common ground that works envisaged under the 'Ruigoord 1992' zoning plan are taken from the 'Landelijk gebied 1968' zoning plan and the 'Amsterdam-Noordzeekanaalgebied 1979' and 'Amsterdam-Noordzeekanaalgebied 1987' regional plans, the implementation of which extended no further than raising part of the boundaries with sand at the end of the 1960s.

4. The Raad van State had doubts as to whether those regulations were compatible with the directive and therefore ordered a stay of proceedings on 12 March 1996, referring the following question to the Court of Justice for a preliminary ruling:

'Does Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the

* Original language: French.

1 — OJ 1985 L 175, p. 40, referred to hereinafter as 'the directive'.

environment permit consent to be granted to a project mentioned in Annex I to the directive where, in the course of preparation of the consent, no environmental impact assessment within the meaning of the directive was conducted in a case in which the consent relates to a project for which consent had been granted before 3 July 1988, no use was made of that consent and no environmental impact assessment satisfying the requirements of the directive was conducted in the course of the preparation of that consent?'

5. First of all it will be recalled that Article 2(1) of the directive, which had to be transposed by 3 July 1988, provides that '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 an assessment with regard to their effects. These projects are defined in Article 4.'

6. Article 4(1) provides that '... projects of the classes listed in Annex I shall be made subject to assessment in accordance with Articles 5 to 10', subject to the option accorded to Member States by Article 2(3) of granting total or partial exemption from the directive for specific projects in exceptional cases. Annex I, point 8, covers 'trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tonnes.'

7. Under Article 1(2) of the directive 'development consent' means 'the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

8. Under the provisions of the Wet op de Ruimtelijke Ordening (Netherlands Town and Country Planning Law) a municipal council is empowered to adopt a development plan subject to the approval of regional councillors, who may also adopt a regional plan giving broad outlines for the future development of the land concerned, review an existing regional plan and require the municipal council to adopt or review a development plan, for all or part of the region.

9. Finally, without going into detail it may be noted that the texts transposing the directive into Netherlands law include the Besluit Milieu-effectrapportage (Order on Environmental Impact Assessment) of 20 May 1987, which came into force on 1 September of the same year. The order requires an environmental impact study to be made prior to any

decision to build a port of the type covered by point 8 of Annex I to the directive.

10. However, Article 9(2) of the Order also specifies that an environmental impact study is not compulsory if an 'activity' within the meaning of the Order is already included in a current structural or zoning plan or if its site is substantially maintained when such plans are revised or a new structural or zoning plan is drawn up; it is that point which has given rise to the case before us.

11. The Netherlands Government believes that granting such a dispensation in no way infringes the obligations which the directive imposes on Member States. In the first place, it falls within the margin of discretion which the directive allows national authorities in adopting measures transposing it. Secondly, the requirements of legal certainty, of the protection of legitimate expectations and of the principle of proportionality demand that previously authorised projects should not be compromised, or at least delayed, with all the costs that that entails, solely because a consent given after 3 July 1988 has replaced an earlier authorisation granted under a procedure which complied with the rules in force at the time.

12. Consequently we are dealing with an action in which the facts are clear. The development provided for in the 'Ruigoord 1992' zoning plan requires an environmental impact assessment both under the directive and under national legislation.

13. However, that assessment was not conducted, and under national regulations was not required, as the projects were already included in an earlier plan which was not preceded by an environmental impact study and which was adopted before the deadline for transposition of the directive.

14. What seems less clear, on first appraisal, is whether the decisions adopting the 'Landelijk gebied 1968' and 'Ruigoord 1992' zoning plans should be regarded as 'development consents' within the meaning of Article 1(2) of the directive. The national court appears to have no doubts, and it is precisely for that reason that it has referred a question for a preliminary ruling; no doubts are expressed in the written submissions of the various Dutch parties, either. All implicitly assume that this is a development consent within the meaning of the directive, so that the case before the national court falls to be decided on the basis of the way in which the obligations which it imposes on Member States are to be interpreted.

15. However, the Austrian Government and the Commission do not share this view. The Austrian Government argues that the directive does not apply to land development schemes, so there is no need for the Court to give a preliminary ruling. In support of that view, it argues that it is precisely because such plans are outside the scope of the directive that the Commission is trying at present to draft a directive on 'a concept of the assessment of environmental consequences', to provide an environmental study procedure applicable to both actual and predevelopment plans.

16. The Commission has analysed the Netherlands legislation and is of the opinion that a development plan can in no case be regarded as a development consent involving a compulsory environmental impact study; this obligation arises at a later stage, when the contractor, as developer, is authorised to carry out the plan.

17. In view of the differing analyses of the legal situation surrounding the question the Court has asked the Netherlands Government, the regional councillors of Noord-Holland, the Municipality of Amsterdam and the Commission 'to explain in writing the legal consequences under Netherlands legislation of approval by the regional deputation of a structural plan, particularly whether the decision granting approval specifically appoints a developer, whether it includes a development consent within the meaning of Article 1 of Council Directive 85/337 authorising the developer to carry out the structural plan concerned and, in this case, whether such a development consent remains valid for the whole period of the approval of the plan concerned'.

18. From the submissions to the Court it appears that the difference between the two contentions is not as clear as one might have thought at first.

19. In the first place the Commission no longer excludes the possibility that under the Netherlands rules a development plan may include a consent to carry out the proposed works; secondly, the Netherlands Government and the parties from the Netherlands specify that a development consent must certainly be granted if the works are to be completed, but the administrative authority's powers will be circumscribed. In fact it will be obliged to grant consent if the application

meets all the development plan's requirements, so that it has powers of assessment regarding environmental considerations only during the procedure for approving that plan.

20. In view of that information, and taking account of the fact that the Netherlands authorities, and the courts of the Netherlands, are certainly best placed to interpret Netherlands legislation, I am of the opinion that the Court should reply to the question, and, like the Raad van State, I regard it as established that the Netherlands decisions adopting development plans such as the 'Landelijk gebied 1968' and 'Ruigoord 1992' zoning plans are development consents within the meaning of Article 1(2) of the directive.

21. If the national court has asked us for a ruling it is obviously because it can find no direct and explicit answer in the text of the directive, which has not foreseen the case of a development consent replacing an earlier consent with no change in its object and scope.

22. In fact, this is not the only question which the directive seems to leave open and it is not the first time that the Court has had to consider its interpretation and the steps which Member States must take to ensure its correct application. Among the cases which have led the Court to analyse the obligations arising from the directive, two seem to me to be relevant to the present question, these being *Bund Naturschutz in Bayern* [2] and *Commission* v *Germany*. [3] These cases demonstrate that whilst the Community legislator gave the Member States three years in which to comply with the directive, it refrained from laying down the provisions necessary to settle the problems which would certainly arise in due course in applying the directive.

23. Nevertheless, it was easy to foresee that a project within the scope of the directive might have been considered during the transposition period and the consent procedure be still unfinished when that period expired. Did such projects require an environmental impact study, even though this was not compulsory when the consent procedure commenced, or could they be exempt?

24. Advocate General Gulmann favoured dispensation in his Opinion on the first of these two cases, mainly for reasons of legal

2 — Case C-396/92 [1994] ECR I-3717.
3 — Case C-431/92 [1995] ECR I-2189.

certainty and in the light of the principle of proportionality; however, he recognised that that would not resolve all the problems, as in some cases it could be difficult to determine whether or not the consent procedure had been commenced before the deadline for transposition. The Court was able to give a preliminary ruling on the case without expressing a view on this point, which was only settled in the second case along the lines recommended by Advocate General Gulmann, whose viewpoint Advocate General Elmer adopted in his own Opinion.

25. In substance the Court decided that Member States could exempt projects from the environmental impact assessment if a formal consent application had been lodged before 3 July 1988.

26. The question before us at present is certainly different, as in the case of the 'Ruigoord 1992' zoning plan the entire consent procedure took place after the deadline for transposition, but in replying to the question I believe we must bear in mind the consequences arising from the absence of any transitional provisions in the directive, a point raised by Advocate General Gulmann in his Opinion.

27. It is clear that our interpretation of the directive must be guided by the need to make it effective, and there should therefore be no question of giving Member States an opportunity to postpone the systematic and effective implementation of an environmental impact study in cases specified in the directive. The legislature certainly intended that environmental considerations should effectively be taken into account by means of an appropriate assessment once the three-year period specified by the directive had expired.

28. However, we must also recognise that the directive does not exclude the possibility of using a development consent granted without an environmental impact study before the deadline of 3 July 1988 to carry out subsequent work which would entail a preliminary study today.

29. In other words, previous development consents are not null and void if the project was not completed by 3 July 1988.

30. It seems to me that we must conclude that the validity of development consents is a matter for national law, provided that the latter does not fix a period for that validity which undermines the obligations imposed by the directive on Member States.

31. It is interesting to note in this regard that the Netherlands authorities themselves seem to be aware of possible abuses arising from Article 9 of the Order of 20 May 1987 to which I referred above, as a change in the regulations in 1994 limited the dispensation from an environmental impact study to cases where the earlier plan was adopted after 1 September 1984.

32. I will refrain from giving an opinion on whether in doing so the Netherlands Government has transposed the directive correctly, and will only stress that we are dealing with the environment, a field in which certainties become obsolete particularly rapidly. Who cannot call to mind some grandiose project drawn up ten years ago, or even more recently, in the name of economic development (sacrosanct) or simply of progress, unopposed at the time but not implemented for lack of funds, and which no-one would dare to recommend today because of the foreseeable impact on the environment?

33. Despite this the directive is also silent on the period of validity of consents granted under its rules, yet again relying on the Member States to act in the spirit of the directive and in accordance with their general obligations under Article 5 of the Treaty.

34. It is certainly not for me to say whether this trust has been justified or misplaced, but I fear that the absence of any provision regarding the period of validity of consents will be the source of many difficulties.

35. In this case, however, there is no problem regarding the period of validity of development consents. None of the parties denies that the 'Ruigoord 1992' zoning plan must receive a new development consent.

36. In the question referred, the Netherlands Raad van State mentions 'a consent' which 'relates to a project for which consent had been granted before 3 July 1988'.

37. The fact that this means a new consent is equally clear in the light of the facts on which the main action is based.

38. It should be recalled that the Haarlemmerliede en Spaarnwoude Municipal Council initially adopted in 1968 a development plan including the construction of a port and an industrial zone ('Landelijk gebied 1968').

39. Later it changed its mind and adopted the 'Ruigoord 1984' plan, under which most of the area in question is given over to recreational activities. This plan was rejected for the most part by the regional councillors of Noord Holland.

40. The Raad van State tells us that under Article 30 of the Town and Country Planning Law 'in the event that complete or partial approval of a zoning plan is refused, the municipal council is to draw up a *new plan*, taking account of the decision refusing approval.' [4]

41. The Raad van State also states that the aim is to *replace* the 'Landelijk gebied 1968' zoning plan by the 'Ruigoord 1992' plan.

42. The Raad van State is therefore seeking in fact a ruling on a consent relating to a new plan. That being so, and if this is a new plan calling for a new development consent, there must also be a new application procedure. The fact that the 'Ruigoord 1992' plan has been the subject of a domestic action makes this plain.

43. What are the legal consequences of such a situation in the light of the directive? In *Bund Naturschutz in Bayern* the Court ruled that 'there is nothing in the directive which could be construed as authorising the Member States to exempt projects in respect of which the consent procedures were initiated after the deadline of 3 July 1988 from the obligation to carry out an environmental impact assessment'. [5] In *Commission* v *Germany* the Court stated that 'the date when the application for consent was formally lodged thus constitutes the sole criterion which may be used to determine the date the procedure was commenced. Such a criterion accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive'. [6]

44. Might one object that in the event we are really dealing with a single procedure, which commenced in 1968, which has undergone various changes and which will conclude with a decision granting development consent for the 'Ruigoord 1992' plan?

45. It is perhaps this argument which implicitly underlies the transitional provisions in the Netherlands legislation, according to which an environmental impact assessment report is not compulsory, *inter alia* where an activity is pursued under a current structural or zoning plan, or where these plans have

4 — Reference, p. 4, third to last paragraph (English version).

5 — Judgment cited earlier, paragraph 18.

6 — Judgment cited earlier, paragraph 32.

been reviewed or a new structural or zoning plan adopted, provided that the location of the activity is substantially maintained and does not conflict with a regional plan in force. [7]

46. It must be noted, however, that the directive lays emphasis on the *developer*. Under Article 1(2) this term covers either the applicant for a development consent for a private project or the public authority which initiates a project.

47. In this case it is a public authority, the Haarlemmerliede en Spaarnwoude Municipal Council, which initiated a project in 1968. Later, in 1984, it adopted a project of an entirely different kind. By so doing, it implicitly withdrew its initial application and decided not to make use of the consent obtained for the initial project.

48. Finally, the developer must draw up a new plan taking account of the decision refusing consent for the 1984 plan.

7 — Article 9(2) of the Order of 20 May 1987, cited earlier.

49. In circumstances such as these it seems to me impossible to argue that this is a single procedure commencing with a formal application in 1968.

50. Consequently, I believe that, to ensure that the directive is effective, the Court must find as follows: if a procedure leading to a development consent, within the meaning of the directive, to carry out works covered by Annex I to the directive was commenced by the formal introduction of a new application after 3 July 1988, this consent must be preceded by an environmental impact assessment meeting the conditions laid down in Articles 5 to 10 of the directive, regardless of whether the consent involves something new as compared with a previous consent, valid or void.

51. Over and above the fact that that solution is, in my opinion, dictated by the foregoing considerations, it seems to me to offer various advantages.

52. In the first place, it has the merit of simplicity, as it takes account of the indisputable fact that the national authorities intend to give development consent on the expiry of a

procedure which was not commenced before 3 July 1988.

53. Secondly, it cannot be said to encroach on the powers which the community legislator has to all appearances extended to Member States. It avoids all pronouncements on the validity of any earlier consent and is totally independent of the reasons for which the national authorities believe they must issue a new consent.

54. Thirdly, it may claim to be based both on good sense and on the principles generally followed in resolving problems relating to the effect of earlier legal rules, as it determines that present-day decisions must apply the procedural rules in force at present.

55. Fourthly, it seems to me to respect the requirements of legal certainty, as we may assume that the decision of national authorities to substitute one consent for another, depriving it of validity, has been taken to meet these requirements, which are familiar in Member States' national laws. Finally, this seems to be the only solution which upholds the credibility of the Community's environmental policy.

56. Certainly there could be borderline cases where the earlier consent could be either very recent, replacement being necessary only for purely formal reasons, or even a little less recent but preceded by an environmental study which in fact meets the directive's requirements and where a rule of reason could apply. Perhaps the Court will be asked one day to rule on a question in such a context and refine the case-law as appropriate. However, the consent relating to the 'Ruigoord 1992' plan is quite remote from such a hypothesis.

57. At the hearing the Netherlands representative asked if the Court could limit the scope in time of its preliminary ruling if it was not in line with his Government's suggestion. In view of the Court's consistent case-law it seems to me difficult to comply with this request, as the necessary conditions are not met. Even if there were a risk of serious economic repercussions, due in particular to the many legal relationships created in good faith on the basis of national regulations considered to be valid, I find it hard to believe that individuals and national authorities have been encouraged to take action contrary to Community regulations because of an objective and significant uncertainty regarding their scope, to which uncertainty the conduct of other Member States or of the Commission might possibly have contributed.

Conclusion

58. I propose that the Court give the following answer to the question referred for a preliminary ruling:

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment does not permit development consent to be granted for a project mentioned in Annex I to the directive unless it has been preceded by an environmental impact study within the meaning of the directive, if the development consent relates to a project which had already obtained a development consent before 3 July 1988 but which was not preceded by an environmental impact study meeting the directive's requirements, if no use was made of this consent, and if there is reason to believe that a new development consent will be granted following a new formal application.