OPINION OF ADVOCATE GENERAL
BOT
delivered on 14 July 2011 [1]

1. Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2] requires that an environmental assessment of certain public plans and programmes be carried out before they are adopted. That assessment includes consultation, by the authority responsible for preparing the plan, of the public and of bodies with environmental responsibilities.

2. The present reference for a preliminary ruling has been submitted in the context of proceedings between, on the one hand, Seaport (NI) Ltd and Magherafelt District Council and Others, and, on the other, the Department of the Environment for Northern Ireland, concerning the consultation procedure which was conducted in relation to the preparation of draft regional development plans in Northern Ireland.

3. The Court is asked to clarify two of the rules relating to implementation of the consultation procedure. The first, which relates to Article 6(3) of the Directive, concerns the designation of the authorities to be consulted. In the present case, the Department of the Environment for Northern Ireland is both the authority responsible for the plan in question and the authority designated by national law for purposes of the consultation procedure. Consequently the question is whether, in a situation such as that in the main proceedings, the Member State is required to designate a new authority to be consulted, separate from and independent of the first.

4. The second rule, referred to in Article 6(2) of the Directive, concerns the time frame for the purposes of the consultation procedure. The question is whether that time frame may be laid down on a case-by-case basis by the authority responsible for the plan or programme or whether it must be set out in the legislation transposing the Directive.

5. For the reasons which I shall now explain, I consider that in a situation such as that in the main proceedings, if the Directive is to be credibly and effectively implemented, the Member State must designate a new authority to be consulted which is separate from and independent of the authority responsible for preparing the plan. By contrast, in my view there is nothing to prevent national legislation from providing that the time-limit specified for the purposes of the consultation procedure may be laid down on a case-by-case basis by the authority responsible for the

1 — Original language: French.
2 — OJ 2001 L 197, p. 30 ('the Directive').

plan, on condition, however, that that period is sufficient to provide the authorities and the public consulted with a meaningful opportunity to express their views on the draft plan.

I — The legal context

A — *The Directive*

6. It follows from Article 1 of Directive 2001/42 that the fundamental objective thereof is, where plans and programmes are likely to have significant effects on the environment, to require that an environmental assessment of those plans and programmes be carried out at the time when they are being prepared and before they are adopted. In that way, the European Union legislature seeks to ensure a high level of environmental protection in accordance with Article 174 EC and Article 37 of the Charter of Fundamental Rights of the European Union.

7. The Directive lays down a minimum environmental assessment framework, leaving the procedural details to the Member States, having regard to the principle of subsidiarity. [3]

3 — Recital 8 in the preamble to the Directive.

8. Under Article 2(b) of the Directive, an environmental assessment includes the preparation of a report on the environmental effects (stating the probable significant effects on the environment and reasonable alternative solutions) and the carrying-out of consultations with the authorities responsible for environmental matters, the public and other Member States where there are significant cross-border effects. The environmental report and the results of consultations are to be taken into account before the plan or programme is adopted. Once that plan or programme has been adopted, the authorities responsible for environmental matters, the public and any other Member State consulted must be informed and the relevant information made available to them.

9. The consultation procedure is set out in Article 6 of the Directive, which is worded as follows:

'1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme

and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

3. Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.

4. Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making ….

5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States.'

B — *The transposition of the Directive into national law*

10. The Directive was transposed by the Environmental Assessment of Plans and Programmes (Northern Ireland) Regulations 2004 ('the 2004 Regulations').

11. Regulation 4 of the 2004 Regulations transposes Article 6(3) of the Directive, which concerns the designation of consultation authorities. Regulation 4 is worded as follows:

'(1) Subject to paragraph 2, … the Department of the Environment [for Northern Ireland] shall be the consultation body ….

(2) Where the Department of the Environment is at any time the responsible authority as regards a plan or programme, it shall not at that time exercise the functions under [the 2004 Regulations] of the consultation body in relation to that plan or programme …'.

12. Regulation 12 of the 2004 Regulations transposes Article 6(2) of the Directive, which concerns the periods laid down for the purposes of the consultation procedure. Regulation 12 is worded as follows:

'(1) Every draft plan or programme for which an environmental report has been prepared … and its accompanying environmental report … shall be made available to the consultation body and to the public in accordance with the following provisions of this regulation.

(2) As soon as reasonably practicable after their preparation, the responsible authority shall send a copy of the relevant documents to the consultation body and invite it to express its opinion on the relevant documents within a specified period.

(3) The responsible authority shall also:

(a) within 14 days of the preparation of the relevant documents, publish in accordance with paragraph (5), or secure the publication of, a notice:

(i) stating the title of the plan, programme or modification;

(ii) stating the address (which may include a website) at which a copy of the relevant documents may be inspected or from which a copy may be obtained;

(iii) inviting expressions of opinion on the relevant documents;

(iv) stating the address to which, and the period within which, opinions must be sent; and

(b) keep a copy of the relevant documents available at its principal office for inspection by the public at all reasonable times and free of charge; and

(c) publish a copy of the relevant documents on the authority's website.

(4) The periods referred to in paragraphs (2) and (3)(a)(iv) must be of such length as will ensure that those to whom the invitation is extended are given an early and effective opportunity to express their opinion on the relevant documents.

…'

II — The facts and main proceedings

13. At the time material to the main proceedings, the Department of the Environment for Northern Ireland comprised four executive agencies, two of them being the Planning Service and the Environment and Heritage Service. [4]

14. During the preparation of the draft Northern Area Plan 2016 and the Magherafelt Area Plan 2015, the Planning Service worked very closely with the Environment and Heritage Service. The latter provided information and advice on the proposed content of the plans in question.

15. For purposes of the consultation procedure, the Department of the Environment for Northern Ireland published the draft Northern Area Plan 2016 and the

4 — These two agencies do not have separate legal identity, but do have their own staff, administrative resources and premises.

environmental report for public comment and also sent them both to its Environment and Heritage Service and other public authorities. The period for submitting comments and representations was set at eight weeks. The Department of the Environment for Northern Ireland received 5 250 representations concerning the draft plan from members of the public and 4 comments concerning the environmental report. Among these were 49 representations from Seaport (NI) Ltd, one of which related to the content of that report and the conduct of the environmental assessment.

16. With regard to the draft Magherafelt Area Plan 2015 and the environmental report, these were sent to the Environment and Heritage Service and other interested bodies. The Department of the Environment for Northern Ireland requested them to submit comments and representations within a period of six weeks. It received some 5 300 representations concerning the draft plan and 5 relating to the environmental report.

17. During the course of November and December 2005, Seaport (NI) Ltd and Magherafelt District Council and others respectively commenced proceedings in the High Court of Justice in Northern Ireland (United Kingdom) on the ground that the environmental assessment relating to the draft plans in question had not been carried out in accordance with the requirements of the Directive.

18. In each of the two sets of proceedings, the High Court of Justice in Northern Ireland found that Regulation 4 of the 2004 Regulations did not properly transpose the requirement, set out in Article 6(3) of the Directive, that a new consultation authority be designated in circumstances where the Department of the Environment for Northern Ireland was also the authority responsible for the plan. In the same way, that court took the view that Regulation 12 of the 2004 Regulations did not properly transpose Article 6(2) of the Directive in that it failed to lay down an express time-limit within which representations had to be submitted.

19. The Department of the Environment for Northern Ireland lodged an appeal before the Court of Appeal for Northern Ireland (United Kingdom).

III — The questions referred

20. Forming the view that an interpretation of European Union law was necessary to enable it to resolve the dispute, the Court of Appeal for Northern Ireland decided to refer the following three questions to the Court for a preliminary ruling:

‘1. On the proper construction of Directive [2001/42], where a State authority which prepares a plan falling within Article 3 is itself the authority charged

with overall environmental responsibility in the Member State, is it open to the Member State to refuse to designate under Article 6(3) any authority to be consulted for the purposes of Articles 5 and 6?

IV — My assessment

A — *The first two questions*

2. On the proper construction of Directive [2001/42], where the authority preparing a plan falling within Article 3 is itself the authority charged with overall environmental responsibility in the Member State, is the Member State required to ensure that there is a consultation body which will be designated that is separate from that authority?

21. The first two questions submitted by the referring court ask whether Article 6(3) of the Directive must be interpreted as meaning that, for the purposes of the consultation procedure, a Member State is required to designate a new authority charged with environmental responsibility where the authority referred to by national law for that purpose is the same as that which is responsible for preparing the plan or programme in question. Should the need arise, the referring court asks whether that new authority must be separate from the authority responsible for preparing the plan or programme.

3. On the proper construction of the Directive, may the requirement in Article 6(2) to the effect that the authorities referred to in Article 6(3) and the public referred to in 6(4) be given an early and effective opportunity to express their opinion "within appropriate time frames", be transposed by rules which provide that the authority responsible for preparing the plan shall authorise the time-limit in each case within which opinions shall be expressed, or must the rules transposing the Directive themselves lay down a time-limit, or different time-limits for different circumstances, within which such opinions shall be expressed?'

22. The United Kingdom and Danish Governments, as well as the European Commission, propose that the reply to the first two questions should be in the negative.

23. The United Kingdom and Danish Governments express the view, in essence, that

the Directive brings about a minimum harmonisation of environmental assessment procedures. The Member States are for that reason, they submit, not required to set up a new body, separate from and independent of that referred to by national law. In the present case, the collaboration of the environmental and planning services of the Department of the Environment for Northern Ireland made it possible to achieve the results sought by the Directive with regard to both the transparency of the decision-making process and the comprehensive and reliable nature of the environmental information. By reason of its responsibilities, the Department of the Environment for Northern Ireland ensures that the environmental effects of the plan are duly considered and that private interests are not taken into account to the detriment of the public interest.

24. The Commission highlights the differences in the administrative organisation of the Member States. Although certain States are in a position to designate more than one authority for the purposes of the consultation procedure, others, such as the Grand Duchy of Luxembourg or the Republic of Malta, would, in view of their size, find it difficult to designate a new authority fulfilling the requirements laid down in Article 6(3) of the Directive. The Commission adds that there is nothing in the wording of the Directive to suggest that, in a case such as that in the main proceedings, the Member State is required to designate a new authority. If that were the case, the Commission observes that such an artificial entity would be unlikely to provide information of any real value.

25. I do not concur with the observations made in the course of these proceedings. For the reasons which I shall now set out, I take the view that a Member State in a situation such as that arising in the main proceedings cannot avoid its obligations under Article 6(3) of the Directive on the ground that the authority responsible for preparing the plan is also the authority designated by national law for the purposes of the consultation procedure. In such a situation, I consider that, in order to implement the Directive credibly and effectively, that Member State must designate a new consultation authority which is separate from and independent of the first authority.

26. This conclusion is based on the nature and scope of the consultation procedure laid down by the European Union legislature, and also on the aims which it pursues.

27. The consultation procedure referred to in Article 6 of the Directive is designed to guarantee everyone the right to live in an environment suitable for ensuring their health and well-being, in accordance with Article 174 EC and Article 37 of the Charter of Fundamental Rights of the European Union.

28. The consultation procedure thus enshrines the right of every person to participate in decision-making procedures where

they affect the environment. In that respect, the legislature of the European Union acted on the basis of the latter's obligations under the Convention on access to information, public participation in decision-making and access to justice in environmental matters, known as the Aarhus Convention. [5] The Aarhus Convention, it should be recalled, seeks to ensure that the public has a right to participate in decision-making procedures concerning the environment, particularly with regard to plans and programmes relating to the environment. [6] However, consultation is not solely a right. It is also a duty, namely the duty to protect and improve the quality of the environment by expressing concerns and by assisting the authorities responsible for preparing plans to take due account of those concerns and by adopting the best decisions.

29. All of the provisions of the Directive bear witness to the European Union legislature's intention to respect those rights. The legislature sets up a procedural framework which makes it possible to ensure, at each stage of the preparation and adoption of a plan, that the environmental concerns of the authorities and the persons affected by those projects are genuinely taken into account. In particular, the aim is to ensure that the information supplied for the environmental assessment is comprehensive and reliable. [7]

30. Consultation of the authorities is intended to take place from the first stages of the preparation of the plan right through to its adoption. First of all, the authorities express their views on the need for an environmental assessment of the plan in question (Article 3(6) of the Directive). Next, they must be consulted on the scope and level of detail of the information to be included in the environmental report (Article 5(4) of the Directive). Finally, they must express their opinion on that report and on the draft plan or programme (Article 6(2) of the Directive).

31. The essence of the consultation procedure is therefore that an authority with responsibility for environmental matters should provide an opinion which is informed and which is, above all, directly concerned with the environmental effects of the plan. That procedure must make it possible to obtain an opinion, at each stage, not only as to the need for an environmental assessment, but also as to the actual content of the report on the environmental effects and the draft plan. The authority designated for the purposes of consultation must therefore be able to provide up-to-date information of real value. It must also be in a position to criticise the evaluations and choices made by the

5 — Convention signed on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1).

6 — Article 7 of the Aarhus Convention.

7 — Recital 15 in the preamble to the Directive.

authority responsible for preparing the plan, by suggesting modifications and alternative solutions on the basis of its own knowledge and areas of competence.

32. Consequently, that authority must, of necessity, be a body which is separate from and independent of the planning authority, this being the only guarantee that the consultation procedure will be credible and effective. As the Commission points out in its observations, 'clearly, a body cannot consult itself'. In the same way that an individual cannot be a judge in, and a party to, proceedings, a public authority cannot be consulted on the effects of a plan for which it is originally responsible.

33. To accept the contrary would, in my view, render the consultation procedure entirely pointless and would impede attainment of the aims of the European Union legislature.

34. The Department of the Environment for Northern Ireland cannot, in the same way as it prepares its plan, formulate constructive criticism of its draft and propose alternative solutions other than the choices which it has already made. In addition, although it is one of the authorities best able to defend environmental interests, it must nevertheless be in a position to take into consideration opinions and concerns which may be held, for example, by more specialised bodies or local authorities affected by the plan because of its geographical scope. On that point, it is interesting to note that the responsibilities of the Department of the Environment for Northern Ireland did not prevent the public concerned from submitting more than 5 250 representations concerning the draft Northern Area Plan 2016 and more than 5 300 representations in respect of the Magherafelt Area Plan 2015. The Department of the Environment for Northern Ireland cannot therefore avoid the obligation to consult another authority responsible for environmental questions, as otherwise the Directive would lose one of its key elements.

35. In order to ensure that the Directive is credibly and effectively implemented, therefore, I think it is essential that, in a situation such as that in the main proceedings, the Member State should designate, in accordance with Article 6(3) of the Directive, a new authority for purposes of the consultation procedure, separate from and independent of the authority responsible for preparing the plan.

36. In my view, such an obligation does not impose an impossible burden on those Member States which, because of their size, do not have an extensive network of public authorities with environmental responsibilities.

37. Article 6(3) of the Directive is framed in broad terms. The Member States are given, in accordance with Article 6(5) of the Directive, a wide measure of discretion in organising the environmental consultation procedure. [8]

38. It thus appears from paragraph 7.11 of the Commission Guidelines [9] that the Member States may choose to designate governmental or public authorities at the national, regional or local level. These may be authorities concerned by the environmental effects of implementation of the plan, such as environmental inspectorates, environmental research institutions performing a public task or units in government. According to paragraph 7.15 of the Guidelines, these may also be authorities which have environmental responsibilities in a more general way, such as 'neighbouring local authorities'.

39. The Member State are also free to determine the method for designating consultation authorities. According to the Guidelines, such authorities may be designated by inclusion in the transposing legislation, as is the case here. The Member States may also prefer a case-by-case approach which makes it possible for account to be taken of the content of the plan or programme. [10] In that case, a Member State may take into account the identity of the authority responsible for the plan in order to designate a new consultation authority for the purposes of the environmental assessment.

40. The wording of Article 6(3) of the Directive and the Commission's interpretation of it suggest that the Member States have sufficient latitude to adopt a procedure which will ensure that the Directive is effectively and credibly implemented. In a situation such as that in the main proceedings, I take the view that the United Kingdom of Great Britain and Northern Ireland can achieve that objective by designating, for example, for the purposes of the consultation procedure in issue, a local authority which may be concerned by the environmental effects of the plan. [11]

41. In view of all of the foregoing, I accordingly take the view that Article 6(3) of the Directive must be interpreted as meaning that, where the authority responsible for the plan is also the authority designated by national law for purposes of the consultation

8 — See also recital 5 in the preamble to the Directive.

9 — Guidelines on the implementation of the Directive ('the Guidelines').

10 — Paragraphs 7.13 to 7.15 of the Guidelines.

11 — In this connection, the referring court points out that other public bodies in Northern Ireland have statutory powers relating to specific aspects of the environment.

procedure, the Member State must designate a new consultation authority which is separate from and independent of the first.

B — *The third question*

42. The third question submitted by the referring court asks whether Article 6(2) of the Directive precludes the authority responsible for preparing the plan from laying down a time-limit in each case for the purpose of the consultation procedure.

43. In the main proceedings, the High Court of Justice in Northern Ireland found that, in accordance with the principle of legal certainty, the Member States should be required to specify that time-limit in the transposing legislation and that they could not delegate the responsibility for laying down the time-limit in each case to the authority responsible for the plan.

44. The United Kingdom Government submits that the time-limits for the purpose of the consultation procedure need not necessarily be specified in the transposing legislation. The Commission, for its part, takes the view that nothing in the text of the Directive and no other principle of law require the Member States to specify in their transposing legislation a precise time-limit for purposes of the consultation procedure. The Commission adds that it is sufficient if the time-limit is determined at the time of the consultation.

45. Like the United Kingdom Government and the Commission, I take the view that Article 6(2) of the Directive does not preclude national legislation such as that at issue in the main proceedings, which provides that the time-limit set for the purpose of the consultation procedure is to be laid down in each case by the authority responsible for the plan or programme. My stance is based on the following considerations.

46. First, it is accepted that the Directive does not bring about a full harmonisation of environmental assessment procedures and, in particular, of the consultation procedure. As is made clear by recital 8 in the preamble and Article 6(5) of the Directive, the European Union legislature intended to lay down a minimum framework, leaving the specific details concerning consultation of the authorities and the public to be laid down by the Member States.

47. Therefore, with regard to the time-limit laid down for the consultation procedure, the European Union legislature merely states, in Article 6(2) of the Directive, that 'appropriate' periods must be given to the authorities and the public consulted so that they have an 'effective opportunity' to express their

opinion. [12] The Directive therefore leaves it to the Member States to decide how to transpose that provision into national law. [13] Consequently, there is nothing to prevent a Member State from deciding to leave it to the authority responsible for the plan in question to specify the time-limit within which expressions of opinion must be received, provided that that time-limit meets the conditions set out in Article 6(2) of the Directive. [14]

48. That approach has the advantage of avoiding excessive inflexibility in the procedure by permitting the authority responsible for the plan to specify a period which can take into account the nature, scale and complexity of the plan. In that connection, it must be observed that the scope of the Directive is extremely wide because, pursuant to Article 3, it covers such widely different sectors as agriculture, energy, industry, telecommunications and indeed tourism. Apart from the diverse nature of the draft versions which may be drawn up, each plan has, in my view, specific characteristics and for that reason merits separate examination within a time frame which must be appropriate. It seems to me that the authority responsible for the plan is best placed to determine that time frame.

49. In addition, I think that approach does not conflict with the principle of legal certainty, given that the authority responsible for the plan sets the duration of the period for consultation when the draft plan and the environmental report are published, in accordance with Article 6(2) of the Directive.

50. In the present case, I find that the Department of the Environment for Northern Ireland laid down a period of eight weeks for the draft Northern Area Plan 2016 and one of six weeks for the draft Magherafelt Area Plan 2015, in accordance with Regulation 12 of the 2004 Regulations. Those periods appear sufficient because they enabled the authorities and the public who were consulted to submit more than 5 250 representations concerning the first project and more than 5 300 representations with regard to the second. As the United Kingdom Government points out in its observations, if in a given case the consultation bodies or the public consider that the time frame set is too short, an extension can, under national law, be requested and, if it is refused, legal proceedings by way of

12 — See also recital 15 in the preamble to the Directive, which states that that period must allow 'sufficient time' for consultations and the expression of opinion.

13 — See, by way of illustration, Article 14(2) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), by virtue of which 'Member States shall allow at least six months to comment in writing on [the reference] documents in order to allow active involvement and consultation.'

14 — On this point, it is interesting to note that Article 6(3) of the Aarhus Convention, applicable to public participation concerning plans, programmes and policies relating to the environment, provides that 'the public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public … and for the public to prepare and participate effectively during the environmental decision-making.'

judicial review can be brought on the basis that the period allowed for consultation was inadequate.

51. In the light of all those factors, I take the view that Article 6(2) of the Directive does not preclude national legislation which provides that the time frame set for the purpose of the consultation procedure is to be laid down in each case by the authority responsible for the plan or programme, on condition that that time frame is sufficient to give the authorities and the public consulted an effective opportunity to express their opinion on the draft plan or programme and on the environmental report.

V — Conclusion

52. In the light of the foregoing, I propose that the Court should answer as follows the questions referred by the Court of Appeal for Northern Ireland:

(1) Article 6(3) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment must be interpreted as meaning that, where the authority responsible for the plan is also the authority designated by national law for purposes of the consultation procedure, the Member State must designate a new consultation authority which is separate from and independent of the first.

(2) Article 6(2) of Directive 2001/42 must be interpreted as not precluding national legislation which provides that the time frame set for the purpose of the consultation procedure is to be laid down in each case by the authority responsible for the plan or programme, on condition that that time frame is sufficient to give the authorities and the public consulted an effective opportunity to express their opinion on the draft plan or programme and on the environmental report.