Case C-110/20

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 February 2020

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

23 January 2020

Applicant:

Regione Puglia

Defendant:

Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others

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Subject of the action in the main proceedings

Actions for annulment of four judgments issued by the TAR Lazio (Regional Administrative Court, Lazio) which confirmed the legality of four ministerial decrees finding that four seismic surveys to be carried out in adjacent maritime areas, submitted by a single hydrocarbons research company, are environmentally compatible.

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Is Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 to be interpreted as precluding national legislation such as that described which on the one hand recommends, for the purpose of issuing a hydrocarbons

exploration permit for an area of a specified extent, granted for a specific period of time — in the present case, an area of 750 square kilometres for six years — and on the other hand allows those limits to be exceeded by the issue of multiple exploration permits for adjacent areas to the same legal entity, provided that they are issued following separate administrative procedures?

Provisions of EU law cited

Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons: recitals 5, 6 and 8 and Articles 3(2) and 4.

Provisions of national law cited

Article 6 of Legge. 9 gennaio 1991, n. 9 in materia di permesso di ricerca degli idrocarburi (Law No 9 of 9 January 1991 on the hydrocarbons exploration permit, as amended by Decreto legislativo. 25 novembre 1996, n. 625 (Legislative Decree No 625 of 25 November 1996) transposing Directive 94/22/EC:

‘1. The exploration permit shall be granted by decree of the Ministro dell’industria, del commercio e dell'artigianato (Minister for Industry, Trade and Crafts), after consulting the Technical Committee for Hydrocarbons and Geothermal Energy and the relevant region or the autonomous provinces of Trento or Bolzano, in agreement with the Ministro dell’ambiente (Minister for the Environment) and the Ministro della marina mercantile (Minister for the Merchant Navy), according to their respective spheres of competence …

2. The area covered by the exploration permit shall be such as to permit the rational development of the exploration programme and in any case may not exceed 750 square kilometres; adjacent land and sea areas may be included in the area covered by the permit.

3. If the Minister for Industry, Trade and Crafts does not consider the area requested to be of a sufficient dimension or rational configuration for the purpose of optimal exploration, he may decide not to grant the exploration permit until it is possible to combine the area under consideration with neighbouring areas.

4. The duration of the permit shall be six years.

5. The permit holder shall be entitled to two successive extensions of three years each, provided he has fulfilled the obligations under the permit.

6. The permit holder may be granted a further extension if … works are still in progress … for reasons not attributable to his inactivity, negligence or incompetence …’

Article 9(1) of Decreto Direttoriale 22 marzo 2011 (Departmental Decree of 22 March 2011) and, identically, Article 14(1) of Decreto Direttoriale 15 luglio 2015 (Departmental Decree of 15 July 2015):

'During the exploration phase, more than one exploration permit or individual licence may be granted to the same legal entity, either directly or to parent companies, subsidiaries or entities within the same corporate group, provided that the total area does not exceed 10 000 km2.'

Outline of the facts and the main proceedings

1 On 27 August 2013, Global Petroleum Ltd, an Australian company operating worldwide in the offshore hydrocarbons sector, submitted four applications to the Ministero per lo Sviluppo economico (Italian Ministry of Economic Development) for four exploration permits in adjacent areas located off the coast of Puglia, each with an area of just under 750 square kilometres.

2 At the time, the procedure for issuing permits was governed by the Departmental Decree of 22 March 2011, and subsequently by the Departmental Decree of 15 July 2015, both of which provided that, following publication of the application and completion of the examination phase in respect of any applications from other applicants, the interested party was required to submit a separate application for a positive environmental impact assessment (EIA) of its project.

3 Thus, on 30 May 2014, Global Petroleum submitted four applications to the Ministero dell'Ambiente e della Tutela del Territorio e del Mare (Italian Ministry of the Environment and Protection of Land and Sea — MATTM) to obtain the necessary decisions on environmental compatibility pursuant to Article 22 et seq. of Decreto Legislativo 3 aprile 2006, n. 152 (Legislative Decree No 152 of 3 April 2006), relating to two-dimensional and possibly three-dimensional seismic surveys to be carried out using the 'air gun' technique in the areas concerned.

This technique uses a high-pressure compressed air generator, known as an 'air gun', to generate seismic waves that hit the seabed; by analysing the return echo, it is possible to reconstruct the subsea rock formation and identify any commercially viable hydrocarbon deposits. Unless it is controlled, this activity can be harmful to marine life, which is why an environmental assessment is necessary.

4 With four separate decrees, the MATTM, in agreement with the Ministro dei Beni e delle Attività culturali e del Turismo (Minister for Cultural Heritage and Activities and Tourism), found that the projects were environmentally compatible , specifying that the appropriate technical committee for environmental impact assessments (EIA and SEA) had also assessed their cumulative effect.

5 Regione Puglia (Puglia Regional Authority) — the authority invited to take part in the procedure — challenged those decrees by separate actions before the

competent Regional Administrative Court. It argued that the decrees infringed Article 6(2) of Law No 9/1991, interpreting the limit of 750 square kilometres as referring not only to individual permits, but also to individual operators. Therefore, in its opinion, an individual operator could not obtain permits for a total area exceeding that limit.

6 In each of the proceedings, the Regional Administrative Court dismissed the allegation that the ban had been circumvented. It ruled that Law No 9/1991 was designed not to protect the environment (which was protected by other laws), but to promote the rational exploitation of hydrocarbon resources and thus competition between operators in the sector. Consequently, individual operators were entitled to receive multiple permits, even for adjacent areas, provided that each application submitted was for an area of less than 750 square kilometres and each authorisation was obtained following a separate procedure.

7 Puglia Regional Authority appealed against the judgments of the lower court before the Consiglio di Stato (Council of State, Italy). All three ministries concerned, as well as the Presidenza del Consiglio dei Ministri (Office of the Italian Prime Minister) and the other party to the proceedings, Global Petroleum, joined the proceedings.

Main arguments of the appellant

8 According to the appellant, it is precisely because of the need to promote competition in the sector that the maximum extent of the permits that can be issued to an individual operator should be limited to 750 square kilometres; otherwise such an operator could, paradoxically, occupy with its activities the entire maritime area to be exploited.

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

9 The Council of State questions the interpretation adopted by the Regional Administrative Court and submits to the Court the question of the conformity of the national legislation in question with Directive 94/22/EC, and in particular Article 4 thereof.

10 The Council of State starts by noting that, in principle, Directive 94/22/EC should be interpreted as encouraging competition in the sector (fifth recital). More specifically, it seeks to promote ‘market’ competition — in other words, based on the presence of the largest number of competing operators — and not competition simply ‘for the market’, in which applicants are selected by means of competitive mechanisms to operate a particular market in the broadest sense, in a *de jure* or de facto monopoly (eighth recital), in order to avoid any inefficiency (Article 4). Indeed, the allocation of a given economic asset by means of a competitive mechanism among several applicants allows competition to take place (Article 3(2)). However, there is no mention of the final outcome, which could be

a situation in which competition exists, but equally could be a monopoly, if the economic asset to be allocated is the only one of its kind available.

11 However, the implementation of the Directive, transposed in national law by means of the amendment of Article 6 of Law No 9/1991 pursuant to Legislative Decree No 625/1996, does not comply with that interpretation of the Directive.

12 Indeed, Article 6, as amended, lays down a maximum extent and duration for individual exploration permits that may be issued. However, it does not expressly prohibit — and so it allows, in the Council of State's opinion — more than one permit to be issued to the same legal entity, each for an area corresponding to the maximum extent, provided that these are issued, as in the present case, following an equivalent number of administrative procedures.

13 First, a literal and logical argument applies here: if the law is silent, then what is not prohibited must be considered to be permitted.

14 In the same vein, a systemic/historical argument can be made, since the national legislation on hydrocarbons prior to Directive 94/22/EC, from legge n. 6/1957 (Law No 6/1957) to the original version of Article 6 of Law No 9/1991, has always set two distinct limits: the first relating to the maximum extent of individual permits (first 50 000 hectares, then 70 000 hectares, and finally 100 000 hectares); the second relating to the maximum total extent of permits that can be issued to a single legal entity (from 300 000 hectares throughout national territory and 150 000 hectares in the same region, to 1 million hectares for more than one permit issued to a single entity other than the Ente nazionale idrocarburi (National Hydrocarbons Authority, now ENI), with a specific ban on permits for adjacent areas).

According to the Council of State, it is evident, therefore, that the removal of the reference to limits for each operator in the new legal framework should be taken to mean that those limits have been abolished, with an end result at odds with the aim of promoting competition, which Directive 94/22/EC seeks to achieve.

15 The same conclusion will be reached even with a limit of 10 000 square kilometres per operator, as laid down in the Departmental Decrees of 22 March 2011 and 15 July 2015. That limit is more than 13 times the individual maximum extent, and could therefore frustrate the aim of promoting competition as construed by the Council of State.

16 The question raised is relevant for the purposes of the decision in the main proceedings. Indeed, if the Council of State's interpretation is correct and Article 6 of Law No 9/199, as amended, is found to be contrary to Directive 94/22/EC in so far as it allows multiple exploration permits to be issued to the same legal entity for a total area exceeding 750 square kilometres, the permits issued to Global Petroleum, as well as the contested EIA decrees, will be unlawful since they relate to projects that are not permissible.