

THE COURT OF JUSTICE ON THE APPLICATION OF THE ASSESSMENT PROCEDURE UNDER ARTICLE 6(3) OF THE HABITATS DIRECTIVE TO A TEMPORAL EXTENSION OF A CONSTRUCTION PERMIT

BY ELEONORA GREGORI FERRI

Court of Justice (First Chamber), judgment of 9 September 2020, *Friends of the Irish Environment Ltd v An Bord Pleanála (Irish Planning Board)*, request for a preliminary ruling from the High Court (Ireland) (C-254/19, EU:C:2020:680)

A decision extending the period originally set for carrying out a project for the construction of a gas terminal must be regarded as an agreement of a project under Article 6(3) of the Habitats Directive, where the original consent, having lapsed, ceased to have legal effect on expiry of the period originally set for those works and the latter have not been undertaken.

It is for the competent authority to assess whether a decision extending the period originally set for carrying out such a project, the original consent for which has lapsed, must be preceded by the appropriate assessment of its implications under Article 6(3) of the Habitats Directive and, if so, whether that assessment must relate to the entire project or part thereof, taking into account, inter alia, previous assessments that may have been carried out and changes in the relevant environmental and scientific data as well as changes to the project and the existence of other plans or projects.

The assessment of a project's implications must be carried out where it cannot be ruled out, having regard to the best scientific knowledge in the field, that the plan or project might affect the conservation objectives of the site. A previous assessment of that project, carried out before the original consent for the project was granted, cannot rule out that risk unless it contains full, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects.

Introduction

On 9 September 2020 the Court of Justice (“CJEU”) handed down its judgment in Case C-254/19, concerning the interpretation of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 (so-called “Habitats Directive”) in regard to a Member State authority’s decision to grant a temporal extension of a construction permit having as object a gas terminal, on top of the 10-year period set in the original permit, which had elapsed.

The case was referred to the CJEU in 2019 by the Irish High Court, under the preliminary reference procedure (Art. 267 TFUE). The case was brought before the domestic court by an environmental NGO, Friends of the Irish Environment, against the Irish Planning Board.

Facts and the core subject matters referred to the CJEU for preliminary ruling

The Irish Planning Board granted a 10-year period development permit for a construction project of a liquefied natural gas regasification terminal, to be located adjacent to two areas that nowadays are classified as Natura 2000 sites.

Such permit was granted pursuant to a national legislation, which the CJEU had recognized that had not correctively transposed the Habitats Directive into the domestic legislative regimeⁱ.

Indeed, no reference either to the Habitats Directive or to the two European areas of conservation – which might have been affected by the project– was made in the original permit granted by the national authority. As a consequence thereof, the referring court reported to the CJEU that the national authority’s decision did not contain “*complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works*”ⁱⁱ, implying that the competent authority had issued such decision without a proper prior assessment of its implications for the site in accordance with Article 6(3) of the Habitats Directive.

The original permit provided for a 10-year time limit on the carrying out and completion of the development works. Shortly before expiration of such term, the construction works of the terminal still had not commenced and the developer applied for an extension of the duration of the original permit. The national authority granted such temporal extension – once again, without carrying out an assessment under Article 6(3) of the Habitats Directive - and the appellant in the main proceedings challenged it before court.

The High Court therefore stayed proceedings and referred some questions to the CJEU for preliminary ruling, concerning in particular whether a decision to extend the duration of a construction permit constitutes an ‘agreement on a project’ for the purposes of Article 6(3) of the Habitats Directive; and what are the considerations that a national authority shall take into account in carrying out the screening exercise required as first stage of the assessment procedure provided for under Article 6(3) of the Habitats Directive and whether such authority shall assess the environmental impacts of the entire project or of part of it.

The questions submitted also lead the CJEU to further clarify what definition of ‘project’ shall be taken into account, as the Habitats Directive does not provide such a definition, and how a national authority shall consider a project’s implications on a natural site in order to rule out any doubt on possible adverse effects on the integrity of it.

EU Law and the CJEU’s interpretation

Article 6(3) of the Habitats Directive lays down a two-stages procedure to be carried out by a national authority before granting consent to carry out works related to projects likely to have a significant effect on natural sites. First, the national authority shall make ‘*an appropriate assessment*’ of the implication of the project for the site’s conservation objectives. Second, in light of the conclusion of such prior assessment, the competent authority shall express its ‘*agreement*’ with the project, only to the extent that it will not adversely affect the integrity of the site concerned.

Therefore, in first place it is relevant to determine whether a national authority’s decision to extend the period originally set in a construction permit relates to a ‘project’ under Article 6(3) above.

ⁱ Judgment of the Court (Second Chamber) of 13 December 2007, *Commission v. Ireland* (C-418/04, EU:C:2007:780).

ⁱⁱ According to the Opinion issued by the AG for the Case (Kokott), the Irish High Court might here recall what the CJEU held in judgment of the Court (Fourth Chamber) of 24 November 2011, *Commission v. Spain* (Alto Sil) (C-404/09, EU:C:2011:768).

To do so the Court observes that, based on its case-lawⁱⁱⁱ, the definition of ‘project’ within the meaning of Article 1(2)(a) of the EIA Directive^{iv} can be considered, as “*if an activity is regarded as a ‘project’ within the meaning of the EIA Directive, it may constitute a ‘project within the meaning of the Habitats Directive’*”^v, and therefore applied.

In this respect, it is also relevant to determine whether the national authority’s original permit and its subsequent decision to grant an extension of the time period of the latter are to be considered as a single operation, in which case they shall be treated as a single project and, therefore, under certain conditions, the extension of the construction consent may be exempted from a new assessment procedure under the Habitats Directive.

But – the CJEU further notes - where the original consent ceases to have effect and a temporal extension is required to allow the execution of the works, such extension, *de facto*, replaces the original permit and shall be subsequently qualified and treated as a distinct project to be subject to the impact assessment provided for under the Habitats Directive.

This implies also that the national authority’s decision to grant the extension of the duration limit to carry out the works qualifies as a new consent (or agreement) on that project, under the meaning of Article 6(3) of the Habitats Directive.

Having state so, the second stage of the assessment procedure to be carried out under the Habitats Directive requires that, before a project is approved, all the aspects that may affect the conservation objectives of a site must be identified and carefully evaluated according to the precautionary principle. It means that the risk that the project will not have adverse effects on the site can be ruled out only having regard to the specific environmental characteristics of the site concerned and on the basis of the best scientific knowledge in the field.

No authorization can be granted where the assessment procedure lacks complete, precise, and definitive findings and conclusions so to overcome any doubt as to the effects of the project on the site. This is also the case for any decision to extend the validity of an expired authorization: there shall be no scientific doubt as to the effects of the works on the site, to be evaluated also in light of any possible changes occurred in the meantime in the environmental context.

However, this is an assessment that the competent national authority shall carry out, also to determine whether such assessment must relate to the entire project or to a part thereof, based on all relevant scientific and environmental data, as well as on any changes in the project occurred in the meantime. It follows that, when the original permit have already been granted in lack of such an assessment, in the event of a request of a temporal extension of the latter the national authority must carry out a new and full assessment of the implications of the project on the site.

Conclusions

The considerations expressed by the CJEU in *Friends of the Irish Environment* deserve closer attention in the near future, as they are expected to have wide implications on national planning systems, with particular reference to national authorities’ assessment procedures in respect to possible temporal extensions of construction permits related to works to be carried out in (or close to) natural conservation sites.

The judgment, indeed, states clearly that a national authority cannot grant an automatic renewal of a construction permit, without carefully verifying if such renewal shall be considered as a different

ⁱⁱⁱ See, *inter alia*, Judgment of the Court (Grand Chamber) of 29 July 2019, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres* (C-411/17, EU:C:2019:622).

^{iv} Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (so-called “EIA Directive”), according to which ‘project’ means: “- *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*”.

^v See paragraph 30 of the judgement and the case-law cited therein.

project requiring a specific, additional consent or agreement for the purposes of the Habitats Directive. It also further clarifies the specific obligations and considerations that a national authority shall take into account in order to carry out an ‘*appropriate assessment*’, *i.e.* having regard to any changes in the relevant environmental and scientific data, as well as any changes to the project, so to reach full, precise, and definitive conclusions leaving no doubt on the absence of adverse effects of the project on the site.