

Case C-575/21

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:

20 September 2021

Referring court:

Verwaltungsgericht Wien, (Administrative Court, Vienna, Austria)

Date of the decision to refer:

14 September 2021

Applicant:

WertInvest Hotelbetriebs GmbH

Construction authority:

Magistrat der Stadt Wien

Subject matter of the main proceedings

Environmental impact assessment – Urban development projects – Thresholds – UNESCO World Heritage Sites – Margin of discretion – Case-by-case assessment

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

Does 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) as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1) ('Directive 2011/92/EU') preclude a national rule by which the assessment of the environmental effects of urban development projects is made conditional both on the attainment of thresholds for land take of at least 15 ha and

for gross floor area of more than 150 000 m² and on the development project in question being a project for entirely multifunctional development with at least residential and commercial buildings, including the access roads and utilities intended for those buildings, and with a catchment area that extends beyond the area covered by the project? In this regard, is it relevant that national law imposes special conditions for:

- theme parks or amusement parks, sports stadia or golf courses (above a certain land take or a certain number of parking spaces);
- industrial or trading estates (above a certain land take);
- shopping centres (above a certain land take or a certain number of parking spaces);
- accommodation establishments, such as hotels or holiday villages, and ancillary facilities (above a certain number of beds or a certain land take, limited to the area outside enclosed settlements); and
- car parks or garages accessible to the public (above a certain number of parking spaces)?

II. Does Directive 2011/92/EU require lower thresholds or criteria with lower thresholds (than those referred to in the first question) to be set for areas of particular historical, cultural, urban-design or architectural significance, such as UNESCO World Heritage Sites, having regard, in particular, to the rule in point 2(c)(viii) of Annex III, according to which ‘landscapes and sites of historical, cultural or archaeological significance’ are also to be taken into account when deciding whether an environmental impact assessment must be carried out for the projects listed in Annex II?

III. Does Directive 2011/92/EU preclude a national rule according to which, when assessing an ‘urban development project’ as referred to in the first question, aggregation (cumulation) with other similar and geographically related projects is restricted in such a way that only the sum of the capacities approved in the last five years, including the capacity or capacity expansion applied for, is to be taken into account; urban development projects or parts of such projects are no longer to be regarded conceptually as urban development projects once they have been carried out; and the assessment to be carried out on a case-by-case basis of whether an accumulation of effects is likely to result in significant harmful, undesirable or adverse effects on the environment, thus requiring an environmental impact assessment to be carried out for the proposed project, is not carried out if the capacity of the proposed project is less than 25% of the threshold?

IV. If the answer to Question I and/or II is in the affirmative: Can the examination to be carried out on a case-by-case basis in the event that the discretion accorded to the national authorities of the Member States (in

conformity with the provisions of Article 2(1) and Article 4(2) and (3) of Directive 2011/92/EU, which are directly applicable in this case) is exceeded, in order to determine whether the project is likely to have significant effects on the environment and must therefore be made subject to an environmental impact assessment, be limited to certain aspects of protection, such as the protection objective of a particular area, or must all of the criteria set out in Annex III to Directive 2011/92/EU be taken into account in that case?

V. Does Directive 2011/92/EU, having regard in particular to the principles of judicial protection laid down in Article 11 of that Directive, permit the assessment referred to in the fourth question to be carried out first by the referring court (in a building consent procedure and as part of the verification of its own jurisdiction) in the proceedings of which national law accords the ‘public’ only extremely limited status as a party and against the decisions of which members of the ‘public concerned’ have only extremely limited judicial protection within the meaning of Article 1(2)(d) and (e) of Directive 2011/92/EU? Is it relevant to the answer to that question that – apart from the possibility for an authority to make a declaration of its own motion – only the project applicant, a participating authority or the environmental ombudsman is permitted under national law to request a separate declaration to establish whether the project is subject to the requirement to carry out an environmental impact assessment?

VI. Does Directive 2011/92/EU permit building permits for individual construction measures which form part of ‘urban development projects’ pursuant to point 10(b) of Annex II to this Directive to be granted before, or alongside, a necessary environmental impact assessment, or before the completion of a case-by-case assessment of the environmental effects intended to clarify the need for an environmental impact assessment, without carrying out a comprehensive assessment of the environmental effects within the meaning of Directive 2011/92/EU as part of the building consent procedure, and while according the public only limited status as a party?

Provisions of European Union law relied on

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

Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

Provisions of national law relied on

Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz 2000) (Federal Environmental Impact

Assessment Act (Environmental Impact Assessment Act 2000), ‘the UVP-G 2000’), Paragraphs 1, 2(1), 3(1), (2), (4), (4a), (6), (7) and (9), Paragraph 39(1), point 18(b) of the second column of Annex 1 and Annex 2.

Paragraph 2(2) of the UVP-G 2000 provides:

(2) A project means the execution of an installation or any other intervention in the natural surroundings and landscape, including all of the geographically and factually related measures. A project may encompass one or more installations or interventions if they are related geographically and factually.

Paragraph 3 of the UVP-G 2000 provides:

Paragraph 3(1) Projects listed in Annex 1 and modifications to such projects shall be subject to an environmental impact assessment in accordance with the following provisions. Projects listed in the second and third column of Annex 1 shall be assessed by the simplified procedure.

(2) In the case of projects in Annex 1, which do not reach the thresholds or meet the criteria laid down in that annex but which, when combined with other projects, reach the threshold or fulfil the criterion in question, the authority shall declare, on a case-by-case basis, whether the cumulative effects are likely to result in significant harmful, undesirable or adverse effects on the environment and whether an environmental impact assessment must therefore be carried out for the proposed project. For cumulation, account shall be taken of other similar and geographically related projects, which are already in existence or have obtained consent, or projects which have previously been submitted to a public authority with a full application for consent or for which consent has previously been applied for in accordance with Paragraph 4 or 5. A case-by-case assessment need not be carried out if the proposed project has a capacity of less than 25% of the threshold. When deciding on a case-by-case basis, account shall be taken of the criteria in points 1 to 3 of subparagraph 5 and subparagraphs 7 and 8 shall be applied. The environmental impact assessment shall be carried out by the simplified procedure. A case-by-case assessment is not required if the project applicant applies for an environmental impact assessment to be carried out.

(6) Consents for projects subject to an assessment in accordance with subparagraphs 1, 2 or 4 shall not be issued before completion of the environmental impact assessment or the case-by-case assessment, and notices given under administrative provisions shall have no legal effect before completion of the environmental impact assessment. Consents issued in breach of that provision may be annulled within a period of three years by the authority with jurisdiction under Paragraph 39(3).

(7) Upon request by the project applicant, a participating authority or the environmental ombudsman, the authority shall declare whether an environmental impact assessment as provided for in this Federal Act is to be carried out for a project and which of the criteria laid down in Annex 1 or in Paragraph 3a(1) to (3)

that project satisfies. That declaration can also be made of the authority's own motion.

Point 18(b) of the second column of Annex 1 provides for an EIA (environmental impact assessment) obligation for the following projects:

b) Urban development projects^{3a)} with a land take of at least 15 ha and a gross floor area of more than 150 000 m²;

^{3a)} Urban development projects are projects for entirely multifunctional development with at least residential and commercial buildings, including the access roads and utilities provided for those buildings, and with a catchment area that extends beyond the area covered by the project. Once completed, urban development projects or parts of such projects shall no longer be regarded as urban development projects as defined in this footnote.

With regard to urban development projects, column 3 of Annex 1 provides:

Paragraph 3(2) shall apply to point b, with the proviso that the sum of the capacities that have obtained consent in the last 5 years, including the capacity or capacity expansion applied for, is to be taken into account.

Wiener Stadtentwicklungs-, Stadtplanungs- und Baugesetzbuch (Bauordnung für Wien – BO für Wien) (Vienna Urban Development, Urban Planning and Building Code (Building Code for Vienna, 'the BO for Vienna') Paragraph 70(1) and Paragraph 134(1) and (3)

Brief summary of the facts and the procedure

- 1 On 30 November 2018, WertInvest Hotelebetriebs GmbH applied to the Magistrat der Stadt Wien (Vienna City Administration) for planning consent for the project 'ICV Heumarkt Neu – Neubau Hotel InterContinental, Wiener Eislaufverein WEV' (New ICV Heumarkt – rebuilding of the InterContinental hotel, Vienna Ice Sports Club). The area is to be redeveloped as part of the proposed project. The existing InterContinental hotel is to be demolished and replaced by two new buildings providing hotel, commercial and conference premises, a tower or 'high-rise' to be used for hotel, event, residential and office purposes and a hotel, conference and commercial building (with three basement levels) forming the base building upon which the tower and one of the new buildings will be constructed. The building which will not be constructed on the base building ('Heumarkt building') is located between that building and the adjacent concert hall and also has three basement levels. In addition, the existing ice rink will be rebuilt, and a new underground ice arena will be built with an underground sports hall and a swimming pool. An underground car park with 275 parking spaces will also be built. The project has a land take of approximately 1.55 ha and a gross floor area of around 89 000 m². The entire project is located in the central zone of the UNESCO World Heritage Site 'The Historic Centre of Vienna'.

- 2 On 17 October 2017, WertInvest Hotelbetriebs GmbH applied, under the UVP-G 2000, for a declaration establishing that an environmental impact assessment need not be carried out for that development project.
- 3 By decision of 16 October 2018, the Wiener Landesregierung (Provincial Government of Vienna) declared, regarding that application, that an environmental impact assessment need not be carried out, since the project did not fulfil any of the criteria set out in Annex 1 to the UVP-G 2000. With regard to the criterion ‘urban development project’ (point 18(b) of the second column of Annex 1) it was declared that the thresholds would not be reached and that the cumulation provision of that Act would not apply either, since the required 25% of the threshold would not be reached.
- 4 Neighbours and an environmental organisation filed an appeal against that decision.
- 5 The Bundesverwaltungsgericht (Federal Administrative Court), which had jurisdiction over the appeal, informed the applicant and the Vienna City Administration that it did not believe that the provision of point 10(b) of Annex II to Directive 2011/92/EU had been fully transposed, appointed an expert and scheduled a hearing. WertInvest Hotelbetriebs GmbH then withdrew its application for a declaration.
- 6 Although the application for a declaration had been withdrawn, the Federal Administrative Court decided, by judgment of 9 April 2019, that the project at issue was subject to the obligation to carry out an environmental impact assessment. It referred to the possibility of making such a decision of its own motion and the fact that the applicant had not explained comprehensibly the reasons why it did not wish to implement the project. The Federal Administrative Court noted that the Austrian legislature had not taken sufficient account of projects located in an area eligible for protection when determining the EIA criteria for ‘urban development projects’ under point 18(b) of the second column of Annex 1 to the UVP-G 2000. Those protected areas also included UNESCO World Heritage Sites. The project at issue showed that projects which do not reach the thresholds could also have a significant effect on complexes of urban buildings protected by UNESCO. In substance, the Federal Administrative Court finds that Austria has failed fully to transpose point 10(b) of Annex II to Directive 2011/92/EU and, consequently, the criteria and thresholds under point 18(b) of the second column of Annex 1 to the UVP-G 2000 should not be observed and the court must carry out a case-by-case assessment of the effects of the project on the protected area. This gives rise to an EIA obligation.
- 7 By judgment of 25 June 2021, the Verwaltungsgerichtshof (Supreme Administrative Court) set aside the judgment of the Federal Administrative Court. It found that the Federal Administrative Court no longer had jurisdiction following the withdrawal of the application.

- 8 The decision of the Vienna Provincial Government of 16 October 2018 was also set aside.
- 9 During the procedure to establish whether there was an EIA obligation, the building consent procedure remained pending before the Vienna City Administration, which wished to await the outcome of the EIA procedure. The City Administration finally held a hearing in December 2019. It was held that the project was eligible for consent under the Building Code for Vienna. The question of the need for an environmental impact assessment was reserved.
- 10 Since the building authority was awaiting the conclusion of the declaratory proceedings, WertInvest Hotelbetriebs GmbH brought an action for failure to act before the Verwaltungsgericht Wien (Administrative Court, Vienna) on 12 March 2019, and applied to the Administrative Court, Vienna for a building permit (implicitly denying the EIA obligation). In other pleadings it was argued that, in view of the thresholds in point 18(b) of the second column of Annex 1 to the UVP-G 2000, the project applied for is not subject to the EIA obligation.

Brief summary of the grounds for the request

- 11 An action for failure to act, such as that in the present case, is admissible if the authority has not made a decision within six months of receipt of the application. If, following an admissible and justified action for failure to act, jurisdiction over the processing of the application passes to the Administrative Court, the Administrative Court itself is to decide on the administrative case, but need not rule expressly on the action for failure to act. The Administrative Court, Vienna believes that an answer to the questions referred for a preliminary ruling is required for its decision.
- 12 Under the national rules of jurisdiction, the Administrative Court is required to verify its own jurisdiction (taking into account any EIA obligation) of its own motion as a preliminary question and to set out, on the basis of comprehensible findings, the reasons why it considers that there is no EIA obligation and that it therefore has jurisdiction. Under Paragraph 3(6) UVP-G 2000, consents may not be granted for projects subject to assessment in accordance with Paragraph 3(1), (2) or (4) UVP-G 2000 until an environmental impact assessment or a case-by-case assessment has been completed.
- 13 In the present case, only the urban development project referred to in point 18(b) of the second column of Annex 1 to the UVP-G 2000 is capable of triggering a possible EIA obligation. The thresholds set there are a land take of at least 15 ha and a gross floor area of at least 150 000 m². In addition, urban development projects are subject to a specific cumulation rule under which the sum of the capacities approved in the last 5 years, including the capacity or capacity expansion applied for, must be taken into account. The Act defines urban development projects as projects for entirely multifunctional development with at least residential and commercial buildings, including the access roads and utilities

provided for those buildings, and with a catchment area that extends beyond the area covered by the project. Urban development projects or parts of those projects are no longer regarded as urban development projects once they have been carried out.

- 14 As parties in the permit procedure, all neighbours have an individual right to expect compliance with statutory rules of jurisdiction. An objection of lack of jurisdiction raised by a neighbour, with reference to the EIA obligation, must therefore be examined. In that regard, neighbours are part of the ‘public concerned’, within the meaning of Directive 2011/92/EU, which must be able to appeal against a decision on the absence of an EIA obligation.
- 15 The criterion ‘urban development project’ under point 18(b) of the second column of Annex 1 to the UVP-G 2000 transposes point 10(b) of Annex II to Directive 2011/92/EU, according to which an environmental impact assessment must be carried out, inter alia, for ‘urban development projects’. Article 4(2) of the Directive requires Member States to determine whether projects listed in Annex II are to be made subject to such an assessment. They must make that determination through a case-by-case examination, through thresholds or criteria set by the Member State, or through both procedures. When a case-by-case examination is carried out or thresholds and criteria are set, the selection criteria set out in Annex III to the Directive must be taken into account. One of the criteria set out in Annex III for determining whether or not an EIA obligation exists is ‘landscapes and sites of historical, cultural or archaeological significance’ (point 2(c)(viii)), which can be found in the sub-category ‘absorption capacity of the natural environment, paying particular attention to the following areas’ (point 2(c)) of the category ‘location of projects (point 2).
- 16 According to the case-law of the Court of Justice of the European Union, Member States enjoy a certain margin of discretion within which they may, by establishing criteria and/or thresholds, facilitate the assessment of a project and its EIA obligation. However, this margin of discretion is limited by the obligation (Article 2(1) of Directive 2011/92/EU) to carry out an environmental impact assessment for projects likely to have significant effects on the environment by virtue, in particular, of their nature, size or location. The margin of discretion would be exceeded if the criteria and thresholds were set in such a way as to exempt, in advance, a whole class of projects from the EIA obligation unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see judgment of 21 March 2013, *Salzburger Flughafen*, C-244/12, EU:C:2013:203, paragraph 29 et seq.). When interpreting the conditions of Annex II to the Directive, overall account must be taken of the fact that the scope of Directive 2011/92/EU is wide and its purpose very broad (see judgment of 24 November 2016, *Bund Naturschutz in Bayern und Wilde*, C-645/15, EU:C:2016:898, paragraph 23). If the discretion afforded to the Member States has been exceeded, the national authorities are required, in accordance with Article 2(1) and Article 4(2) and (3) of Directive 2011/92/EU, to examine in each individual case whether the project is likely to have significant

effects on the environment and, if so, to carry out an environmental impact assessment (see judgment of 21 March 2013, *Salzburger Flughafen*, C-244/12, EU:C:2013:203, paragraph 43).

- 17 With regard to urban development projects, the Administrative Court has already held that it cannot be concluded that there is no a priori obligation to examine the effects of all projects of a certain type, and that to do so would exceed the margin of discretion. However, national authorities dealing with consent procedures for projects listed in Annex II to Directive 2011/92/EU must carry out a specific assessment of whether an EIA is to be carried out, in the light of the criteria set out in Annex III to Directive 2011/92/EU.
- 18 The conformity of the national implementing measures with EU law has also been challenged already by the European Union, referring also to the project at issue. The Commission considers that the thresholds for urban development projects laid down by the Austrian legislature in the UVP-G 2000 are so high that, in practice, all such projects that are now possible, are exempted in advance from the EIA obligation.
- 19 In 2017, UNESCO placed the historic centre of Vienna on the ‘Red List of World Heritage in Danger’ on account of the design of the present project, which, inter alia, changes the entire cityscape.

The questions referred

- 20 The question for the Administrative Court, Vienna is whether, when Directive 2011/92/EU was transposed into Austrian law, the thresholds and criteria were set at such a high level that, in practice, an entire class of projects is exempted, in advance, from the EIA obligation and whether, as a consequence, the Austrian legislature exceeded its discretion.
- 21 By its second question, the referring court asks whether, in the light of the inclusion of ‘landscapes and sites of historical, cultural or archaeological significance’ among the ‘selection criteria referred to in Article 4(3)’ listed in Annex III to Directive 2011/92/EU, lower thresholds or less complicated criteria must be set for areas particularly worthy of protection (such as UNESCO World Heritage Sites), or whether the location of the project is also to be taken into account, which is not provided for under the UVP-G 2000 for urban development projects.
- 22 The third question seeks to ascertain whether the restrictions on aggregation (cumulation) which it describes are compatible with Directive 2011/92/EU, since they are significant and affect the scope of the assessment.
- 23 If the Austrian legislature exceeded its discretion when transposing the Directive, the national authorities must assess, on a case-by-case basis, whether the project is likely to have significant effects on the environment and, if so, whether an

environmental impact assessment must be carried out. The fourth question seeks to clarify what specific form that case-by-case assessment should take.

- 24 The fifth question is based on the legal framework governing the building consent procedure. Under the Building Code for Vienna, only a limited group of persons is accorded the status of party. The ‘public’ is almost entirely excluded and therefore has no legal remedy against the decision of the referring court relating to the need for an environmental impact assessment. However, it should be noted that a declaratory procedure under the UVP-G 2000 also accords only a limited group of persons the status of party.
- 25 The sixth question is raised in the light of the fact that, under Austrian law, certain building works within urban development projects may be approved irrespective of there being an EIA obligation for the project as a whole. The Court of Justice has already ruled on situations in which final approval in conjunction with an earlier decision constitutes a ‘multi-stage consent procedure’. In that regard, it held that, in such a case, an environmental impact assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment. If correct, the interpretation of the law proposed by the applicant, according to which EIA procedures and building consent procedures proceed, to some extent, in parallel, also raises the question of whether it is permissible under EU law to give ‘early’ consent to a detailed design project that forms part of an entire urban development project, without carrying out a full environmental impact assessment during the building consent procedure considering, also, that the number of persons accorded the status of party is limited under the Act.