

Case C-411/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

27 May 2019

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

16 January 2019

Applicants:

WWF Italia o.n.l.u.s. and Others

Defendants:

Presidenza del Consiglio dei Ministri

Azienda Nazionale Autonoma Strade SpA (ANAS)

Subject matter of the main proceedings

Action brought before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court for the Lazio Region; ‘the referring court’) for annulment of the acts by which the Italian authorities declared that the preliminary project for a road was compatible with the environment.

Subject matter and legal background to the reference for a preliminary ruling

The reference for a preliminary ruling, under Article 267 TFEU, concerns the possible incompatibility with EU law of the Italian legislation and administrative provisions which, in the present case, have enabled the preliminary project for a road to be approved as being environmentally compatible, in respect of which a different administrative authority, previously called upon to decide on environmental compatibility, had by contrast expressed a negative opinion.

Questions referred

(1) Does Article 6 of Directive 1992/43/EEC, in conjunction with Directive 2009/47/EC where applicable to the present case, preclude national primary legislation and the related secondary implementing legislation, as set out above, which allow the body ‘with final responsibility’ — competent to adopt the environmental compatibility measure for the preliminary project for works in the event of the reasoned objection of the Italian Ministry for the Environment and Protection of Land and Sea [(‘MATTM’)] — to provide approval, thereby allowing the procedure to continue, relying on the existence of an overriding public interest, whereas the State body responsible for environmental protection has stated that it is impossible to prepare any mitigation requirements and measures for the version of the project under approval, in respect of which a negative opinion regarding environmental impact assessment [(‘EIA’)] had already been expressed?

(2) Do the abovementioned directives preclude a solution such as that adopted which, for the purposes of approving the preliminary project for works subject to the EIA procedure, has the ‘overriding public interest’ referred to take precedence over the environmental interest — even though that overriding interest is based exclusively on the more economical nature of the works, their compliance additionally with landscaping, historical, cultural and socio-economic protection and the need to complete a trans-European road network, in the present case the TEN-[T] network defined as ‘Comprehensive’, as by Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 — despite the fact that there is an existing alternative solution already approved from an environmental perspective?

(3) Is a solution such as that adopted, whereby it was considered possible to postpone to the stage of the definitive project further assessment and studies of the environmental significance of the route not approved in terms of EIA – including the Assessment of Environmental Implications – instead of requiring the proponent of the works to carry out further assessment and studies to mitigate the economic and landscaping effects on the alternative route already approved, on the other hand, from an environmental perspective, compatible with the abovementioned Community legislation?

(4) In such circumstances and if the answer to the first, second and third questions is that there is compatibility [with EU law], do the abovementioned directives preclude a solution such as that adopted, which does not consider binding a negative opinion indicating environmental incompatibility, issued by the competent body in the course of the approval procedure for the preliminary project for the works, postponing to the stage of the definitive project more in-depth assessment of the impact thereof on the territory’s landscaping and environmental aspects, with specific reference to the assessment of environmental implications and the consequent provision of sufficient measures for the compensation and mitigation of impacts?

(5) Do the abovementioned directives preclude a solution such as that adopted, where the proponent of the works is requested at the stage of drafting the definitive project for the works to take into account the requirements, observations and recommendations in relation to landscaping and the environment set out in the course of the interdepartmental conference held with regard to the preliminary project, even if in that regard the body responsible for environmental protection has found that it is impossible to develop any mitigation requirements and measures for the project under approval?

(6) Do the abovementioned directives preclude a solution such as that adopted where the proponent has also been requested to develop the environmental impact study for the works, including the so-called ‘appropriate assessment’, duly drafted in accordance with the legal requirements in force, which would serve as the basis for the assessment of implications in question?

(7) Do the abovementioned directives preclude a solution such as that adopted, where a third party (the Lazio Region) has been identified, different from the body ordinarily responsible (the [Environmental Impact Assessment – Strategic Environmental Assessment] EIA-SEA Committee of the MATTM), to verify the environmental impact study annexed to the definitive project for the works, in order also to identify any subsequent mitigation and compensation measures necessary to protect and safeguard the environmental and landscaping aspects of the territory concerned, leaving to the MATTM’s EIA-SEA Committee, in accordance with and for the purposes of Article 185(4) and (5) of Legislative Decree No 163/06, only the *ex post* formulation of its own opinion as to whether the definitive project for the construction of the route in question complies with the landscaping and environmental requirements, after the abovementioned verification?

Provisions of EU law and case-law of the Court of Justice relied on

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (‘the Habitats Directive’). In particular, recitals 1, 7 and 10, and Article 2(3), Article 3(1), Article 4(5) and Article 6.

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds. In particular, recitals 6 and 12, and Article 2, Article 3(2)(b) and Article 4(4).

The referring court also makes the following references to the case-law of the Court of Justice: judgments of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 32, 35, 36, 39, 40, 43 to 48, 52 to 54, 57 to 64; of 3 April 2014, *Cascina Tre Pini*, C-301/12, EU:C:2014:214; of 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraphs 68 to 77; of 21 July 2011, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, C-2/10, EU:C:2011:502; of 24 November 2011, *Commission v Spain*, C-404/09, EU:C:2011:768; of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10;

of 20 September 2007, *Commission v Italy*, C-304/05, EU:C:2007:532; of 11 July 1996, *Royal Society for the Protection of Birds*, C-44/95, EU:C:1996:297.

Provisions of national law relied on

Decreto legislativo del 12 aprile 2006, n. 163 - Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 of 12 April 2006, Code on public works contracts, public service contracts and public supply contracts implementing Directives 2004/17/EC and 2004/18/EC; ‘Legislative Decree No 163/06’). In particular:

- Article 165(3) which regulates the content of the preliminary project for infrastructure, providing, inter alia, that if a work is subject to an environmental impact assessment, the preliminary project must also be accompanied by the environmental impact study;
- Article 182(1) and (2) in which the environmental impact assessment procedure is made mandatory;
- Article 183(6) which provides that the Consiglio dei ministri (Italian Council of Ministers) is the competent body to adopt the environmental compatibility measure in the event of the reasoned objection of the Ministero dell’ambiente e della tutela del territorio e del mare (Ministry for the Environment and Protection of Land and Sea (‘MATTM’));
- Article 185(4) and (5) under which the Committee for the Verification of the Environmental Impact (or ‘the EIA-SEA committee’) is to express its own opinion on whether the definitive project complies with the requirements of the environmental compatibility measure.

Decreto legislativo del 29 dicembre 2011, n. 228 - Attuazione dell’articolo 30, comma 9, lettere a), b), c) e d) della legge 31 dicembre 2009, n. 196, in materia di valutazione degli investimenti relativi ad opere pubbliche (Legislative Decree No 228 of 29 December 2011 – Implementation of Article 30(9)(a), (b), (c) and (d) of Law No 196 of 31 December 2009 on the assessment of public works investments; (‘Legislative Decree No 228/11’). In particular:

- Article 1(1), which provides: ‘Ministers shall be required to carry out the *ex ante* and *ex post* assessment referred to in this decree for the purposes of ensuring the rationalisation, transparency, efficiency and effectiveness of the expenditure ... allocated to carrying out public works and works of public utility ...’;
- Article 4, which provides that ministers are to develop feasibility studies in order to identify the optimal design solutions for achieving the objectives identified in the *ex ante* assessment. For works having an estimated cost of over

EUR 10 million, ministers are also to submit, in annex to the feasibility studies, the risk analysis;

- Article 8(1) to (3), under which ministers are to prepare guidelines for the assessment of public works investments in the sectors for which they are responsible.

Decreto del Presidente del Consiglio dei ministri del 3 agosto 2012 - attuazione dell'articolo 8, comma 3, del [decreto legislativo n. 228/11] (Decree of the President of the Council of Ministers of 3 August 2012 – implementation of Article 8(3) [of Legislative Decree No 228/11]). In particular, Article 2(1)(b), in accordance with which: ‘the “*ex ante* assessment of individual works” is the assessment activity, referred to in Article 4 of Legislative Decree No 228/2011, carried out as a rule by means of cost-benefit analysis techniques, designed to identify the optimal design solutions for achieving the objectives identified in the assessment of infrastructure needs’.

Decreto del Presidente della Repubblica dell'8 settembre 1997, n. 357 - Regolamento recante attuazione della direttiva 92/43/CEE relativa alla conservazione degli habitat naturali e seminaturali, nonché della flora e della fauna selvatiche (Decree of the President of the Republic No 357 of 8 September 1997 - Regulation implementing Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ('DPR No 357/97')). In particular:

- Article 5, entitled ‘Assessment of Implications’, which provides as follows: ‘... The proponents of territorial plans ... shall prepare ... a study to identify and assess the effects which the plan may have on the site, taking into account its conservation objectives. ...’
- 3. The proponents of action not directly connected with or necessary to maintaining a favourable conservation status for the species and habitats present on the site, but which may have a significant effect on the site itself, either on its own or in conjunction with other action, shall submit, for the purposes of the assessment of implications, a study designed to identify and assess ... the main effects which that action may have on the ... site of Community importance or on the special area of conservation, taking into account their conservation objectives.
- 4. For projects subject to the environmental impact assessment procedure ... which concern ... sites of Community importance or the special areas of conservation, as defined in the present regulation, the assessment of implications shall be included within the scope of the abovementioned procedure which, in such a case, shall also consider the projects’ direct and indirect effects on the habitats and species on account of which those sites and areas were identified. To that end, the environmental impact study prepared by the proponent must include the factors relating to whether the project is

compatible with the conservation aims provided for by the present regulation
....

- ...
- 9. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or action must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the competent authorities shall take all compensatory measures necessary to ensure that the overall coherence of the Natura 2000 network is protected and it shall inform the Minister for the Environment and Protection of Land of those measures.
- 10. Where the sites concerned host priority natural habitat types and priority species, the plan or action which has been assessed as having a negative impact on the site of Community importance, may be carried out only by reference to requirements relating to human health or public safety, to requirements of primary importance for the environment or, further to an opinion from the European Commission, for other imperative reasons of overriding public interest’.
- Article 6, entitled ‘Special protection areas’, according to which: ‘1. The “Natura 2000” network shall include the special protection areas provided for by Directive 79/409/EEC
- 2. The obligations under Articles 4 and 5 shall also apply to the special protection areas referred to in paragraph 1.’

Succinct presentation of the facts and the proceedings

- 1 In 2015, the Azienda Nazionale Autonoma Stradale SpA (‘ANAS’) requested that the ‘environmental impact assessment’ (‘EIA’) procedure be initiated with regard to the preliminary project to complete a section of the Strada Statale n. 675 (State road No 675; ‘SS 675’) linking the port of Civitavecchia with the Orte intermodal node. That request concerned a new road route (‘the green route’) which, according to ANAS, had lower construction costs than another route (‘the violet route’), already approved from an environmental impact perspective.
- 2 In 2016, Committee for the Verification of the Environmental Impact (‘the EIA-SEA Committee’) at the MATTM raised some critical points concerning the ‘green route’ from an environmental perspective, emphasising in particular that that route is to be developed for 14.4 km within a special protection area and extends to less than 1 km from a site of Community importance.
- 3 On 20 January 2017, the EIA-SEA Committee, on the basis of the considerations referred to in the preceding paragraph, expressed a negative opinion on the preliminary project for the ‘green route’, also noting that the problems concerning

the high costs of the (previously approved) ‘violet route’ could be resolved by subdividing that route into two sections.

- 4 Following that negative opinion, the Presidenza del Consiglio dei Ministri (the Presidency of the Council of Ministers, ‘the PCM’), which in accordance with Article 183(6) of Legislative Decree No 163/06 had become the competent authority for adopting the environmental compatibility measure, requested the MATTM to provide environmental impact assessments indicating any mitigation and compensation measures. By opinion of 7 July 2017, the EIA-SEA Committee adopted a new negative opinion on the ‘green route’, stressing that it was impossible to develop any mitigation and compensation measures, as requested by the PCM.
- 5 Notwithstanding that further negative opinion, the PCM, by decision of 1 December 2017, adopted the environmental compatibility measure for the ‘green route’, basing that decision on the ‘overriding public interest’ which made it necessary to complete strategic connecting routes between the various highways coming within the TEN-T trans-European network, which constitutes a ‘comprehensive’ network under Regulation (EU) No 1315/2013. That decision likewise provided that ANAS would carry out, when drawing up the definitive project, the environmental impact study of the route in question, including the so-called ‘appropriate assessment’, which would serve as the basis for the subsequent ‘Assessment of Environmental Implications’ by the competent authority, in compliance with the requirements, observations and recommendations in relation to landscaping set out in the course of the interdepartmental conference called by the Ministero delle infrastrutture e dei trasporti (the Ministry of Infrastructure and Transport; ‘the MIT’).
- 6 A number of environmental associations and natural persons (‘the applicants’) brought an action before the referring court for the annulment of that decision.
- 7 In the meantime, by decision of 28 February 2018, the Comitato interministeriale per la programmazione economica (the Interministerial Economic Planning Committee, ‘the CIPE’) approved the preliminary project for the ‘green route’ and named the Regione Lazio (Lazio Region) as the body responsible for verifying the environmental impact study to be annexed to definitive project for the route in question.
- 8 That decision has been challenged by the applicants by means of additional grounds to the action referred to in paragraph 6.

The essential arguments of the parties to the main proceedings

- 9 In support of the action brought before the referring court, the applicants submit that the decision of 1 December 2017, by which the PCM adopted the environmental compatibility measure for the ‘green route’, infringes Article 6(4) of Directive 92/43/EEC, transposed into national law by Article 5 of DPR 357/97.

According to that provision, ‘imperative reasons of overriding public interest’ may be privileged over environmental-protection grounds only where two conditions are met: the ‘absence of alternative solutions’ and the taking of ‘all compensatory measures necessary’. Neither condition is met in the present case and, in particular, as regards the absence of alternative solutions, the applicants emphasise that the ‘violet route’, approved moreover in terms of environmental impact by the MATTM and the CIPE, constitutes an alternative to the ‘green route’ capable of serving both the public interest in protecting the environment and that relating to the need to carry out the works.

- 10 In its supplementary grounds, the applicants dispute the legality of the CIPE’s decision of 28 February 2018, which approved the preliminary project for the ‘green route’, in so far as that decision identifies the Lazio Region as the body responsible for verifying the environmental impact study, including the Assessment of Environmental Implications, which ANAS must submit alongside the definitive project, and for identifying any subsequent mitigation and compensation measures. In that regard, the applicants submitted that the Assessment of Environmental Implications cannot be verified by the Lazio Region since it comes within the EIA-SEA Committee’s competence, with that committee having already expressed its views on that point. In addition, the applicants state that since the Assessment of Environmental Implications has already been examined by that committee, it cannot be submitted again at the stage of the definitive project.
- 11 The defendants emphasise, in their defences, the following factors: (a) that the contested measures are justified on public-interest grounds; (b) that the PCM used the power conferred on it by law as the body ‘with final responsibility’ in the present case; (c) that in the preliminary project for the ‘green route’ a cost-benefit analysis was performed in respect of the works to be carried out; (d) that the ‘violet route’ had undergone an unsustainable costs increase, so that it was no longer feasible; and (e) that ANAS has used an innovative and revolutionary approach in the area of environmental impact assessment, capable of objectively measuring the impact of new works on the various environmental, landscaping, historical, cultural and socio-economic components.

Succinct presentation of the reasons for the reference for a preliminary ruling

- 12 The referring court is uncertain whether the environmental impact assessment procedure for the ‘green route’ complies with the EU legislation referred to.
- 13 In that regard, the referring court points out that the environmental compatibility measure and the subsequent approval of the preliminary project for the route in question were adopted:
- 14 taking the view that the overriding public interest stemming from the lower cost of the works and the completion of the strategic connecting routes between the

highways coming within the TEN-T trans-European network took precedence over the environmental aspect;

- 15 without taking into consideration the fact that the competent State body (the EIA-SEA Committee) had expressed an extremely negative view, stressing that it was impossible to prepare any mitigation requirements and measures for the version comprising the 'green route' and noting that there was an alternative, composed of the 'violet route', already approved from an environmental perspective, the cost of which could be reduced by being subdivided into two sections;
- 16 by allowing the procedure for the design and construction of the road in question to continue and postponing more in-depth assessments of the environmental impact of the works to the drafting of the definitive project, with specific reference being made to the Assessment of Environmental Implications and the consequent provision of measures (solely) for the mitigation and compensation of impacts;
- 17 by naming, in accordance with Article 5(2) of DPR No 357/97, the Lazio Region as the competent body to verify the environmental impact study annexed to the definitive project for the works, for the purposes also of identifying any subsequent mitigation and compensation measures necessary to protect and safeguard the environmental and landscaping components of the territory concerned and leaving to the MATTM's EIA-SEA Committee, in accordance with Article 185(4) and (5) of Legislative Decree No 163/06, only the formulation of its own opinion in the matter, in the definitive project, on the abovementioned landscaping and environmental requirements;
- 18 providing that, at the stage of drawing up the definitive project for the works, ANAS is to take into account the requirements, observations and recommendations in relation to landscaping and the environment set out in the course of the interdepartmental conference held with reference to the preliminary project, developing moreover the environmental impact study for the works in question, on the basis of which to carry out the Assessment of Environmental Implications.
- 19 The referring court also makes reference to the defendants' main arguments and, in particular, the circumstance referred to in point (e) of paragraph 11 above, namely that in the present case ANAS is claimed to have used an innovative and revolutionary approach in the area of environmental impact assessment. In the light of such an innovative approach, and in the absence of specific case-law on the point, the referring court considers it necessary to refer to the Court of Justice the questions set out in the present reference for a preliminary ruling.