JUDGMENT OF THE COURT (First Chamber)

10 June 2004 *

In Case C-87/02,

Commission of the European Communities, represented by M. van Beek and R. Amorosi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by M. Massella Ducci Teri, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero-Variante, tra Teramo (Italy) e Giulianova, alla strada statale SS 80'), of a

* Language of the case: Italian

type listed in Annex II to 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), required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive,

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas (Rapporteur), A. La Pergola, R. Silva de Lapuerta and K. Lenaerts, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 January 2004,

gives the following

Judgment

1 By an application lodged at the Registry of the Court on 13 March 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (Italy) (a project known as 'Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80', hereinafter the 'Lotto zero' project), of a type listed in Annex II to 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), required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.

Legal background

Community legislation

2 Directive 85/337 applies, according to Article 1(1) thereof, to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

3 Article 1(2) of the Directive defines a project as:

'— 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'.

4 Article 2(1) of Directive 85/337 states:

'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.'

5 Article 4 of Directive 85/337 provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

6 Annex II to Directive 85/337, relating to projects subject to Article 4(2) thereof, lists in paragraph (d) of point 10, headed 'Infrastructure projects':

'Construction of roads, harbours, including fishing harbours, and airfields (projects not listed in Annex I)'.

7 Article 5 of Directive 85/337 in essence specifies the minimum information to be provided by the developer. Article 6 requires Member States to take the measures necessary to ensure that the authorities and members of the public concerned are informed and are able to express an opinion before the project is initiated. Article 8 requires the competent authorities to take into consideration information gathered pursuant to Articles 5 and 6. Article 9 imposes an obligation on the competent authorities to inform the public of the decision taken and any conditions attached to it.

8 Article 12 of Directive 85/337 provides that Member States are to take the measures necessary to comply with the Directive within three years of its notification. It was notified to Member States on 3 July 1985.

9 That directive was amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), Article 3(1) of which provides for implementation by 14 March 1999 at the latest. Directive 97/11 was therefore not applicable in the present case at the material time.

10 Article 4(2) et seq. of Directive 85/337, as amended by Directive 97/11, states:

'2. 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).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

National legislation

11 The Decree of the President of the Republic of 12 April 1996, entitled 'Atto di indirizzo e coordinamento per l'attuazione dell'art. 40, comma 1, della L. 22 febbraio 1994, n. 146, concernente disposizioni in materia di valutazione di impatto ambientale' (Policy and coordination measure for the application of Article 40(1) of Law No 146 of 22 February 1994 on the provisions relating to the assessment of environmental effects) (GURI No 210, of 7 September 1996, p. 28, hereinafter 'the Decree of 12 April 1996') states, in Article 1:

'1. The Regions and the Autonomous Provinces of Trento and Bolzano shall ensure that an environmental impact assessment is carried out for projects listed in Annexes A and B, in conformity with Directive 85/337/EEC, following the guidelines contained in the present measure.

...

4. Projects included in Annex B which are situated, even in part, within the protected natural areas defined by Law No 394 of 6 December 1991 shall be made subject to an assessment of their effects on the environment.

...

6. For projects listed in Annex B which are not situated in a protected natural area, the competent authority shall ascertain, in accordance with the rules laid down in Article 10 and on the basis of the information provided in Annex D, whether the characteristics of a project require an assessment of its effects on the environment to be undertaken.'

12 Article 10(1) and (2) of the Decree of 12 April 1996 states:

'1. For the projects referred to in paragraph 6 of Article 1, the developer or authority which submits the proposal shall request the screening provided for in that paragraph. The information which the proposing developer or authority must provide for that screening shall contain a description of the project and the information necessary in order to understand and assess the main effects which the project could have on the environment.

2. The competent authority shall take a decision within 60 days on the basis of the information required under Annex D and shall identify potential measures making it possible to mitigate effects and to monitor works and/or installations. In the event that the competent authority does not respond within the period referred to above, the project shall be considered exempted from the procedure. The Regions and Autonomous Provinces of Trento and Bolzano shall adopt the measures necessary to make public the list of projects for which screening has been requested and the results thereof.'

13 Annex B to the Decree of 12 April 1996 on the types of projects referred to in Article 1(4) of that decree lists in point 7(g) and (h):

'(g) Secondary outer roads,

(h) Construction of relief roads in urban areas or reinforcement of existing roads of four or more lanes of a length greater than 1 500 metres in an urban area.'

14 Annex D to the Decree of 12 April 1996 specifies the information which the competent authority must take into account when examining the characteristics and location of a project in the context of the screening provided for in the sixth paragraph of Article 1 of that decree.

15 The Abruzzo Region transposed the Decree of 12 April 1996 by Regional Law No 112, of 23 September 1997, entitled 'Norme urgenti per il recepimento del decreto del Presidente della Repubblica 12 aprile 1996' (Urgent rules for the transposition of the Decree of the President of the Republic, of 12 April 1996).

Pre-litigation procedure

16 It is apparent from the application made by the Commission that on 11 May 1998 it asked the Italian authorities to provide information on the 'Lotto zero' project. According to the information available to the Commission at the time, consent for

that project was given without its being made subject to an environmental impact assessment and to screening intended to determine whether an assessment of its effects on the environment was necessary.

17 The Commission had been informed, in the context of a question put by a Member of the European Parliament, that the purpose of the project was to construct a stretch of express relief road 10.50 metres wide, comprising four viaducts and four tunnels. The road, which would cross an area close to residences some metres from the historic centre of the commune of Teramo in Abruzzo (Italy), would affect the bed of the Tordino river, the subject of the environmental improvement project known as 'Fiume Tordino medio corso', financed by the Community. That area was proposed by the Italian Republic as a site of Community importance under the procedure intended to set up the European ecological network known as 'Natura 2000', within the meaning of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

18 By letter of 23 July 1998, the Republic of Italy confirmed to the Commission that the project concerned construction of a two-lane road 10.50 metres in width and of an unspecified length, one section of which, crossing the territory of the commune of Teramo, would affect the right part of the basin of the Tordino river and would measure 5 440 metres in length, including 2 260 metres of viaduct and 930 metres of tunnel.

19 It emerges from the correspondence between the Commission, the Italian Environment Ministry and the Permanent Representation that, on 12 March 1999, the Abruzzo Region gave its consent to carrying out the works and that the special commissioner appointed for that work decided not to subject the operation to either an environmental impact assessment or screening.

20 By letter of 21 May 1999, the Ministry drew attention to the requirements imposed by the Decree of 12 April 1996 and asked the special commissioner for the project and the Abruzzo Region to give reasons for the decision not to subject that project to either an impact assessment or screening. The special commissioner then asked the Abruzzo Region to initiate the regional procedures for screening environmental compatibility, in accordance with the Decree of 12 April 1996.

21 The project was subjected to the procedure intended to ascertain whether it was required to undergo an assessment of its effects on the environment. Since the Abruzzo Region considered that the area in question was not part of a protected area within the meaning of Law No 394/91 and Regional Law No 38/96, it decided, by means of Regional Decree No 25/99, prot. No 3624 of 15 November 1999, to approve the screening of environmental compatibility and thereby exempt the project from the environmental impact assessment procedure.

22 By letter of 30 May 2000, sent to the Commission by a note of 16 June 2000 from the Permanent Representation, the Italian Environment Ministry pointed out that Regional Decree No 25/99 had been adopted following the favourable opinion by the Comitato di Coordinamento Regionale sulla Valutazione di Impatto Ambientale (Regional Coordinating Committee on environmental impact assessment, hereinafter 'the Coordinating Committee') No 3/76 of 22 October 1999, which for its part referred back to a civil engineering opinion which was not mentioned in Regional Decree No 25/99. The Decree provided no explanation for that omission and no argument in support of the decision taken by the regional administration.

23 On 24 October 2000, the Commission sent a letter of formal notice to the Italian Republic, stating that the information available to it did not indicate that the Abruzzo Region had subjected the project in question, which is listed in Annex II to Directive 85/337, to screening intended to establish whether its characteristics required an assessment within the meaning of Articles 5 to 10 of the Directive.

24 Since the Commission did not consider the various responses by the Italian authorities to that formal notice to be satisfactory, it delivered a reasoned opinion to the Italian Republic by letter of 18 July 2001, giving it two months in which to adopt the measures required in order to comply with it.

Procedure before the Court

25 The Court decided to ask various questions of the Italian Republic and of the Commission and to request that they produce several documents. In particular, it asked the Italian Republic to produce the civil engineer's opinion referred to in the context of the pre-litigation procedure. After examining the responses and documents, the Court decided, in accordance with Article 44a of the Rules of Procedure, to give judgment without a hearing.

Substance

Arguments of the parties

26 The Commission points out that, under the first paragraph of Article 4(2) of Directive 85/337, projects listed in Annex II are to be made subject to an assessment, in accordance with Articles 5 to 10 of the Directive, when Member States consider that their characteristics require it. The second paragraph of Article 4(2) of Directive 85/337 authorises Member States, inter alia, to set criteria or thresholds in order to determine which of the projects listed in the classes set out in Annex II must be made subject to an assessment in accordance with Articles 5 to 10 of that directive.

27 The Commission states that, as is clear from Case C-435/97 *WWF and Others* [1999] ECR I-5613, in the absence of a legislative measure which specifies, from the outset and in its entirety, which projects to subject to an environmental impact assessment procedure, Member States have the power to exclude a specific project from that procedure only following a concrete examination of that project which makes clear, on the basis of a full screening, the reasons why it cannot have an effect on the environment.

28 In the Decree of 12 April 1996, the Italian Republic failed to specify, from the outset and in their entirety, in accordance with the second paragraph of Article 4(2) of Directive 85/337, what projects must be made subject to an environmental impact assessment. It merely referred to those likely to be made subject to screening intended to establish the need to carry out an environmental impact assessment. Such is the case for the projects listed in Annex B to the Decree of 12 April 1996, in particular in point 7(g) (secondary outer roads) or 7(h) (construction of relief roads in urban areas or widening of an existing road to four or more lanes, of a length greater than 1 500 metres within an urban area), which correspond to the projects listed in Annex II to Directive 85/337, in particular in point 10(d) and (e) (construction of airfields, roads, harbours, including fishing harbours).

29 Since the project 'Lotto zero' corresponds to the projects provided for by those provisions, it should have been made subject to screening, and clear and precise reasons should have been given for the decision not to carry out an assessment in accordance with Articles 5 to 10 of Directive 85/337. However, the decision not to make the project subject to assessment makes no mention of any established assessment criteria and fails to explain whether the screening referred to in the sixth paragraph of Article 1 of the Decree of 12 April 1996 was carried out or, if it was, how it was carried out. The statement of reasons provided for Regional Decree No 25/99 therefore suggests that the Abruzzo Region did not ascertain whether it was necessary for the project to be made subject to an assessment in accordance with Articles 5 to 10 of Directive 85/337. In its reply, the Commission states that the opinion of the Coordinating Committee referred to in Decree No 25/99 was never brought to its attention.

30 It points out that, even if the content and mechanism of the screening referred to in Article 4(2) of Directive 85/337 were elaborated only by Directive 97/11, which amends Directive 85/337 but which is not applicable in the present case, it is not acceptable that it be completely ignored without any reasons being given for the decision.

31 In addition, the argument that the rejection by national courts of applications brought by environmental protection associations prevents the Commission from ascertaining whether a Member State has fulfilled its obligations under the Directive is without any foundation and contrary to the Court's case-law. It is in fact clear from *WWF*, cited above, that it is for the national court to ascertain whether the competent authorities have correctly assessed the significance of the effects of a project on the environment. However, that does not preclude the Court's ruling on the obligations for Member States which result from Article 4(2) of Directive 85/337 and, accordingly, the Commission, on the basis of the powers conferred on it under Article 226 EC, has the duty to draw attention to a failure to comply with a provision of Community law.

32 Finally, the Commission points out that a Member State must deal with infringements not only by its central government but also those by its local and decentralised authorities.

33 The Italian Republic recalls the circumstances in which the Abruzzo Region adopted Regional Decree No 25/99 of 15 November 1999.

34 As regards the reasons for that decision, it maintains that Article 4(2) of Directive 85/337 allows a case-by-case examination to determine whether the project must be made subject to assessment. That directive thus provides for the adoption of an express measure before subjecting a project to an assessment. Accordingly, it is

warranted to allow the competent authorities not to respond when no assessment is needed and not to require them to adopt formal measures unless the project must be made subject to an impact assessment.

35 Such would be the procedure under Article 10(2) of the Decree of 12 April 1996, by which the competent authority may fail to respond where it takes the view that no assessment is needed, which is tantamount to a decision to close the screening procedure.

36 The Italian Republic in any event denies the alleged infringement, since the national competent authority adopted an explicit measure, namely Decree No 25/99, on the basis of an opinion by the Coordinating Committee.

37 It points out that, as is clear from the judgment in *WWF*, cited above, it is for the national court to review whether the competent authorities have correctly assessed the significance of the effects of a project on the environment. In the present case, the project 'Lotto zero' was subjected to review by the Tribunale amministrativo regionale del Lazio as the result of an application introduced by the Associazione Italiana Nostra-Onlus and the Associazione Italiana per il World Wildlife Fund. By an order of 21 June 2000, that court rejected the application to suspend implementation of the contested decisions relating to that project.

Findings of the Court

38 First of all, it should be recalled that the fact that a Member State has conferred on its regions the responsibility for giving effect to directives cannot have any bearing on the application of Article 226 EC. The Court has consistently held that a Member

State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives. While each Member State may freely allocate internal legislative powers as it sees fit, the fact remains that it alone is responsible towards the Community under Article 226 EC for compliance with obligations arising under Community law (Case C-33/90 *Commission* v *Italy* [1991] ECR I-5987, paragraph 24; also, to that effect, the order in Case C-180/97 *Regione Toscana* v *Commission* [1997] ECR I-5245, paragraph 7). Therefore, it is not relevant in the present case that the infringement results from a decision by the Abruzzo Region.

39 The fact that proceedings have been brought before a national court to challenge the decision of a national authority which is the subject of an action for failure to fulfil obligations and the decision of that court not to suspend implementation of that decision cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of remedies available through the national courts cannot in any way prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects (Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraph 9, and Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 24).

40 As regards the present action, in accordance with the first paragraph of Article 4(2) of Directive 85/337, projects of the classes listed in Annex II are to be made subject to an assessment where Member States consider that their characteristics so require. The second paragraph of Article 4(2) of the Directive provides that 'Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10'.

41 The Court has already held that the second paragraph of Article 4(2) mentions, by way of indication, methods to which the Member States may have recourse when determining which of the projects falling within Annex II are to be subject to an assessment within the meaning of Directive 85/337 (*WWF*, paragraph 42).

42 Consequently, Directive 85/337 confers a measure of discretion on the Member States and does not therefore prevent them from using other methods to specify the projects requiring an environmental impact assessment under the Directive. So the Directive in no way excludes the method consisting in the designation, on the basis of an individual examination of each project concerned or pursuant to national legislation, of a particular project falling within Annex II to the Directive as not being subject to the procedure for assessing its environmental effects (*WWF*, paragraph 43).

43 However, the fact that the Member State has the discretion referred to in the previous paragraph is not in itself sufficient to exclude a given project from the assessment procedure under the Directive. If that were not the case, the discretion accorded to the Member States by Article 4(2) of the Directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it could have significant environmental effects (*WWF*, paragraph 44).

44 Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis

of a comprehensive screening, be regarded as not being likely to have such effects (*WWF*, paragraph 45).

45 In the present case, the infringement relates to a project to construct a road which, in accordance with the Italian legislation which transposes Directive 85/337 and with the Directive itself, should have been screened to determine whether it needed to be subjected to an assessment. The Commission claims that the Italian Republic in essence failed to state reasons for the decision by the Abruzzo Region not to carry out an impact assessment, which suggests that no preliminary screening was carried out.

46 Examination of the documents produced shows that Decree No 25/99, by which the Abruzzo Region gives a favourable opinion as regards the outcome of the screening procedure and decides to exempt the project from the assessment procedure, is based on a cursory statement of reasons and merely refers to the favourable opinion by the Coordinating Committee. The latter opinion, which appears in the handwritten minutes of the Committee's meeting of 22 October 1999, contains a sentence which conveys the favourable opinion and states that in adopting that opinion, the Committee had available to it the civil engineer's opinion No 8634 of 6 July 1999.

47 As the Advocate General rightly observes in point 33 of his Opinion, that opinion by Teramo's civil engineering department, produced at the Court's request, is not an opinion on the environmental effects of the project, but merely an authorisation 'solely for hydraulic purposes' to cross the Tordino river and carry out certain works. The document attached by the Italian Republic to its defence, the cover page of which gives the necessary details as to the nature of the document and which was produced at the Court's request, does not appear to be required under the Law as part of the screening procedure. Moreover, the Court does not have information which would allow it to conclude that it was used by the competent authority as a basis for its decision.

48 That information indicates that no screening was carried out to determine whether to subject the project 'Lotto zero' to an impact study and that the failure to fulfil obligations as set out by the Commission in its claims is established.

49 It should be pointed out, however, that if the civil engineer's opinion had not been produced at the request of the Court, it would have been impossible to determine whether the screening had been carried out or not. It must be observed that a decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.

50 In conclusion, it must be held that since the Abruzzo Region did not ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero — Variante, tra Teramo e Giulianova, alla strada statale SS 80'), of a type listed in Annex II to Directive 85/337, required an environmental impact assessment in accordance with Articles 5 to 10 of that directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.

Costs

51 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Declares that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80'), of a type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, required an environmental impact assessment in accordance with Articles 5 to 10 of that directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.**

2. **Orders the Italian Republic to pay the costs.**

Jann Rosas La Pergola

Silva de Lapuerta Lenaerts

Delivered in open court in Luxembourg on 10 June 2004.

Registrar President of the First Chamber

R. Grass P. Jann