JUDGMENT OF THE COURT (Second Chamber)

6 November 2008 *

In Case C-381/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (France), made by decision of 4 June 2007, received at the Court on 8 August 2007, in the proceedings

Association nationale pour la protection des eaux et rivières — TOS

v

Ministère de l'Écologie, du Développement et de l'Aménagement durables,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, J.-C. Bonichot, J. Makarczyk, P. Kūris (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: J. Mazák,
Registrar: B. Fülöp, Administrator,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 26 June 2008,

after considering the observations submitted on behalf of:

— the Association nationale pour la protection des eaux et rivières — TOS, by P. Jeanson, Vice-President,

— the French Government, by G. de Bergues and A.-L. During, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

— the Netherlands Government, by M. de Grave, acting as Agent,

— the Commission of the European Communities, by S. Pardo Quintillán and J.-B. Laignelot, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 6 of Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 2006 L 64, p. 52).

2 The reference was made by the Conseil d'État in actions for misuse of powers brought by the Association nationale pour la protection des eaux et rivières — TOS — seeking the annulment, in particular, of Decree No 2006-881 of 17 July 2006, amending Decree No 93-743 of 29 March 1993 on the nomenclature of operations subject to authorisation or declaration under Article 10 of Law No 92-3 of 3 January 1992 on water, Decree No 94-354 of 29 April 1994 on water distribution zones (JORF of 18 July 2006, p. 10786), and Decree No 2006-942 of 27 July 2006, amending the nomenclature of classified facilities (JORF of 29 July 2006, p. 11336).

Relevant provisions

Community legislation

3 Recitals 6 to 8 in the preamble to Directive 2006/11 which, in accordance with Article 1(a) thereof applies inter alia to inland surface water, that is to say, under Article 2(a) to 'all static or flowing fresh surface water situated in the territory of one or more Member States', state as follows:

'(6) In order to ensure effective protection of the aquatic environment of the Community, it is necessary to establish a first list, called List I, of certain individual substances selected mainly on the basis of their toxicity, persistence and bioaccumulation, with the exception of those which are biologically harmless or which are rapidly converted into substances which are biologically harmless, and a second list, called List II, containing substances which have a deleterious effect

on the aquatic environment, which can, however, be confined to a given area and which depends on the characteristics and location of the water into which such substances are discharged. Any discharge of these substances should be subject to prior authorisation which specifies emission standards.

(7) Pollution through the discharge of the various dangerous substances within List I must be eliminated …

(8) It is necessary to reduce water pollution caused by the substances within List II. To this end Member States should establish programmes which incorporate environmental quality standards for water, drawn up in compliance with Council Directives, where they exist. The emission standards applicable to such substances should be calculated in terms of these environmental quality standards.'

4 Article 3 of Directive 2006/11 provides:

'Member States shall take the appropriate steps to eliminate pollution of the waters referred to in Article 1 by the dangerous substances in the families and groups of substances in List I of Annex I, hereinafter referred to as "List I substances", and to reduce pollution of the said waters by the dangerous substances in the families and groups of substances in List II of Annex I, hereinafter referred to as "List II substances", in accordance with this Directive.'

5 Article 6 of Directive 2006/11, the wording of which is identical to that of Article 7 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23), which was repealed by Directive 2006/11, provides:

'1. In order to reduce pollution of the waters referred to in Article 1 by List II substances, Member States shall establish programmes in the implementation of which they shall apply in particular the methods referred to in paragraphs 2 and 3.

2. All discharges into the waters referred to in Article 1 which are liable to contain any List II substances, shall require prior authorisation by the competent authority in the Member State concerned, in which emission standards shall be laid down. Such standards shall be based on the environmental quality standards, which shall be fixed as provided for in paragraph 3.

3. The programmes referred to in paragraph 1 shall include environmental quality standards for water; these shall be laid down in accordance with Council Directives, where they exist.

…'

6 Point 8 of List II of families and groups of substances in Annex I to Directive 2006/11, referred to in Articles 3 and 6 of the latter, refers to substances which have an adverse effect on the oxygen balance, particularly ammonia and nitrites.

7 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; 'Framework Directive on water policy') which predates Directive 2006/11 but the provisions of which will replace those of that directive from 22 December 2013, in accordance with Article 22(2) of the Framework Directive on water policy, states in Article 11:

'1. Each Member State shall ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4. …

2. Each programme of measures shall include the "basic" measures specified in paragraph 3 and, where necessary, "supplementary" measures.

3. "Basic measures" are the minimum requirements to be complied with and shall consist of:

…

(g) for point source discharges liable to cause pollution, a requirement for prior regulation, such as a prohibition on the entry of pollutants into water, or for prior authorisation, or registration based on general binding rules, laying down emission controls for the pollutants concerned, including controls in accordance with Articles 10 and 16 …

…'

8 Article 22(3)(b) of the Framework Directive on water policy contains the following transitional provision:

'for the purposes of Article 7 of Directive 76/464/EEC, Member States may apply the principles for the identification of pollution problems and the substances causing them, the establishment of quality standards, and the adoption of measures, laid down in this Directive.'

National legislation

9 Under the heading 'Water and aquatic environments', the provisions of the Environmental Code relating to authorisation or declaration of installations, structures, works and activities are intended, according to Article L. 211-1 of that code, to enable balanced and long-term management of water resources intended to ensure, inter alia, the protection of water and the fight against all pollution. Article L. 211-2 of the Environmental Code provides, in particular, that general rules on the preservation of the quality and distribution of surface water are to be determined by decree of the Conseil d'État. Under that article, those general rules are to specify in particular the quality standards and measures necessary to restore and preserve that quality, the conditions under which effluent, drainage and other discharges, direct or indirect deposits of matter may be prohibited or regulated and, more generally, any fact likely to alter the quality of water and the aquatic environment, in the same way as the conditions in which the measures necessary to preserve that quality may be prescribed. In addition to those general rules, national requirements or requirements which are specific to certain parts of the territory are, pursuant to Article L. 211-3 of that code, also laid down by decree of the Conseil d'État.

10 Article L. 214-1 of the Environmental Code provides:

'The following are subject to the provisions of Articles L. 214-2 to L. 214-6: installations not appearing in the nomenclature of classified facilities, structures, works and activities carried out for non-domestic purposes by any natural or legal person, public or private, involving … effluent discharge, drainage discharge, direct or indirect discharges or deposits, continuous or occasional, even non-polluting.'

11 The first paragraph of Article L. 214-2 of the Environmental Code provides:

'The installations, structures, works and activities referred to in L. 214-1 are defined in the nomenclature, drawn up by decree of the Conseil d'Etat following consultation with the National Water Board, and subject to authorisation or declaration depending on the danger which they pose and the seriousness of the effects they may have on water resources and aquatic ecosystems, having regard, in particular, to the existence of the zones and areas established for the protection of water and aquatic environments.'

12 Article L. 214-3 of the Environmental Code provides:

'I. The following are subject to authorisation by the administrative authorities: installations, structures, works and activities likely to pose risks to public health and safety, have an adverse effect on the free flow of water, reduce water resources, notably increase the risk of flooding, cause serious damage to the quality or diversity of the aquatic environment, in particular to fish-farm populations.

…

II. The following are subject to declaration: installations, structures, works and activities which, since they are not likely to pose such risks, must none the less comply with the requirements laid down pursuant to Articles L. 211-2 and L. 211-3.

Within a period laid down by decree of the Conseil d'État, the administrative authority may contest the planned operation if it appears that it is incompatible with the provisions of the principal water management plan or the water management plan, or adversely affects the interests referred to in Article L. 211-1 so seriously that no steps could be taken to remedy it. The works may not begin before that time-limit has expired.

If observance of the interests referred to in Article L. 211-1 is not ensured by implementation of the requirements laid down pursuant to Articles L. 211-2 and L. 211-3, the administrative authority may at any time lay down by decree any specific requirements necessary.

…'

13 Articles R. 214-32 to R. 214.40 of the Environmental Code contain provisions applicable to operations subject to declaration. The declaration is to be addressed, as provided for in the first of those articles, to the Prefect of the department or departments concerned who, within 15 days following receipt of the declaration, pursuant to Article R.214-33 of that code is to send to the party making the declaration, when

the declaration is incomplete, an acknowledgment of receipt stating the documents or information missing, or when the declaration is complete, a receipt of the declaration stating either the date on which, in the absence of objections, the planned operation may begin or that there are no objections, enabling that operation to be started up immediately. The same provision provides that that receipt is to be accompanied, if necessary, by a copy of the general requirements applicable. The time-limit allowed for the Prefect to be able to make an objection to an operation subject to declaration is specified by Article R. 214-35 of the Environmental Code as being two months from receipt of a complete declaration.

14 The installations, structures, works or activities concerned must, pursuant to Article R. 214-38 of the Environmental Code, be set up, carried out and operated in accordance with the declaration file and, as the case may be, the specific requirements referred to in Articles R. 214-35 and R. 214-39 of that code. Article R. 214-39 provides that amendment of the requirements applicable to an installation may be requested by the party making the declaration from the Prefect who is to decide by decree and that it may also be ordered by the Prefect on the basis of the third paragraph of Article L. 214-33, II of the Environmental Code. Moreover, Article R. 214-40 of that code provides that any amendment made by the party making the declaration to the project as declared which is such as to entail a significant change to the details in the initial declaration file must, before it is carried out, be brought to the knowledge of the Prefect, who may require a new declaration, which is subject to the same formalities as the initial declaration.

15 Decree No 2006-881, the annulment of which is sought in the main proceedings, revises the nomenclature referred to in paragraph 1 of Article L. 214-2 of the Environmental Code, which is included in the Annex to Article R. 214-1 of that code under the heading 'Nomenclature of the operations subject to authorisation or declaration under Articles L. 214-1 to L. 214-3 of the Environmental Code'. Under section 3.2.7.0 of that nomenclature, as amended, fresh-water fish farms ('fish farms') are henceforth subject, in respect of water control, to the declaration procedure, whereas previously they were subject to authorisation or declaration depending on whether they gave rise to a study or an impact statement.

16 Moreover, pursuant to Article L. 511-1, the provisions of the Environmental Code relating to facilities classified for the protection of the environment are to apply to facilities which may present hazards or risks for, inter alia, public health and safety, agriculture, and the protection of nature and the environment. Pursuant to Article L. 511-2 of the Environmental Code, those facilities are defined in the nomenclature of classified facilities which makes them subject to authorisation by the Prefect or to declaration, according to the seriousness of the hazards or risks their operation may present.

17 Decree No 2006-942, the annulment of which is also sought in the main proceedings, amended that nomenclature. It follows that fish farms are henceforth subject to authorisation in respect of the policy of classified establishments for the protection of the environment only when their annual production capacity exceeds 20 tonnes.

The main proceedings and the question referred for a preliminary ruling

18 The Association nationale pour la protection des eaux et rivières — TOS submits, in support of its actions for annulment of Decree No 2006-881 and Decree No 2006-942 before the Conseil d'État, that those measures fail to have regard to the provisions of Article 6 of Directive 2006/11.

19 After pointing out that the waste from fish farming contains ammonia and nitrites, which are List II substances, and that Article 6 of Directive 2006/11 makes discharges liable to contain such substances subject to prior authorisation in which emission

standards are to be specified, the national court states in its decision that, with the exception of those with an annual production capacity exceeding 20 tonnes, which are subject to authorisation under the legislation concerning facilities classified for the protection of the environment, fish farms are subject as such only to a declaratory scheme.

20 However, the court making the reference states that that scheme, in view of what is regarded as the low-polluting nature of such fish-farm facilities, is based on the objective of simplification of administrative procedures and better allocation of monitoring resources. It states that, under that scheme, the Prefect has the right to object to works, which cannot begin until a period of two months has passed, and where he does not object he may impose technical requirements in order to protect the interests referred to in Article L. 211-1 of the Environmental Code, in particular setting limits on the emissions of pollutants. It takes the view that, in those circumstances, serious difficulty is raised by the question as to whether Article 6 of Directive 2006/11 may be interpreted as allowing the Member States to introduce such a scheme.

21 Accordingly, the Conseil d'État decided to stay the proceedings in respect of the claims made in the application for annulment directed against Decree No 2006-881 in so far as it makes fish farms subject to a declaratory scheme in connection with water policy, and in respect of the application for annulment of Decree No 2006/942 and to refer the following question to the Court for a preliminary ruling:

'May Article 6 of Directive 2006/11/EC … be interpreted as allowing the Member States, once programmes to reduce water pollution including environmental quality standards have been adopted under that article, to introduce a declaratory scheme, in respect of facilities regarded as being low-polluting in nature, subject to a reference to those standards and a right for the administrative authority to object to the commencement of the operations or to impose limits on discharges specific to the facility concerned [?]'

The question

22 In order to answer the question referred, it must be pointed out, first, that Directive 2006/11 is not intended to make the commencement of operations liable to discharge dangerous substances into the aquatic environment subject to a particular regime of authorisation or declaration on the basis of the characteristics of those operations. On the other hand, as is apparent in particular from recitals 6 to 8 of that directive, it is intended to eliminate pollution by List I substances of the waters falling within its scope and to reduce pollution of those waters by List II substances, such as ammonia and nitrites. Directive 2006/11 is not therefore designed to oblige Member States to adopt applicable measures specific to certain operations or facilities as such, but it requires them to take appropriate measures to eliminate or reduce pollution of waters caused by discharges liable to contain dangerous substances, in accordance with the nature of the latter.

23 Accordingly, in order to reduce pollution of waters by List II substances, Article 6 of Directive 2006/11 provides, inter alia, that the Member States are to establish programmes including environmental quality standards for water, drawn up in compliance with Council directives where they exist. For the implementation of those programmes, Article 6(2) provides that all discharges into the waters referred to in Article 1 of the directive which are liable to contain any such substances require prior authorisation by the competent authority in the Member State concerned, in which emission standards are to be laid down, based on the environmental quality standards.

24 It must be stated, secondly, that Directive 2006/11 does not lay down any exception to the rule in Article 6(2) thereof. Accordingly, for the reasons set out in paragraph 22 of this judgment, that provision does not make a distinction according to the characteristics of the facilities from which the discharges come and, in particular, according to whether those facilities are regarded as being high-polluting or low-polluting.

Nor does it make a distinction according to the extent of the discharges. A declaratory scheme such as the one described in the question referred by the national court could therefore be regarded as permitted under Article 6 of Directive 2006/11 only if it required the competent administrative authority to adopt in all cases of discharges a decision capable of being regarded as constituting prior authorisation within the meaning of that article.

25 Not only must the authorisation laid down in Article 6(2) of Directive 2006/11 be prior to any discharge liable to contain any of the List II substances, it must also specify the emission standards, which are based on the environmental quality standards set out in a programme established by the Member State in accordance with Article 6(1) and (3). The Court has, however, held on numerous occasions that it follows from Article 7(2) of Directive 76/464, of which the wording is identical to that of Article 6(2) of Directive 2006/11, that authorisations must contain emission standards which are applicable to authorised individual discharges and which have been calculated in accordance with the quality objectives previously laid down in a programme established pursuant to Article 7(1) to protect the expanses of water and watercourses in question (see, inter alia, Case C-282/02 *Commission* v *Ireland* [2005] ECR I-4653, paragraph 68 and the case-law cited). The Court also stated, in connection with Article 7(2), that the quality objectives fixed by those programmes on the basis of analyses of the waters affected serve as the point of reference for calculating the emission standards set in the prior authorisations (see Case C-384/97 *Commission* v *Greece* [2000] ECR I-3823, paragraph 41).

26 It follows that prior authorisation within the meaning of Article 6(2) of Directive 2006/11 means that every request for authorisation for that purpose must be examined individually and cannot be tacit (see, with particular regard to Article 7 of Directive 76/464, Case C-230/00 *Commission* v *Belgium* [2001] ECR I-4591, paragraph 16).

27 On the one hand, prior specific examination of each planned discharge liable to contain List II substances is necessary to implement programmes to reduce water pollution established by the Member States in accordance with Article 6(1) of Directive 2006/11, under which subjecting all discharges of that nature to prior authorisation constitutes one of the means of implementing those programmes. Such an examination is also necessary to fix in each case of authorised discharge the emission standards determined on the basis of the environmental quality standards included in those programmes and intended to reduce discharges containing one or more List II substances. That examination requires, moreover, an assessment of the actual state of the waters affected which must be taken into account in determining the emission standards. On the other hand, tacit authorisation cannot be compatible with the requirement to specify, in the prior authorisation, the emission standards calculated on the basis of the procedure described above.

28 In the light of those considerations, a declaratory scheme such as that at issue in the main proceedings, subject to a reference to the environmental quality standards included in the programmes to reduce water pollution and a right for the administrative authority to object to the commencement of the operations or to impose limits on discharges specific to the facility concerned, cannot satisfy the requirements referred to above of Article 6 of Directive 2006/11, since it does not guarantee that any discharges liable to contain a List II substance give rise to a specific examination leading to the fixing of emission standards specific to them, calculated on the basis of the applicable environmental quality standards and the actual state of the waters affected. Such a scheme does not therefore require the competent administrative authority to adopt a decision capable of being regarded as constituting prior authorisation within the meaning of Article 6(2) of Directive 2006/11.

29 Furthermore, neither the existence of general rules on the preservation of the quality of surface water and national requirements or requirements specific to certain parts of the territory, such as those laid down in Articles L. 211-2 and L. 211-3 of

the Environmental Code and the requirements applicable to fish farms laid down by an order made, according to statements made at the hearing, on 1 April 2008, even subject to penalties, nor the communication to the person making the declaration of a copy of the general requirements applicable, such as those laid down by Article R. 214-33 of the same code, can make good the failure to specify emission standards applicable to individual discharges, determined on the basis of the environmental quality standards laid down and the actual state of the water affected.

30 Therefore, contrary to the French Government's assertion, a declaratory scheme such as that at issue in the main proceedings is not governed by provisions which might place it on the same footing in practice as a simplified authorisation scheme satisfying the requirements laid down in Article 6 of Directive 2006/11.

31 It follows from all of the foregoing considerations that, contrary to what the French, Italian and Netherlands Governments maintain in their written or oral observations, a declaratory scheme subject to a right to object, even if it is based on the objective of simplification of administrative procedures and better allocation of monitoring resources, such as that at issue in the main proceedings, cannot be regarded as equivalent to the scheme of prior authorisation provided for in Article 6 of Directive 2006/11.

32 That conclusion cannot be called into question by the argument put forward by the Netherlands Government at the hearing, and supported also by the French Government, regarding the Framework Directive on water policy.

33 It is true that the Member States may already apply, under the transitory provision in Article 22(3)(b) of the Framework Directive on water policy, for the purposes of Article 6 of Directive 2006/11, 'the principles for the identification of pollution problems and the substances causing them, the establishment of quality standards, and the adoption of measures, laid down in [the Framework Directive on water policy]'. In particular, as the Commission of the European Communities noted at the hearing, Article 11(3)(g) of the Framework Directive on water policy allows, for point source discharges liable to cause pollution, the adoption, inter alia, of a registration scheme and does not therefore necessarily lay down a prior authorisation scheme.

34 However, that registration scheme is to be understood, even on a transitional basis, only in connection with the implementation of the Framework Directive on water policy. That registration scheme cannot be applied independently of other measures laid down by that directive — the existence of which in the context of the main proceedings is not apparent from either the decision making the reference or the observations submitted by the French Government — and presupposes, in particular, as is apparent from Article 11 of that directive, the prior identification of river basin districts, the carrying out of analyses in respect of each of them and the establishment of a programme of measures taking into account the results of those analyses as well as the definition of the emission controls for the pollutants concerned.

35 As a result of all of the foregoing, the answer to the question referred must be that Article 6 of Directive 2006/11 cannot be interpreted as allowing the Member States, once programmes to reduce water pollution including environmental quality standards have been adopted under that article, to introduce a declaratory scheme, in respect of facilities regarded as being low-polluting in nature, subject to a reference to those standards and a right for the administrative authority to object to the commencement of the operations or to impose limits on discharges specific to the facility concerned.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 6 of Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community cannot be interpreted as allowing the Member States, once programmes to reduce water pollution including environmental quality standards have been adopted under that article, to introduce a declaratory scheme, in respect of facilities regarded as being low-polluting in nature, subject to a reference to those standards and a right for the administrative authority to object to the commencement of the operations or to impose limits on discharges specific to the facility concerned.

[Signatures]