JUDGMENT OF THE COURT (Sixth Chamber)
18 June 1998 *

In Case C-81/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Netherlands Raad van State for a preliminary ruling in the proceedings pending before that court between

Burgemeester en wethouders van Haarlemmerliede en Spaarnwoude and Others

and

Gedeputeerde Staten van Noord-Holland

on the interpretation 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),

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, G. F. Mancini, P. J. G. Kapteyn, J. L. Murray and K. M. Ioannou (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: J. Mischo,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Burgemeester en wethouders van Haarlemmerliede en Spaarnwoude,

— the Burgemeester en wethouders van Amsterdam,

— Mr Schuitemaker and others, by L. D. H. Hamer, of the Amsterdam Bar,

— the Gedeputeerde Staten van Noord-Holland,

— the Netherlands Government, by J. G. Lammers, substitute Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Austrian Government, by W. Okresek, Ministerialrat in the Chancellor's Office, acting as Agent,

— the Commission of the European Communities, by H. van Lier, Legal Adviser, acting as Agent, assisted by J. Stuyck, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of the Burgemeester en wethouders van Amsterdam, represented by B. ter Haar, of the Amsterdam Bar; Mr Schuitemaker and others, represented by L. D. H. Hamer; the Gedeputeerde Staten van Noord-Holland, represented by S. E. Bakker, civil servant, acting as Agent; the Netherlands Government, represented by J. S. van den Oosterkamp, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by H. van Lier and J. Stuyck, at the hearing on 22 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 5 March 1998,

gives the following

Judgment

1 By order of 12 March 1996, received at the Court on 18 March 1996, the Netherlands Raad van State referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation 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, hereinafter 'the directive').

2 The question arose in the course of an action brought by a number of persons concerned challenging the decision of 18 May 1993 whereby the North Holland provincial authorities approved the 'Ruigoord 1992' zoning plan which was adopted by the Municipal Council of Haarlemmerliede en Spaarnwoude on 21 September 1992 under the Wet op de Ruimtelijke Ordening (*Staatsblad* 1962, p. 286; Town and Country Planning Law). The action was based on the fact that the plan had been authorised without an environmental assessment having been made as required by the directive.

3 The file indicates that 'Ruigoord 1992' concerns an area of approximately 6.5 km^2 on which there is to be built, primarily, a port and an industrial zone extending from the western port zone of Amsterdam, which lies east of the area in question.

4 The projects featured in the plan were already contained in the 'Landelijk Gebied 1968' zoning plan and in the regional plans known as 'Amsterdam-Noordzeekanaalgebied 1979' and 'Amsterdam-Noordzeekanaalgebied 1987', the implementation of which never progressed further than raising a portion of the perimeter by sand in the late 1960s. There was no environmental assessment made in connection with those plans prior to consent, as required by the directive.

5 The 'Ruigoord 1984' plan drawn up by the Haarlemmerliede en Spaarnwoude Municipal Council on 25 September 1984 designated most of the area in question as being for recreational purposes. The plan was largely turned down by decision of the North Holland provincial authorities on 5 March 1985. The 'Ruigoord 1992' plan was intended to replace the 'Landelijk Gebied 1968' plan.

6 The directive concerns, according to Article 1(1) thereof, the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

7 According to Article 1(2), 'project' means 'the execution of construction works or of other installations or schemes' and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. Under the same provision, 'development consent' means 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

8 Article 2(1) of the directive provides:

'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.'

9 Article 4 of the directive, read in conjunction with point 8 of Annex I, indicates that an assessment must be made of projects concerning trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels over 1 350 tonnes.

10 Article 12(1) of the directive requires the Member States to take the measures necessary to comply with the directive within three years of its notification. Since the directive was notified to the Member States on 3 July 1985, that period expired on 3 July 1988.

11 The directive was transposed into Netherlands law mainly by the Besluit Milieueffectrapportage of 20 May 1987 (*Staatsblad* 1987, p. 278; the Order on Environmental Impact Assessment, hereinafter 'the EAO'). The order lists the projects (which it calls 'activities') for which an environmental assessment is required. Thus the construction of a port for civil use for inland waterway or maritime navigation is described therein as an 'activity' where it relates to a port permitting the passage of vessels of a tonnage of 1 350 tonnes or more, so that the adoption of a plan or a development plan which first provides for the possible construction of such a port is to be preceded by an environmental assessment.

12 Article 9(2) of the EAO provides, however, that an environmental impact assessment report is not obligatory where an 'activity' within the meaning of the order has already been incorporated in a current structural, zoning or regional plan.

13 According to Articles 10(1) and 28(1) of the Town and Country Planning Law, such plans are to be submitted for the approval of the provincial authorities after adoption by the municipal authorities. The former may also require the municipal authorities to draw up or revise a development plan.

14 The national court has found that there was no obligation under the EAO to make the environmental impact assessment which should in principle have preceded the plan at issue because the latter had been included in earlier development plans.

15 Since it was in doubt as to the compatibility of those rules with the directive, the Netherlands Raad van State stayed the proceedings and referred 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 environment permit consent to be granted for a project mentioned in Annex I to the directive where, in the course of the 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?'

16 The question asks essentially whether the directive is to be interpreted as permitting Member States to waive the obligations concerning environmental impact assessments in the case of projects listed in Annex I where:

— the projects have already been the subject of a consent granted prior to 3 July 1988, the date by which the directive was to have been transposed into national law,

— the consent was not preceded by an environmental assessment in accordance with the requirements of the directive and no use was made of it,

— a fresh consent procedure was formally initiated after 3 July 1988.

17 The applicant in the main action maintains that approval of a development plan constitutes a decision which confers on the authorities entitlement to proceed with the project. It therefore amounts to consent within the meaning of Article 1(2) of the directive. Inasmuch as it dispenses the national authorities from the requirement of making an environmental assessment for plans which ought to be subject to such an assessment, the EAO conflicts with the directive and must remain inapplicable in so far as it is a national provision incompatible therewith.

18 The Austrian Government and the Commission submit that the obligation to make an environmental assessment concerns only projects for which consent is required. However, approval of development plans does not, in principle, contain any clause granting a particular developer the right to proceed with the project.

Since they cannot be regarded as 'consent' within the meaning of Article 1(2) of the directive, they do not give rise to the obligation to make an environmental assessment.

19 The Netherlands Government submits, by contrast, that since its purpose is to replace the 'Landelijk Gebied 1968' plan, the plan at issue here amounts to a mere extension of the former, which had already been authorised and become irrevocable. Such a case, where consent for projects listed in Annex I of the directive was granted before the expiry for transposing the directive but where for other technical or practical reasons a fresh consent is necessary, falls within the powers of the Member States. The obligation to carry out an environmental assessment in accordance with the directive does not therefore apply.

20 It should be noted, as a preliminary, that it is for the national court to determine in each case and on the basis of the applicable national law whether approval of the development plan constitutes consent within the meaning of Article 1(2), that is to say a decision of the competent authority which entitles the developer to proceed with the project.

21 In this case, it is clear from the order making the reference that the national court considers it established that approval of the plans in question constitutes such consent.

22 In order to reply to the question raised by the national court, it must be noted that it is settled case-law 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 (Case C-396/92 *Bund Naturschutz in Bayern and Others* [1994] ECR I-3717, paragraph 18). Accordingly, in the

case of such projects the principle stated in Article 2(1) of the directive applies, according to which projects likely to have significant effects on the environment are subject to an environmental assessment.

23 However, since the directive does not make provision for transitional rules covering projects in respect of which the consent procedure was initiated before 3 July 1988 and which were still in progress on that date, the Court has held that that principle does not apply where the application for consent for a project was formally lodged before 3 July 1988. It has stated that that formal criterion is the only one which accords with the principle of legal certainty and enables the effectiveness of the directive to be safeguarded (Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 32).

24 The reason for that is that the directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time-consuming by the specific requirements imposed by the directive, and for situations already established to be affected by it.

25 However, the circumstances of this case do not concern a consent procedure for a project which is subject to an assessment, which was formally initiated before 3 July 1988, and which was still in progress on that date. On the contrary, it concerns an application made after 3 July 1988 seeking fresh consent for a project listed in Annex I of the directive and incorporating the development provided for in a project for which consent was obtained years or even decades previously, without any environmental assessment being made in accordance with the requirements of the directive. Despite that, scarcely any progress was made in implementing the project, the developer for which is a public authority.

26 In such a case, the considerations which led the Court to hold that the requirement of an environmental assessment need not apply in *Commission* v *Germany*, cited above, cannot apply in this case, particularly as national legal remedies are available in respect of the new consent procedure.

27 Accordingly, where, as in the main proceedings, for reasons inherent in the applicable national rules, a fresh procedure is formally initiated after 3 July 1988, that procedure is subject to the obligations regarding environmental assessments imposed by the directive. Any other solution would run counter to the principle that an environmental assessment must be made of certain major projects, set out in Article 2 of the directive, and would compromise its effectiveness.

28 Consequently, the reply to the national court must be that the directive is to be interpreted as not permitting Member States to waive the obligations regarding environmental assessments in the case of projects listed in Annex I of the directive where

— the projects have already been the subject of a consent granted prior to 3 July 1988, the date by which the directive was to have been transposed into national law,

— the consent was not preceded by an environmental assessment in accordance with the requirements of the directive and no use was made of it, and

— a fresh consent procedure was formally initiated after 3 July 1988.

Costs

29 The costs incurred by the Netherlands and Austrian Governments, and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Netherlands Raad van State by order of 12 March 1996, hereby rules:

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment is to be interpreted as not permitting Member States to waive the obligations regarding environmental assessments in the case of projects listed in Annex I of the directive where

— the projects have already been the subject of a consent granted prior to 3 July 1988, the date by which the directive was to have been transposed into national law,

— the consent was not preceded by an environmental assessment in accordance with the requirements of the directive and no use was made of it, and

— a fresh consent procedure was formally initiated after 3 July 1988.

Ragnemalm Mancini Kapteyn

Murray Ioannou

Delivered in open court in Luxembourg on 18 June 1998.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber