Anonymised version

Case C-236/24

Request for a preliminary ruling

Date lodged:

29 March 2024

Referring court:

Raad van State (Belgium)

Date of the decision to refer:

26 March 2024

Applicants:

Provincie Oost-Vlaanderen

Sogent

Defendants:

KG

WA

RAAD VAN STATE, AFDELING BESTUURSRECHTSPRAAK (COUNCIL OF STATE, ADMINISTRATIVE LITIGATION DEPARTMENT)

SEVENTH CHAMBER

J U D G M E N T

[…] of 26 March 2024

in the cases I. […]

II. […]

In the case: **I.**

PROVINCIE OOST-VLAANDEREN (PROVINCE OF EAST FLANDERS, BELGIUM) […]

II.

SOGENT

[…]

v

I. + II.

1. KG

2. WA

[…]

I. Subject matter of the action

1 The appeals in cassation, brought on 14 and 15 November 2022, seek to have the judgment […] of the Raad voor Vergunningsbetwistingen (Council for Consent Disputes) of 6 October 2022 in Case […] set aside.

II. Conduct of the court proceedings

2 The appeals in cassation were declared admissible […].

[…] [information concerning the procedure]

The […] hearing […] took place on 22 February 2024.

[…] [information concerning the procedure]

III. Joinder

3 The two appeals in cassation are directed against the same judgment of the Council for Permit Disputes. It is appropriate to join the two cases.

IV. Facts

4 1. The applicant in the case under II is an autonomous municipal corporation established by the city of Ghent within the meaning of Article 231 of the Decree of 22 December 2017 ‘on local government’. It submitted an application to the municipal council of the city of Ghent for an environmental permit for the

reconversion of a laundry site, attaching a project EIA screening note to the application.

2. The municipal environment officer declared the application admissible and complete on 1 September 2020. He ruled that no significant environmental impacts are expected, as also shown in the project EIA screening note, and that there was no need to prepare a project EIA. The municipal council granted the permit on 10 December 2020.

3. The defendants filed an administrative appeal against the environmental permit. On 3 June 2021, the applicant in the case under I declared the appeal unfounded, and granted the permit.

4. By the contested judgment, the action for annulment brought by the defendants against the decision of 3 June 2021 was upheld, that decision annulled, and the environmental permit refused.

V. Examination of the first part of the single plea in both appeals in cassation

Explanation of the plea

5 The applicants have developed an identical appeal in cassation in which they allege that Articles 4 and 9a of Directive 2011/92/EU of 13 December 2011 of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment ('the Project EIA Directive') and Articles 15/1 and 9 and 20 of the Decree of 25 April 2014 'on the environmental permit' have been infringed.

The plea is directed against the assessment of the contested judgment that the application for the environmental permit could not be submitted to the municipal council, because the deputation [of the Provincial Council] is competent in that regard in the first administrative instance under Article 15/1(1) of the Decree of 25 April 2014 'on the environmental permit'. This assessment rests on the following grounds of the contested judgment:

> "the applicants make it sufficiently plausible that the condition in Article 15/1(1) [of the Decree of 25 April 2014 'on the environmental permit' ('the OVD')] that an EIA must be prepared for the project and no exemption from the reporting obligation has been obtained based on an interpretation of this in line with Article 9a of the Project EIA Directive must be understood to apply even if the project requires the preparation of a project EIA screening note in the first instance and it therefore is not apparent that a project EIA does not need to be prepared for it. The contested decision also erroneously contains no statement of reasons in that regard, despite the arguments on that point in the applicants' administrative appeal.

The Project EIA Directive aims to make projects that are likely to have significant impacts on the environment by virtue of their nature, size or location subject to an assessment of their effects before a permit is granted for them (Article 2 of the Project EIA Directive and, inter alia, ECJ 19 September 2000, C-287/98, *Linster*; ECJ 4 May 2006, C-290/03, *Barker*; ECJ 24 March 2011, C-435/09, *Commission* v *Belgium*). This is justified in a (second) recital to that directive from the observation that '[the European Union's] policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay (Article 191 TFEU)', so that 'effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes'. The projects in question are defined in Article 4 of the Project EIA Directive, which provides for projects to be subject to an assessment in all cases in accordance with Articles 5 to 10 of the directive (projects in Annex I to the directive) and projects for which Member States determine, either through a case-by-case examination or on the basis of thresholds or criteria set by them, or on the basis of the application of both procedures, whether or not the project should be subject to such an assessment (projects in Annex II to the directive). The Project EIA Directive therefore provides not only for the task of preparing and assessing a project EIA in accordance with Articles 5 to 10 of that directive when it has been established that an environmental impact assessment is required, but also for the task of examining, on a case-by-case basis and/or by reference to established thresholds or criteria, whether a project is likely to have significant impacts on the environment and whether an environmental impact assessment is required in this regard (Article 4(2) to (6) of the Project EIA Directive).

Article 9a of the Project EIA Directive thereby provides for a general 'no conflict of interest' principle in terms of the usefulness of the Project EIA Directive, whereby Member States must ensure that the competent authority or authorities carry out their 'duties arising from this Directive' in an objective manner and do not find themselves in a situation that gives rise to a conflict of interest, and, in any case, where the competent authority is also the developer, they must ensure an appropriate separation of conflicting functions 'when carrying out the duties arising from this Directive' within their organisation of administrative competences. The reading of that article shows that the aim is to ensure the objectivity of the competent authority or authorities and avoid conflicts of interest in 'all duties' arising from the Project EIA Directive, and thus in principle also in the duties under the screening obligation that involve assessing whether a project is likely to have significant environmental impacts and whether this requires an environmental impact assessment. The general thrust of Article 9a of the Project EIA Directive is confirmed in a (twenty-fifth) recital to Directive 2014/52/EU, which inserts this article into the Project EIA Directive, and which states that 'the objectivity of the competent authorities should be

ensured' and 'conflicts of interest could be prevented by, inter alia, a functional separation of the competent authority from the developer', whereby 'Member States should at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions of those authorities performing the duties arising from Directive 2011/92/EU in cases where the competent authority is also the developer.' Reference is again made to the 'duties' arising from the Project EIA Directive, with no distinction between projects that must be subject to an environmental impact assessment in all cases and projects for which Member States determine whether an environmental impact assessment is required on the basis of a case-by-case examination and/or on the basis of defined thresholds or criteria. The finding that Article 9a of the Project EIA Directive is inserted between Articles 5 to 10 of the Project EIA Directive, which deal with the environmental impact assessment, does not affect the general thrust thereof. In that context, reference may also be made to the (forty-first) recital to Directive 2014/52/EU that 'the objective of this Directive' is to 'ensure a high level of protection of the environment and of human health, through the establishment of minimum requirements for the environmental impact assessment of projects'.

The Project EIA Directive was transposed for Flanders by (Title IV of) the Decree of 5 April 1995 containing general provisions on environmental policy ('the DABM'). It provides (in Chapter III) that 'proposed projects, before authorisation can be granted for the licensable activity that is the subject of the project, shall be subject to an environmental impact assessment in the cases provided for in this chapter' (Article 4.3.1 DABM), defining the concept of 'environmental impact assessment' as 'the procedure that may or may not lead to the preparation and approval of an environmental impact assessment on a proposed action and, where appropriate, to its use as an aid to decision-making on that action' (Article 4.1.1, § 1, 1° DABM). In that context, the Government of Flanders, using the criteria in Annex II to the DABM, designates different categories of projects, namely 'the categories of projects for which a project EIA must be prepared in accordance with this chapter', 'the categories of projects other than those listed in paragraph 1 for which a project EIA or a reasoned request for exemption from the reporting obligation must be prepared in accordance with this chapter', and 'the categories of projects other than those listed in paragraphs 1 and 2 for which a project EIA or a project EIA screening note must be prepared in accordance with this chapter' (Article 4.3.2, §§ 1, 2 and 2a DABM). It is stipulated therein that 'the authority deciding on the admissibility and completeness of the permit application in the cases mentioned in Article 4.3.2, § 2a, for which a project EIA screening note has been prepared, shall decide whether a project EIA needs to be prepared at the time of and as part of the decision on the admissibility and completeness of the permit application', while 'the initiator may submit a reasoned request for exemption from the reporting

requirement to the administration in the cases mentioned in Article 4.3.2, § 2' (Article 4.3.3, §§ 2 and 3 DABM).

A project EIA screening note is a (reasoned) document that indicates whether a proposed project is likely to have significant impacts on people and the environment (Article 1, 5° of the Project EIA Decree). The document should allow the authority to make an informed assessment, using the criteria set out in Annex II DABM, of the extent to which the application generates significant impacts on people and the environment, and whether or not a project EIA should be prepared in relation to it. When making a screening decision, the competent authority must specifically assess the application against the criteria of Annex II DABM, and its decision must adequately demonstrate why it considers that (no) significant environmental impacts are to be expected and the preparation of a project EIA is (not) required (Article 66(2) of the Order of the Government of Flanders of 27 November 2015 implementing the OVD). This shows that the screening of projects for their potentially significant environmental impacts forms the basis for deciding whether or not a project EIA should be prepared for them and is therefore part of 'the procedure that may or may not lead to the preparation and approval of an environmental impact assessment on a proposed action'. Therefore, if the screening process as a task or part of the 'environmental impact assessment' were to be affected by a conflict of interest, due to the fact that the competent authority is also the developer, this could have an impact on the final assessment of whether or not an environmental impact assessment should be carried out. In view of these considerations, the application of the 'no conflict of interest' provision in Article 9a of the Project EIA Directive should not be limited to those projects that are 'directly' subject to an environmental impact assessment under Article 4 of that directive, barring an exemption (Article 4.3.2, §§ 1 and 2 DABM), but also cover projects subject to screening (Article 4.3.2, § 2a DABM). For such projects subject to screening, there is no apparent certainty at the time the application for them is submitted that a project EIA will not need to be prepared because the project EIA screening note is yet to be specifically examined and assessed. Again, this task, which derives equally from the Project EIA Directive, must be able to be performed by a body that 'can perform it objectively and therefore is not in a situation that gives rise to a conflict of interest. Thus, when reading Article 15/1(1) OVD in accordance with Article 9a of the Project EIA Directive, projects subject to screening also fall within its scope and should in principle be submitted to and examined by the deputation in the first administrative instance if the municipal council is the initiator and applicant for the project. The fact that this is contradicted in the explanatory memorandum to Article 15/1 OVD does not prevent this because the recitals in the preparatory works to a decree implementing a directive do not take precedence over its provisions, which must be respected by the Member States.

The finding that, in projects subject to screening, the municipal environment officer has the task of examining the project EIA screening note accompanying the application and, on that basis, deciding whether an EIA should be drawn up on the project 'if the application is submitted by the competent authority itself' (Article 20(2) OVD) does not suggest otherwise in the light of the 'no conflict of interest' provision in Article 9a of the Project EIA Directive. There is therefore no adequate 'appropriate separation' of conflicting functions" in the organisation of the authorisation procedure at first administrative instance when performing the duties arising from the Project EIA Directive, with the result that it is not ensured that the competent authorities can perform their duties arising from this Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest, as envisaged by Article 9a of the Project EIA Directive. As is clear from the case-law of the Court of Justice (judgment in Case C-474/10), in terms of 'appropriate separation', there must be 'genuine autonomy', which is understood to mean that the body designated to carry out the tasks arising from the Project EIA Directive 'has its own administrative resources and personnel and is thus able to carry out the tasks entrusted (to it)', and, in particular, can 'objectively' express its opinion on the project applied for 'by the body to which it belongs'. Although the municipal environment officer performs his duties under the OVD 'independently and neutrally' and in doing so 'may not be prejudiced in the performance of these duties' (Article 9, § 2 OVD), it does not appear that this officer has sufficient 'genuine autonomy' and has his own administrative resources or personnel to assess a project EIA screening note from the municipality and decide on the basis of that note whether or not a project EIA should be prepared. After all, the municipal environment officer is appointed by the municipality by municipal council decision from among its own staff or from staff of an intermunicipal partnership (Article 9, § 2 OVD), while his duties may even be performed temporarily for a maximum of 12 months by the municipal secretary if no municipal environment officer is available within the municipality or the intermunicipal partnership (Article 9, § 3 OVD). In that respect, this official cannot reasonably judge 'objectively' whether or not the project being applied for by the municipality is subject to an EIA, all the more so since, according to the 'professional ethical rights and duties' as a member of staff, this official must perform his duties 'loyally and correctly' and, in doing so, must 'actively and constructively' commit himself to the accomplishment of the municipality's mission and objectives (Article 188 of the Decree of 22 December 2017 on local government). Irrespective of this finding, moreover, in its permit decision in the first administrative instance of 10 December 2020, the municipal council of Ghent did (once again) make its own judgement on the necessity of preparing a project EIA by aligning itself with the opinion on this matter issued by the municipal environment officer on 4 December 2020 with regard to the 'project EIA screening' aspect.

[…]

> Having regard to the explanation above, the applicants make a sufficiently plausible case that the deputation was competent in the first administrative instance of the present application on the basis of Article 15/1(1) OVD because the application is aimed at a municipal project in which the municipal council of Ghent is the initiator and (de facto co-)applicant, and it does not appear that the project manifestly does not require the preparation of a project EIA."

6 In the first part of the plea, the applicants argue that Article 15/1 of the Decree of 25 April 2014 on the environmental permit stipulates that the municipal council cannot adjudicate on its own application if 'an environmental impact assessment [must] be prepared for the project and no exemption from the reporting requirement [has] been obtained'. According to the applicants, this provision unambiguously shows that the deputation can only be competent if the project requires the preparation of an environmental impact assessment, and consequently the deputation cannot be competent if the project is only subject to screening. The applicants argue that this was also confirmed during the parliamentary preparation of the provision.

By holding that projects subject to screening fall within the scope of Article 9a of the Project EIA Directive and inferring from this that Article 15/1 of the Decree of 25 April 2014 on the environmental permit should be read in that sense, the judgment under appeal, according to the applicants, gives that provision an interpretation that is contra legem.

The contested judgment is thus said to infringe Article 15/1 of the Decree of 25 April 2014 on the environmental permit.

7 The applicants request that at least a question should be referred to the Court of Justice for a preliminary ruling regarding the interpretation and scope of Article 9a of the Project EIA Directive.

Assessment

8 Article 15/1, first paragraph of the Decree of 25 April 2014 on the environmental permit states:

> 'However, for the perusal of and decision on a permit application for a project or for the change of a project, for which, according to Article 15, the municipal council is competent, the deputation is competent if the following two conditions are met:
>
> 1° the project requires an environmental impact assessment and no waiver of the reporting requirement has been obtained;
>
> 2° the municipal council is the initiator and applicant for the project.'

This provision was adopted in order to transpose the 'no conflict of interest' rule of Article 9a of the Project EIA Directive. That article provides as follows:

> 'Member States shall ensure that the competent authority or authorities perform the duties arising from this Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest. Where the competent authority is also the developer, Member States shall at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions when performing the duties arising from this Directive.'

9 It follows from the aforementioned Article 15/1, first paragraph that the deputation in the place of the municipal council only takes cognisance of an application for a permit submitted by the municipal council when it is already established at the time the application is submitted that the project is subject to the obligation to prepare an environmental impact assessment.

Where, under the regulations, the project is only subject to the obligation to prepare a project EIA screening note, the obligation to prepare an environmental impact assessment is not established at the time the application is submitted. It is the authority that decides on the admissibility and completeness of the permit application that can decide to subject the project to the obligation to prepare an environmental impact assessment (Article 4.3.3, § 2 of the Decree of 5 April 1995 containing general provisions on environmental policy).

A permit application from a municipal council for a project that requires only a project EIA screening note must therefore be submitted to the same council, after which the municipal environment officer decides whether the project requires an environmental impact assessment (Article 20 of the Decree of 5 April 1995 containing general provisions on environmental policy). The decision of the municipal environment officer that an environmental impact assessment must be prepared automatically results in the incompleteness of the application and the halting of the permit procedure (Article 21, second paragraph of the Decree of 5 April 1995 containing general provisions on environmental policy). If the municipal environment officer judges that no environmental impact assessment needs to be prepared, the municipal council decides on the permit application in the first administrative instance.

The parliamentary preparation of Article 15/1 of the Decree of 25 April 2014 on the environmental permit confirms the will of the decree-maker '[not] to impose the conflict of interest provision mentioned in Article 9a [of the Project EIA Directive] on the authorisation procedure of projects subject to EIA screening'. […]

The contested judgment, in which it was held that the application for authorisation of a project for which a municipal council is the initiator, and for which only a project EIA screening note needs to be prepared, must be submitted not to the

same council, but to the deputation, thus infringes Article 15/1(1) of the Decree of 25 April 2014 on the environmental permit.

10 The possible circumstance that Article 9a of the Project EIA Directive might preclude the municipal environment officer from deciding whether an environmental impact assessment should be prepared for municipal projects requiring only a project EIA screening note does not affect this. Indeed, in this hypothesis, the aforementioned Article 9a has been insufficiently transposed in the Flemish Region, in the absence of regulations that provide for an appropriate separation between the conflicting functions within the meaning of Article 9a.

The aforementioned Article 15/1 cannot be interpreted contrary to its clear text and intent, even under the guise of an interpretation in conformity with the directive. Accordingly, that provision cannot be read as extending the appropriate separation between the conflicting situations provided for in cases where an environmental impact assessment has to be prepared, to cases where only a project EIA screening note has to be prepared.

In view of the direct effect of the aforementioned Article 9a, in the event of its incomplete transposition in the Flemish Region, that provision can serve in place of the invalid grounds as a legal basis for the contested judgment, so that, in that scenario, the applicants would not succeed on that part of the plea.

11 Whether Article 9a of the Project EIA Directive was adequately transposed depends on the scope of that provision. More specifically, the question arises as to whether the 'appropriate separation' referred to in that provision should also be provided for assessing whether projects subject to screening – which are targeted by Article 4(2) of the Project EIA Directive – are subject to the obligation to prepare an environmental impact assessment.

It is appropriate to refer this question to the Court of Justice of the European Union for a preliminary ruling.

DECISION

1. The cases […] are joined.

2. The following question is referred to the Court of Justice of the European Union for a preliminary ruling:

> **'Is Article 9a 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, inserted by Directive 2014/52/EU of 16 April 2014, to be interpreted as meaning that, in cases where the competent authority is also the developer, the appropriate separation between conflicting functions when performing the duties arising from that directive must also be applied to the assessment of whether the projects referred to in Article 4(2) of the**

directive are subject to assessment in accordance with Articles 5 to 10 of the directive?'

3. **[…]** [closing wording and signature]