Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

11 February 2015 *

(Environment — Directive 85/337/EEC — Assessment of the effects of certain public and private projects on the environment — Projects which must be made subject to an assessment — Exploratory drillings — Annex I, No 14 — Concept of 'extraction of petroleum and natural gas for commercial purposes' — Obligation to conduct an assessment in the case of extraction of a certain quantity of gas — Annex II, No 2(d) — Concept of 'deep drillings' — Annex III, No 1 — Concept of 'cumulation with other projects')

In Case C-531/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 11 September 2013, received at the Court on 8 October 2013, in the proceedings

Marktgemeinde Straßwalchen and Others

v

Bundesminister für Wirtschaft, Familie und Jugend,

intervening parties:

Rohöl-Aufsuchungs AG,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Second Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 3 September 2014,

after considering the observations submitted on behalf of:

— the Marktgemeinde Straßwalchen and Others, by G. Lebitsch, Rechtsanwalt,

— Rohöl-Aufsuchungs AG, by C. Onz, Rechtsanwalt, and H.-J. Handler,

— the Austrian Government, by C. Pesendorfer and M. Lais, acting as Agents,

* Language of the case: German.

— the German Government, by T. Henze, A. Lippstreu and A. Wiedmann, acting as Agents,

— the Polish Government, by B. Majczyna, D. Krawczyk and M. Rzotkiewicz, acting as Agents,

— the European Commission, by G. Wilms and C. Hermes, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 October 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Annex I, No 14, 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), as amended by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 114) ('Directive 85/337').

2 The request has been made in proceedings between Marktgemeinde Straßwalchen (municipality of Straßwalchen) and 59 other applicants and the Bundesminister für Wirtschaft, Familie und Jugend (Austrian Federal Minister for Economy, Family and Youth) concerning a decision authorising Rohöl-Aufsuchungs AG to carry out exploratory drilling on the territory of the Marktgemeinde Straßwalchen.

Legal context

EU law

3 Article 4(1) and (2) of Directive 85/337 is worded as follows:

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

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).'

4 No 14 of Annex I to Directive 85/337, headed 'Projects referred to in Article 4(1)', provides:

'Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 m^3/day in the case of gas.'

5 No 2(d) of Annex II to Directive 85/337, headed ‘Projects referred to in Article 4(2)’, provides:

‘… Extractive industry

(d) Deep drillings, in particular:

— geothermal drilling,

— drilling for the storage of nuclear waste material,

— drilling for water supplies, with the exception of drillings for investigating the stability of the soil.’

6 Annex III to Directive 85/337, headed ‘Selection criteria referred to in Article 4(3)’, is worded as follows:

‘1. Characteristics of projects

The characteristics of projects must be considered having regard, in particular, to:

— the size of the project,

— the cumulation with other projects,

— the use of natural resources,

— the production of waste,

— pollution and nuisances,

— the risk of accidents, having regard in particular to substances or technologies used.

2. Location of projects

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

— the existing land use;

— the relative abundance, quality and regenerative capacity of natural resources in the area;

— the absorption capacity of the natural environment, paying particular attention to the following areas:

(a) wetlands;

(b) coastal zones;

(c) mountain and forest areas;

(d) nature reserves and parks;

(e) areas classified or protected under Member States' legislation; special protection areas designated by Member States pursuant to Directive 79/409/EEC and 92/43/EEC;

(f) areas in which the environmental quality standards laid down in Community legislation have already been exceeded;

(g) densely populated areas;

(h) landscapes of historical, cultural or archaeological significance.

3. Characteristics of the potential impact

The potential significant effects of projects must be considered in relation to criteria set out under 1 and 2, and having regard in particular to:

— the extent of the impact (geographical area and size of the affected population);

— the transfrontier nature of the impact;

— the magnitude and complexity of the impact;

— the probability of the impact;

— the duration, frequency and reversibility of the impact.'

Austrian law

7 Annex 1 to the 2000 Law on Environmental Impact Assessments (Umweltverträglichkeitsprüfungsgesetz 2000, BGBl., 697/1993), in the version applicable to the facts of the main proceedings (BGBl. I, 87/2009) ('the UVP-G'), reads as follows:

'This Annex contains the projects which are subject to an EIA [environmental impact assessment] pursuant to Paragraph 3.

Columns 1 and 2 in the annex show projects which are subject in all cases to an EIA, in respect of which an EIA procedure (column 1) or a simplified procedure (column 2) must be carried out. For the modification criteria identified in Annex 1, a case-by-case examination is to be carried out if the threshold value is exceeded; otherwise Paragraph 3a(2) and (3) shall apply unless only "new installations", "new constructions" or "new developments" are expressly covered.

Column 3 contains those projects that are to be subject to an EIA only if specific criteria are met. A case-by-case examination is to be carried out for them above the minimum thresholds indicated. If the results of the case-by-case examination show that an EIA must be carried out, the simplified procedure is to be applied.

The categories of protected areas referred to in Column 3 are defined in Annex 2. However, areas coming within Categories A, C, D or E are to be taken into consideration for purposes of assessing the need to carry out an EIA on a project only if they have already been designated on the day on which the application was submitted.

…

Environmental Impact Assessment (EIA)		Simplified EIA procedure	
Column 1		Column 2	Column 3
29	(a) Extraction of petroleum or natural gas with a capacity of 500 tonnes/day or more per probe for petroleum and 500 000 m3/day or more per probe for natural gas; (b) …		(c) Extraction of petroleum or natural gas with a capacity of 250 tonnes/day or more per probe for petroleum and 250 000 m³/day or more per probe for natural gas in protected areas of Category A (d) … (Quantities and volumes are indicated at atmospheric pressure)'

8 Paragraph 1 of 1999 the Law on Mineral Resources (Mineralrohstoffgesetz 1999, BGBl. I, 38/1999), in the version applicable to the facts of the case in the main proceedings (BGBl. I, 111/2010) ('the MinroG'), provides:

'For the purposes of this Federal Law:

1. "Prospecting" means any direct or indirect search for mineral resources, including the associated activities preparatory thereto, as well as the development and examination of natural deposits of mineral resources and discarded heaps containing such resources in order to determine their exploitability;

2. "Extraction" means the removal or release (exploitation) of mineral resources and the associated activities preparatory, parallel and subsequent thereto;

…'

9 Paragraph 119 of the MinroG, headed 'Authorisation for extractive industry works' provides in subparagraph 1:

'Administrative authorisation must be obtained for the construction (completion) of extractive mining installations on the surface and, starting from the surface, for adits and shafts useful for that installation, the depth of the boreholes and probes of which is at least 300 metres. …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 By decision of 29 August 2011 of the Bundesminister für Wirtschaft, Familie und Jugend, Rohöl-Aufsuchungs AG obtained, pursuant to Paragraph 119 of the MinroG, authorisation to undertake exploratory drilling within the territory of the Marktgemeinde Straßwalchen up to a depth of 4 150 metres, without an environmental impact assessment. The Marktgemeinde Straßwalchen and 59 other persons have challenged that decision before the Verwaltungsgerichtshof (Administrative Court).

11 The order for reference indicates that the authorisation at issue covers a range of project stages and activities, including the construction of the drilling site and assembly of the rig and the completion of recultivation measures if the exploration is unsuccessful.

12 If the exploration is successful, Rohöl-Aufsuchungs AG's authorisation also includes the trial production of natural gas up to a total quantity of 1 000 000 m^3 in order to prove that drilling is economically viable. According to the referring court, some 150 000 m^3 to 250 000 m^3 of gas per day is to be produced, along with a maximum of 150 m^3 per day of petroleum and 18 900 m^3 per day of associated natural gas. The hydrocarbons extracted will then be flared off on the fringes of the drilling site. No provision has been made for connection to a natural gas high-pressure pipeline.

13 The applicants in the main proceedings challenge the validity of the authorisation in question, inter alia on the ground that the exploratory drilling ought to have been the subject of an environmental impact assessment pursuant to Annex I, No 14, to Directive 85/337, which provides that the extraction of petroleum and natural gas is to be made subject to an environmental impact assessment when it is carried out 'for commercial purposes' and where the amount extracted exceeds the thresholds indicated therein.

14 In the first place, the referring court asks the question whether exploratory drilling is carried out 'for commercial purposes' when its purpose is solely to ascertain the profitability of a deposit. It takes the view that the total volume of hydrocarbons which might be extracted in that context will be relatively limited, since the quantity of natural gas the extraction of which has been authorised in the present case is limited to a volume equivalent to only twice the daily threshold provided for in Annex I, No 14, to Directive 85/337.

15 The Verwaltungsgerichtshof observes, in the second place, that if it is accepted that the exploratory drillings pursue commercial purposes within the meaning of Annex I, No 14, to Directive 85/337, the per-day quantities of hydrocarbons earmarked for extraction are below the thresholds listed in the UVP-G which trigger the obligation to conduct an environmental impact assessment. The authorisation in question does not take account of hydrocarbons extracted in the course of other drillings in the region, but is based solely on the exploratory drilling stated in Rohöl-Aufsuchungs AG's request.

16 The Verwaltungsgerichtshof notes that this approach complies with Austrian law, as point 29(a) of Annex 1 to the UVP-G states that account must be taken of the quantities of petroleum and natural gas extracted 'per probe' in order to determine whether an environmental impact assessment must be conducted. However, since Annex I, No 14, to Directive 85/337 does not so provide specifically, the question may be asked whether that provision has been correctly implemented in Austrian law.

17 In the third place, the referring court asks whether, at the time of authorising the exploratory drilling in question, the Austrian authorities were under an obligation to take into account the cumulative effects of all projects 'of the same kind'. It notes in that regard that there are roughly 30 probes for gas extraction within the area of the Marktgemeinde Straßwalchen which were not taken into consideration by the Bundesminister für Wirtschaft, Familie und Jugend in the contested decision,

whereas it is clear from the judgments in *Umweltanwalt von Kärnten* (C-205/08, EU:C:2009:767, paragraph 53) and *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154, paragraph 36) that the objective of Directive 85/337 cannot be circumvented by the splitting of projects.

18 In those circumstances the Verwaltungsgerichtshof decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

‘1. Does the trial production of natural gas, for a limited period and in a limited quantity, which is carried out in the context of an exploratory drilling operation designed to establish whether the permanent extraction of natural gas would be economically viable, constitute an “extraction of … natural gas for commercial purposes” within the meaning of Annex I, No 14, to the EIA Directive?

If the answer to Question 1 is in the affirmative:

2. Does Annex I, No 14, to the EIA Directive preclude a provision of national law which, with regard to the extraction of natural gas, does not relate the threshold figures in Annex I, No 14, to the EIA Directive to extraction (“Gewinnung”) as such, but to “production per probe” (“Förderung pro Sonde”)?

3. Is Directive 85/337 to be interpreted as meaning that, in a situation such as that in the main proceedings, in which an application is being made for authorisation for the trial production of natural gas in the context of an exploratory drilling operation, the authority, in order to determine whether there is an obligation to carry out an environmental impact assessment, must examine, as to their cumulative effect, only all projects of the same kind, specifically, all drilling sites which have been opened in the municipal district?’

Consideration of the questions referred

Consideration of the first question

19 By its first question, the referring court asks, in essence, whether Annex I, No 14, to Directive 85/337 must be interpreted as meaning that exploratory drilling such as that at issue in the main proceedings, in the context of which a trial production of natural gas and petroleum is envisaged in order to determine the commercial feasibility of a deposit, comes within the scope of that provision.

20 It should be observed, as a preliminary point, that under Article 4(1) of Directive 85/337, and subject to Article 2(3) thereof, the projects listed in Annex I to that directive are to be subject to an environmental impact assessment. Thus, under Annex I, No 14, to that directive, the extraction of petroleum and natural gas for commercial purposes must be made subject to an environmental impact assessment when the quantities extracted exceed 500 tonnes per day for petroleum and 500 000 m^3 per day for natural gas.

21 It should also be borne in mind that the need for the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose pursued (see judgment in *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraph 29).

22 It is true that exploratory drilling carried out with a view to ascertaining the feasibility and therefore profitability of a deposit is, by definition, an operation carried out for commercial purposes. As observed by the Advocate General in point 26 of her Opinion, the position would be different only in the case of a drilling carried out solely for research purposes rather than in preparation for an economic activity.

23 However, it follows from the context and objective of Annex I, No 14, to Directive 85/337 that the scope of that provision does not extend to exploratory drillings. In fact, that provision links the obligation to conduct an environmental impact assessment to the quantities of petroleum and natural gas earmarked for extraction. To that end, it provides for thresholds which must be exceeded on a daily basis, which indicates that it aims at projects of a certain duration which enable relatively large-scale quantities of hydrocarbons to be extracted.

24 It should be noted in that regard that a wholesale application of the criteria laid down in Annex I, No 14, to Directive 85/337 to exploratory drillings does not make much sense, as the threshold laid down in that provision is 500 tonnes per day for petroleum and 500 000 m^3 per day for natural gas, whereas, as shown by the decision contested in the main proceedings, which authorises extraction of a total quantity of 1 000 000 m^3 of natural gas only, the limit assigned to an exploratory drilling operation is unrelated to such a threshold.

25 Moreover, it is apparent from the explanations provided both in the order for reference and at the hearing that, prior to an exploratory drilling operation, the actual presence of hydrocarbons cannot be determined with certainty. An exploratory drilling operation is carried out in order to establish the presence of hydrocarbons and, where they are found, to determine the quantity and ascertain, through a trial production, whether or not a commercial operation is feasible. Thus, it is only on the basis of an exploratory drilling operation that the quantity of hydrocarbons that can be extracted per day can be determined. Moreover, the quantity of hydrocarbons earmarked for extraction in such a trial, as well as its duration, are restricted to the technical needs arising from the objective of establishing the feasibility of a deposit.

26 This interpretation is, furthermore, corroborated by the overall scheme of Directive 85/337. Annex II, No 2(d), to that directive is liable to apply to exploratory drillings, with the result that not all exploratory drillings fall outside the scope of the directive.

27 It must be remembered in that regard that under the first subparagraph of Article 4(2) of Directive 85/337, the Member States are to determine through a case-by-case examination or through thresholds or criteria set by them whether projects listed in Annex II to that directive are to be made subject to an environmental impact assessment.

28 The projects listed in Annex II, No 2(d), include deep drillings, which include, in particular, geothermal drilling, drilling for the storage of nuclear waste material and drilling for water supplies, with the exception of drillings for investigating the stability of the soil.

29 It is evident from the wording of that provision that it does not contain an exhaustive enumeration of the different types of drilling it covers; rather, it covers all types of deep drillings, with the exception of drillings for investigating the stability of the soil.

30 Thus, since exploratory drillings are a form of deep drilling, they fall within the scope of Annex II, No 2(d), to Directive 85/337.

31 In the present case, an exploratory drilling operation such as that at issue in the main proceedings, which is aimed at determining the commercial feasibility of a deposit of up to 4 150 metres depth, is a form of deep drilling within the meaning of Annex II, No 2(d), to that directive.

32 In the light of the foregoing considerations, the answer to the first question is that Annex I, No 14, to Directive 85/337 must be interpreted as meaning that exploratory drilling such as that at issue in the main proceedings, in the context of which a trial production of natural gas and petroleum is envisaged in order to determine the commercial feasibility of a deposit, does not come within the scope of that provision.

Consideration of the second question

33 Having regard to the reply given to the first question, there is no need to reply to the second question.

Consideration of the third question

34 By its third question, the referring court asks, in essence, whether Directive 85/337 must be interpreted as meaning that, in order to establish whether an exploratory drilling such as that at issue in the main proceedings is subject to an obligation to conduct an environmental impact assessment, the competent authority must take into account only the cumulative effects of projects of the same kind, which in this case, according to the referring court, will be all drilling operations carried out within the territory of the municipality.

35 As observed by the Advocate General in point 47 of her Opinion, since this question is raised only in the event of an affirmative answer to the first question, the referring court clearly assumes that, in the case before it, an obligation to carry out an environmental impact assessment can be based only on Article 4(1) of Directive 85/337, read in conjunction with Annex I, No 14, thereto.

36 That assumption is incorrect, however, since, as is clear from paragraphs 27 and 30 of this judgment, such an obligation may arise from Article 4(2) of Directive 85/337, read in conjunction with Annex II, No 2(d), thereto.

37 Nevertheless, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions.

38 Therefore, it is appropriate to answer the third question in the light of the obligations which may arise from Article 4(2) of Directive 85/337, read in conjunction with Annex II, No 2(d), thereto.

39 It was observed in paragraph 27 above that, under Article 4(2) of Directive 85/337, the Member States are to determine through a case-by-case examination or through thresholds or criteria set by them whether projects listed in Annex II to that directive are to be made subject to an environmental impact assessment.

40 As regards the establishment of thresholds or criteria, it must be borne in mind that, indeed, Article 4(2)(b) of Directive 85/337 confers a measure of discretion on the Member States in that regard. However, that discretion is limited by the obligation set out in Article 2(1) of the directive to make projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment subject to an impact assessment (judgment in *Salzburger Flughafen*, C-244/12, EU:C:2013:203, paragraph 29).

41 Thus, the criteria and thresholds referred to in Article 4(2)(b) of Directive 85/337 are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an environmental impact assessment (judgment in *Salzburger Flughafen*, EU:C:2013:203, paragraph 30).

42 It follows that the competent national authorities, when they receive a request for development consent for an Annex II project, must carry out a specific evaluation as to whether, taking account of the criteria set out in Annex III to that directive, an environmental impact assessment should be carried out (see, to that effect, judgment in *Mellor*, C-75/08, EU:C:2009:279, paragraph 51).

43 It follows from Annex III, No 1, that the characteristics of a project must be assessed, inter alia, in relation to its cumulative effects with other projects. Failure to take account of the cumulative effect of one project with other projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment (see, to that effect, judgment in *Brussels Hoofdstedelijk Gewest and Others*, EU:C:2011:154, paragraph 36).

44 That requirement must be construed in the light of Annex III, No 3, to Directive 85/337, under which the potential significant effects of a project must be considered in relation to criteria set out under Nos 1 and 2 of that annex, having regard in particular to the probability, magnitude, duration and reversibility of the impact.

45 It follows that a national authority, in ascertaining whether a project must be made subject to an environmental impact assessment, must examine its potential impact jointly with other projects. Moreover, where nothing is specified, that obligation is not restricted only to projects of the same kind. As observed by the Advocate General in point 71 of her Opinion, the preliminary assessment must also consider whether, on account of the effects of other projects, the environmental effects of the exploratory drillings may be greater than they would be in their absence.

46 It should also be borne in mind that the effectiveness of Directive 85/337 would be seriously compromised if the competent authorities of a Member State could, when deciding whether a project must be the subject of an environmental impact assessment, leave out of consideration that part of the project which is located in another Member State (judgment in *Umweltanwalt von Kärnten*, EU:C:2009:767, paragraph 55). For the same reasons, the assessment of the impact of other projects cannot be confined to municipal boundaries.

47 In the light of all the foregoing considerations, the answer to the third question is that Article 4(2) of Directive 85/337, read in conjunction with Annex II, No 2(d), to that directive, must be interpreted as meaning that it may give rise to an obligation to conduct an environmental impact assessment of a deep drilling operation, such as the exploratory drilling at issue in the main proceedings. The competent national authorities must accordingly carry out a specific evaluation as to whether, taking account of the criteria set out in Annex III to that directive, an environmental impact assessment must be carried out. In so doing, they must examine inter alia whether the environmental impact of the exploratory drillings could, due to the impact of other projects, be greater than what it would be without the presence of those other projects. That assessment must not be confined to municipal boundaries.

Costs

48 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:

1. **Annex I, No 14, 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, as amended by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009, must be**

interpreted as meaning that exploratory drilling such as that at issue in the main proceedings, in the context of which a trial production of natural gas and petroleum is envisaged in order to determine the commercial feasibility of a deposit, does not come within the scope of that provision.

2. **Article 4(2) of Directive 85/337, as amended by Directive 2009/31, read in conjunction with Annex II, No 2(d), to that directive, must be interpreted as meaning that it may give rise to an obligation to conduct an environmental impact assessment of a deep drilling operation, such as the exploratory drilling at issue in the main proceedings. The competent national authorities must accordingly carry out a specific evaluation as to whether, taking account of the criteria set out in Annex III to Directive 85/337, as amended by Directive 2009/31, an environmental impact assessment must be carried out. In so doing, they must examine inter alia whether the environmental impact of the exploratory drillings could, due to the impact of other projects, be greater than what it would be without the presence of those other projects. That assessment must not be confined to municipal boundaries.**

[Signatures]