

Case C-463/20**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

24 September 2020

Referring court:

Conseil d'État (Council of State, Belgium)

Date of the decision to refer:

4 June 2020

Applicant:

Namur-Est Environnement ASBL

Defendant:

Région wallonne

**CONSEIL D'ÉTAT (COUNCIL OF STATE, BELGIUM),
ADMINISTRATIVE LITIGATION DIVISION****JUDGMENT****I. Subject matter of the application**

- 1 By an application lodged on 18 January 2017 the non-profit association Namur-Est Environnement applied for annulment of the decision of 27 June 2016 of the inspector general of the département de la nature and des forêts (Department of Nature and Forests, Belgium, 'the DNF') granting the public limited company Sagrex ('Sagrex') derogations from the measures to protect plant and animal species laid down in Articles 2a, 3 and 3a of the loi du 12 juillet 1973 sur la conservation de la nature (Law of 12 July 1973 on nature conservation) (Moniteur belge No 1973A71207 of 11 September 1973, <http://www.ejustice.just.fgov.be/eli/loi/1973/07/12/1973A71207/justel>) ('the Law on nature conservation') in order to work a limestone aggregate quarry at Bossimé.

- 2 On 14 March 2018 the public limited company Cimenteries CBR was granted leave to intervene.

II. Facts

- 3 On 4 November 2008 Sagrex applied for a single permit to resume working of the Bossimé quarry, to dig a tunnel between the Bossimé and Lives-sur-Meuse quarries, to install a conveyor belt in the Lives-sur-Meuse quarry and to develop a riverside loading quay for barges on the Meuse.

- 4 On 12 May 2010 the DNF issued an unfavourable opinion which included the following reasons:

‘Whereas, even though a large number of protected species will be affected by the project, the application surprisingly makes no mention of the statutory obligation to obtain the necessary derogations from the measures to protect protected species in accordance with the legislation in force;

...

Whereas, given the nature and scale of this project, the proposed adjustments before, during and after the works are unlikely to genuinely mitigate or compensate for the many expected impacts, in particular the destruction of natural habitats’.

- 5 On 15 April 2016 Sagrex requested a derogation from the measures to protect plant and animal species laid down by the Law on nature conservation. That request was accompanied by an impact assessment issued in April 2016, entitled ‘Destruction of environments and relocation of plant species in order to work the Bossimé quarry’.
- 6 On 27 June 2016, the DNF granted the derogation sought. It accordingly authorised Sagrex, whilst applying the mitigating measures listed by the DNF, intentionally to disturb individuals of the plant and animal species listed by it, to degrade and destroy areas of habitat of those species, to uproot, intentionally destroy, capture and transport individuals and to degrade areas of habitat of those species. This is the contested measure.
- 7 On 30 September 2016 Sagrex filed amended plans and a corresponding supplementary impact study in support of its application for a single permit.
- 8 A public inquiry into the amended project was held from 21 November to 21 December 2016 and generated a large number of objections.
- 9 On 21 December 2016 the DNF issued a favourable opinion on the application for a single permit, subject to conditions. That opinion was based on the following reasons, among others:

‘Whereas by means of the recommendations set out in the application file, the obligations arising from the derogation of 27/06/16 and the conditions set out below, the significant nature conservation impacts of this project can be reduced to an acceptable level, in particular in the light of the compensatory measures; ...’.

- 10 On 25 September 2017 the competent minister refused the single permit. The intervener brought a separate action for annulment against that decision. That action was dismissed by a judgment of 14 May 2020.

III. Arguments of the parties

A. Application for annulment

- 11 The applicant claims, inter alia, that Articles 2 to 10 of 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 (OJ 2012 L 26, p. 1) and Annex I.19 thereto have been infringed.
- 12 The contested measure amounts to a development consent that has not undergone an impact assessment procedure in accordance with the relevant provisions of Directive 2011/92 and the authority which issued it failed to examine whether such an impact assessment procedure was required in the case at issue.
- 13 Under Article 4(1) of Directive 2011/92, ‘projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.’ Annex I.19 concerns inter alia ‘quarries and open-cast mining where the surface of the site exceeds 25 hectares ...’. Such projects must be ‘subject to a requirement for development consent and an assessment with regard to their effects’ and the development consent is ‘the decision of the competent authority or authorities which entitles the developer to proceed with the project’.
- 14 The project falls under Annex I to Directive 2011/92 and the derogation was granted ‘in order to work a limestone aggregate quarry at Bossimé’. The applicant therefore needs a development consent if it is to be ‘entitled to proceed with the project’ and, in consequence, an assessment of its effects in accordance ‘with Articles 5 to 10’ of the directive should have been carried out before that consent was granted.
- 15 In any event, where a decision-making process involves several stages, the assessment procedure should take place as far upstream as possible. Admittedly, a single permit to work the quarry was applied for in parallel, but that application and its accompanying impact study were subsequent to the request to derogate and the decision of 27 June 2016, since the impact study was issued in July 2016.
- 16 The ‘extract from the Flora and Fauna chapter of the 2008 impact study – Supplementary impact study following amendment of the 2015 project’, annexed to the request to derogate, is of limited scope and cannot amount to an assessment

of the effects on the environment for the purposes of the requirements under the directive.

- 17 Furthermore, an impact assessment also involves consulting the bodies concerned and public participation (Article 6 of Directive 2011/92); the competent authority examining and taking into consideration the information provided in the assessment document and received in the context of the consultations under Article 6 (Article 8 of Directive 2011/92) and including the results of the foregoing in its decision-making on the development consent; and the provision of information to the public (Article 9 of Directive 2011/92), that is to say, stages which – in particular as regards the public participation phase – were not followed in the present case.

B. Defence

- 18 The opposing party counters that the contested measure is not a project within the meaning of Directive 2011/92. Its effect is not to allow a quarry to be operated, but merely to disapply certain provisions of the Law on nature conservation so that an operating permit could be applied for. Since that consent cannot be implemented as such, it is not a ‘decision of the competent authority or authorities which entitles the developer to proceed with the project’. Nor is this a matter of a development consent resulting from a decision-making process comprising several stages, and the contested measure was issued by an authority other than those responsible for examining the application for a single permit, and which is acting in a different context.

C. Reply

- 19 The applicant replies referring to various judgments of the Court of Justice, including the judgment of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12), on application of 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) to the working of a quarry.
- 20 The contested measure is a necessary precondition for working the quarry. It therefore constitutes consent in the context of a decision-making process comprising several stages. The assessment procedure must take place as far upstream as possible. The fact that the contested measure was issued by a different authority from those responsible for examining the application for a single permit is irrelevant in that respect.
- 21 To take the view that the impact assessment may only take place as part of examination of the application for a single permit is to overlook the fact, first, that in the decision-making process, the competent authority must take the environmental effects of the project into account ‘at the earliest possible stage’, and, secondly, that an impact assessment carried out subsequently cannot cast doubt on the contested measure, which grants final consent intentionally to disturb

protected species and to degrade and destroy areas of habitat of those species, meaning that the assessment must be carried out in advance.

D. Statement in intervention

- 22 According to the intervener, although the project for the working of the quarry falls within the concept of ‘project’ within the meaning of Directive 2011/92, the derogation at issue is however not a ‘development consent’ within the meaning of that directive, since it does not, alone, confer entitlement to proceed with the project: it is the combination of the consent and the permit which ‘entitles’ the developer to proceed with its project.
- 23 Since the derogation is a stage in the development consent process constituting an ancillary decision relating only to certain effects of the project, rather than the principal decision, it was not necessary to assess its effects at that stage.
- 24 The impact study accompanying the application for a single permit contains an analysis of the effects on the protected species to which the derogation relates, and the objectives of Directive 2011/92 are therefore fully attained, since the assessment took place before the principal development consent, relates to the effects on the protected species and was made with all the procedural guarantees required by the directive.
- 25 It cannot be found that the project, including all its implementing arrangements, had been finalised at the time of the request to derogate. The applicant must therefore carry out the impact assessment at the stage of applying for the single permit, so that the study relates to the final project, after it has been adapted to comply with the derogation.

E. Final submissions of the opposing party

- 26 The opposing party argues that there is no connection in either the legislation or the regulations between the provisions governing single permits and those governing derogations from the measures to protect plants and animal species. There is therefore no ‘decision-making process’ within the meaning of the EU case-law. The cause, that is to say, the working of a quarry, should not be confused with its effects, that is to say, harm to plant or animal species.

F. Final submissions of the intervener

- 27 The intervener asserts that Directive 2011/92 has been complied with, even though the public inquiry took place after the contested measure was adopted, since ‘both the derogation itself and the specific impact assessment showing that the conditions for the derogation had been complied with and the supplementary impact study relating to flora and fauna (of April 2016) were annexed to the dossier submitted to the public inquiry for the principal decision’. The public inquiry was held precisely at a time when the public had an effective opportunity

to make observations on the project itself, since at that time all options were still open.

G. Final submissions of the applicant

- 28 The applicant again emphasises that the contested measure is a necessary precondition for working the quarry. That working and the disturbance of species ‘constitute one and the same project for intervention in the natural surroundings’. Where the developer needs more than one administrative decision in order to be entitled to proceed with the project, all those administrative decisions taken together constitute the development consent within the meaning of Directive 2011/92. The request to derogate therefore did not undergo a sufficient environmental assessment.

IV. Analysis

- 29 Under Articles 12 and 13 of 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) the Member States are to take the requisite measures to establish systems of protection for the animal species listed in Annex IV (a) and (b). Under Article 16, the Member States can derogate from those measures in certain situations and subject to certain conditions.
- 30 There is no requirement, under Directive 92/43, the Law on nature conservation or the regional administrative legislation, for any impact assessment or public consultation before issuing consent to derogate from measures protecting animal and plant species.
- 31 Sagrex made a request to derogate from the Law on nature conservation so that it could respond to the DNF’s unfavourable opinion of 12 May 2010.
- 32 That request was accompanied by an impact assessment issued in April 2016, entitled ‘Destruction of environments and relocation of plant species in order to work the Bossimé quarry’.
- 33 That impact assessment was accompanied by, inter alia, an extract from the impact study issued in the context of the single permit application. This was the ‘Flora and Fauna chapter of the 2008 impact study – Supplementary impact study following amendment of the 2015 project’, likewise issued in April 2016.
- 34 No public participation phase took place before the contested measure was adopted.
- 35 Article 1(2) of Directive 2011/92 contains, inter alia, the following definitions:
- ‘(a) “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;

...

(c) “development consent” means the decision of the competent authority or authorities which entitles the developer to proceed with the project’.

Article 2(1) of that directive provides, among other matters:

‘Member States shall adopt all measures necessary to ensure that, before development 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 a requirement for development consent and an assessment with regard to their effects on the environment.’

36 Article 6 of Directive 2011/92 is worded as follows:

‘1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent, taking into account, where appropriate, the cases referred to in Article 8a(3). To that end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

- (a) the request for development consent;
- (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;
- (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
- (d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places at which, and the means by which, the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States. Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level.

6. Reasonable time-frames for the different phases shall be provided for, allowing sufficient time for:

(a) informing the authorities referred to in paragraph 1 and the public; and

(b) the authorities referred to in paragraph 1 and the public concerned to prepare and participate effectively in the environmental decision-making, subject to the provisions of this Article.

7. The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days.’

- 37 In its judgment of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12), the Court observed that according to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question ‘at the earliest possible stage’ in the decision-making process (paragraph 51). ‘Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure’ (paragraph 52).
- 38 The Court has also held: ‘It is apparent from the scheme and the objectives of Directive 85/337 that [Article 1(2) of that directive] refers to the decision (involving one or more stages) which allows the developer to commence the works for carrying out his project. Having regard to those points, it is therefore the task of the national court to verify whether the outline planning permission and decision approving reserved matters which are at issue in the main proceedings constitute, as a whole, a “development consent” for the purposes of Directive 85/337 (see, to that effect, the judgment delivered today in Case C-508/03 *Commission v United Kingdom*, not yet published in the ECR, paragraphs 101 and 102). Second, it should be borne in mind, as the Court explained in *Wells*, at paragraph 52, where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure’ (judgment of 4 May 2006, *Barker* (C-290/03, EU:C:2006:286, paragraphs 45 to 47); see also judgment of 4 May 2006, *Commission v United Kingdom* (C-508/03, EU:C:2006:287, paragraph 104); judgment of 28 February 2008, *Abraham and Others* (C-2/07, EU:C:2008:133, paragraph 26); judgment of 3 March 2011, *Commission v Ireland* (C-50/09, EU:C:2011:109, paragraphs 76 and 77); and judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154, paragraph 32)).
- 39 The Court has also held, in paragraph 34 of its judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154), that it is for the national court to determine, on the basis of the national legislation applicable, whether a decision such as that at issue in the main proceedings can be

regarded as a stage in a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the relevant provisions of Directive 85/337 to be carried out.

- 40 In the present case, no public participation phase took place before the contested measure was adopted. The public participation phase occurred principally after the contested measure was adopted, in connection with the public inquiry held into the application for a single permit. It is therefore necessary to examine whether Directive 2011/92 requires a public participation phase to be held before a measure with the scope and effects of the contested measure is adopted.
- 41 It should be noted in that respect that the quarry could not be worked without the derogation at issue. In that sense, it is beyond doubt that the contested measure is a necessary condition for resuming the working of the quarry. It is moreover equally indisputable that the quarry could not be worked unless a single permit is granted, which can only be issued if a public inquiry is held.
- 42 The working of the Bossimé quarry is, as such, a project within the meaning of Article 1(2)(a) of Directive 2011/92. Under Article 4(1) of the directive, that working must be made subject to an environmental assessment, since quarries of that type are covered by Annex I to the directive.
- 43 However, the sole purpose of the contested measure is to authorise the disturbance of animals and degradation of the areas of habitat of those species. Furthermore, the principal decision entitling the developer to proceed with its project is the single permit which may, following a public inquiry, be refused or made subject to stricter conditions than those laid down by the contested measure. Indeed, in the present case, the authority refused to grant the single permit to work the quarry.
- 44 The authority responsible for issuing single permits must examine all the planning and environmental aspects of the project for working the quarry. Accordingly, the authority may determine the effects of that working more strictly in the light of the parameters set by the body that issued the contested measure.
- 45 It is therefore necessary to determine whether the contested measure and the single permit that would authorise the working of the quarry form a single development consent (within the meaning of Article 1(2)(c) of Directive 2011/92) relating to a single project (within the meaning of Article 1(2)(a) of that directive). Having regard to the specific characteristics of the factual context at issue in the light of the existing EU case-law, it is appropriate for this court to refer that question to the Court of Justice of the European Union.
- 46 If the answer to that first question is in the affirmative, a question should also be referred to the Court on the requirements of that directive since, in contrast to the measures at issue in the judgments referred to above, specifically *Wells*, whilst the contested measure is not an implementing decision in the true sense, neither is it the principal decision, since the principal decision is the single permit authorising the working of the quarry.

V. Questions referred for a preliminary ruling

1. Do a decision 'authorising the disturbance of animals and degradation of the areas of habitat of those species for the working of a quarry' and the decision authorising or refusing that working (single permit) form a single development consent (within the meaning of Article 1(2)(c) of 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) relating to a single project (within the meaning of Article 1(2)(a) of that directive) where, first, that working cannot take place without the first of those decisions and, secondly, the authority responsible for issuing single permits retains the ability to determine the environmental effects of that working more strictly having regard to the parameters set by the body that issued the first decision?
2. If the answer to that first question is in the affirmative, are the requirements laid down by that directive, specifically in Articles 2, 5, 6, 7 and 8, sufficiently met where the public participation phase takes place after adoption of the decision 'authorising the disturbance of animals and degradation of the areas of habitat of those species for the working of a quarry' but before adoption of the principal decision entitling the developer to proceed to work the quarry?

WORKING DOCUMENT