

RIGHT TO CHALLENGE THE VALIDITY OF AN ADMINISTRATIVE DECISION BEFORE DOMESTIC COURTS ON THE GROUNDS OF AN INFRINGEMENT OF EU ENVIRONMENTAL LAW

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Judgement of the Court (First Chamber) of 28 May 2020, *IL and Others v Land Nordrhein-Westfalen*, request for a preliminary ruling from the Bundesverwaltungsgericht (German Federal Administrative Court), C-535/18, ECLI:EU:C:2020:391

Article 11(1)(b) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the environmental impact of certain public and private projects must be construed as meaning that it allows the Member States to provide that, if a procedural defect affecting the decision to authorize a project is not such as to change the meaning of the decision, the application for annulment of such decision is admissible only if the procedural defect has denied the claimant itself the right to participate in the decision-making process in environmental matters under Article 6 of Directive 2011/92/EU .

Article 4 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy must be construed as meaning that the assessment of the compliance of a project with the obligations provided for by such directive, including the obligation to prevent the deterioration of bodies of surface water and of underground water likely to be affected by the project, must not be carried out by the competent authority only after granting the development consent for that project.

Article 6 of Directive 2011/92/EU must be construed as meaning that the information to be made available to the public concerned in the procedure for granting development consent to a project must include the necessary information in order to assess the impact of that project on the water, in the light of the criteria and obligations laid down, in particular, under Article 4(1) of Directive 2000/60/EC.

Article 4(1)(b)(i) of the Directive 2000/60/EC must be construed as meaning that there is deterioration of the chemical status of a body of groundwater as a result of a project, both if at least one of the environmental quality standards or one of the threshold values is exceeded, pursuant to Article 3(1) of Directive 2006/118 /EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater from pollution and deterioration, and in the event of a foreseeable increase in the concentration of a pollutant, if the threshold set for such agent has already been exceeded. The measured values at each monitoring point must be considered individually.

Taking into account Article 19 TEU and Article 288 TFEU, Article 1(1)(b) and (2)-first indent and Article 4(1)(b) of Directive 2000/60/EC must be construed as meaning that members of the public concerned by a project must be able to assert, before the competent national courts, the violations of the obligations to prevent the deterioration of water bodies and to enhance their status, if they are directly concerned by such violations.

Introduction

On 28 May 2020, the Court of Justice (“CJEU”) handed down a judgment addressing matters of both procedural and substantive EU environmental law. The questions concerned, in particular, the circumstances where citizens can challenge the validity of an administrative decision granting development permission for an infrastructure project, on the ground that the relevant requirements set forth by EU law have not been complied with, as well as the concept of what constitutes a deterioration of a body of water within the meaning of Directive 2000/60/EC (the “Water Framework Directive” or “WFD”).

The facts

The domestic dispute concerned a decision by a German regulatory authority to approve a plan for the new construction of a major road. Such decision authorized the project developer to discharge rainwater flowing on road surfaces into three bodies of water or into the groundwater and provided also for a few provisions to ensure water quality as regards surface water and groundwater infiltration. The applicants - a group of private individuals at risk of expropriation of their private property or who feared that their domestic wells for private supply of drinking water may be contaminated by the construction works - sought to appeal against the approval decision.

The *Bundesverwaltungsgericht* (German Federal Administrative Court) acknowledged that there had been procedural defects in the approval procedure of the project, including no documented assessment of the bodies of water to ensure that water protection requirements were met (only during the judicial proceedings the regulatory authority provided a technical report describing the bodies of water concerned and the impact of the project).

On the merits, the German Federal Administrative Court noted that, even if the public was not sufficiently informed of the environmental effects of the project during the consultation procedure, under German domestic law regulating the conditions for the admissibility of appeals by individuals, such a procedural defect can only be invoked for the annulment of a decision, if the claimant himself has been denied the opportunity to participate in the decision-making process. In the present case, the domestic court considered that such defect did not influence the outcome of the decision. In that respect, such court considered that the national legislation complies with the aim of Directive 2011/92/EU (the “Environmental Impact Assessment Directive” or “EIA Directive”), *i.e.* to give the public concerned wide access to justice.

From the point of view of substantive law, the domestic court investigated whether it is possible for the assessment relating to the prohibition of deterioration of bodies of water to take place only after the adoption of the approving decision. The court considered that the WFD may be interpreted as requiring that such assessment is carried out before granting the relevant authorization, *i.e.* in the main administrative procedure. Such interpretation of the WFD would imply that the competent authority to carry out the assessment is the regulatory authority, not the court called upon to decide in the litigation proceeding. Therefore, the domestic court considered whether the administrative procedure for granting the project permission should be reopened, to proceed with a new public consultation.

Furthermore, the domestic court also noted that such assessment for bodies of surface water must be assessed prior to the authorization of the project and so the court inferred that the same principle applies to groundwater.

The court also questioned the criteria to be considered when determining whether there is a deterioration in the chemical status of a body of groundwater,

In particular, the court considered that there is a deterioration in the chemical status of a body of groundwater in two cases: on the one hand, when at least one of the quality elements listed in the WFD does not comply, due to the project, with the parameters applicable to the case and, on the other hand, when the concentration of pollutants already exceeding a limit value set forth in the WFD increases even further.

Finally, the domestic court noted that the obligations to prevent the deterioration and the requirement for improvement of bodies of water (Article 4 of the WFD) do not imply that it is admissible for all members of the public concerned by a project, claiming an infringement of their rights, to challenge a decision infringing those obligations. Indeed, under German law, an appeal by an individual claimant is admissible only if the claimant alleged an infringement of the provisions protecting his own rights. However, both the obligation to prevent the deterioration of the state of bodies of water and the obligation to enhance them are set on public authorities and therefore, under German law, such obligations do not confer any right on individuals, as they establish water management objectives that serve the public interest only. Having said that, the domestic court also considered that an objective of the WFD is protecting the water also as supply of drinking water. Under such perspective, persons whose health is threatened by a violation of the mandatory provisions of the WFD, should be able to claim such infringement before the competent national court.

The questions referred to the CJEU

In light of the above considerations, the German Federal Administrative Court requested a preliminary ruling to the CJEU.

By its first question, the referring court asked if it is consistent with Article 11(1)(b)ⁱ of the EIA Directive, a domestic provision according to which a claimant - who is not an environmental association - is entitled to apply for the annulment of a decision due to a procedural defect, only if the procedural defect has denied him the opportunity to participate in the decision-making process.

By its second question, the referring court asked if Article 4(1)(a)(i) to (iii) of the WFD must be interpreted as meaning that it does not only include substantive criteria for examination but, in addition, specifications regarding the regulatory approval procedure, *“in the sense that it would be excluded that the assessment relating to the prohibition of deterioration of bodies of surface water only takes place and be verifiable by means of the corresponding documentation after the adoption of the decision approving the plan”*ⁱⁱ.

In addition, if answered in the affirmative, the referring court also asked whether public participation in accordance with Article 6 of the EIA Directive always relates to the documents regarding the assessment under the WFD, or if it is permissible to differentiate with regard to the time of the creation of the document and its complexity.

By its third question, the referring court asked if the *“deterioration of the status of a body of groundwater”*ⁱⁱⁱ must be interpreted as meaning that a deterioration of the chemical status of a body of groundwater exists as soon as at least one environmental quality standard for one parameter is exceeded for project-related reasons and that irrespective of that, if the relevant threshold for one pollutant has already been exceeded, any additional (measurable) increase of the concentration constitutes a deterioration.

By its fourth question, the referring court asked if Article 4 of the WFD must be interpreted as meaning that all members of the public concerned by a project who assert that the approval of a

project would infringe their rights are also entitled to bring judicial proceedings asserting breaches of the ban on the deterioration of water and the requirement for improvement in water quality. In the alternative, if that provision must be interpreted as meaning that at least such claimants who maintain domestic wells for their private water supply in geographical proximity to the planned road are entitled to bring judicial proceedings asserting breaches of the ban on the deterioration of water and the requirement for improvement.

The CJEU's interpretation

On the first question, the CJEU acknowledged that before the adoption of the decision, no documentation concerning the impact of the project on water was made available to the public and, consequently, the public was not suitably informed.

Accordingly, the referring court stated that the authorization of the project was invalidated by a procedural defect, but since the evidence made available later in the main proceeding, showed that the project would not likely lead to a deterioration in the quality of the water, the procedural defect had at last no impact on the outcome of the decision.

The CJEU held that Article 11 of the EIA Directive grant discretion to Member States in determining what constitutes both a sufficient interest and a violation of a right and so Member States may limit the circumstances where the infringement of an individual's right may be invoked in order to bring a judicial review of a decision, provided that the national legislation is consistent with the objective of giving the public concerned wide access to justice.

Therefore, the CJEU considered that in the case at issue there had been no deprivation of any of the procedural guarantees under Article 6 of the EIA Directive sufficient to establish a right of judicial recourse under Article 11.

As per the second question, the CJEU noted that the purpose of the WFD is to establish a framework for the protection of waters and Article 4 of the WFD sets - in a similar way for both surface water and groundwater - two environmental objectives: the obligation to prevent deterioration and the obligation to enhance the status of bodies of water. In this respect, Article 4 shall not be considered only a mere planning provision, but it shall have binding effects at every stage of the procedure under the WFD. As a consequence of the above, a Member State is required to deny the authorization of a project where the latter is such as to deteriorate the state of the body of water or to jeopardize the achievement of the WFD's objectives and such a verification must be carried out before the project approval.

Also, in light of the foregoing, the CJEU held that the information made available to the public for consultation must be disclosed in due time and be complete, so to allow the assessment of the impact of the project on water in the light of the criteria and obligations laid down in the WFD, before the authorization is granted.

On the third questions, the Court ruled that the deterioration of the chemical status of a groundwater body as a result of a project, can be established when it exceeds at least one of the quality standards or thresholds values, as per Article 3(1) of Directive 2006/118. Moreover, according to the CJEU, when the threshold set for a pollutant has already been exceeded, deterioration is established when there is a foreseeable increase in the concentration of that pollutant.

Finally, on the fourth question the CJEU confirmed that, in light of Article 19 TEU on effective legal protection, and Article 288 TFEU, on the binding nature of directives, in legal proceedings citizens must be able to rely on the obligations imposed by a directive and national courts must be able to take that directive into consideration as an element of EU law in order to, *inter alia*, review the action of a national authority. Otherwise, the directive would have no practical effect.

The CJEU inferred from the above that at least natural or legal persons directly affected by an infringement of the provisions of an environmental directive must be able to demand compliance with such obligations by competent authorities.

Conclusions

Based on the considerations expressed by the CJEU in the Land Nordrhein-Westfalen case, we can conclude that the balance between the procedural discretion granted to Member States under EU law and the right of the citizens to have access to justice in environmental matters is continually developing, also according to the nature of the interests involved and the continuous expansion of individuals' right of appeal in environmental matters.

For the full text of the judgment (in Italian, as it is not available in English yet) please click on the attached pdf document downloaded from the website of the Court of Justice of the European Union.

ⁱ Article 11(1) of the EIA Directive provides that Member States shall ensure that members of the public concerned (a) having a sufficient interest in bringing a lawsuit or alternatively (b) maintaining the impairment of a right have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions, subject to the public participation provisions of the EIA Directive.

ⁱⁱ Opinion of the Advocate General Hogan, delivered on 12 November 2019, point B, p. 12, ECLI:EU:C:2019:957.

ⁱⁱⁱ Article 4(1)(b)(i) of the WFD.