Case C-43/21

Request for a preliminary ruling

Date lodged:

27 January 2021

Referring court:

Nejvyšší správní soud (Czech Republic)

Date of the decision to refer:

20 January 2021

Complainant:

FCC Česká republika, s.r.o.

Defendant:

Městská část Praha-Ďáblice,

Spolek pro Ďáblice

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[OMISSIS]

O R D E R

The Nejvyšší správní soud (the Supreme Administrative Court, Czech Republic) [OMISSIS] has ruled in the case of the Applicants: **a) Městská část Praha-Ďáblice** (the Borough of Prague – Ďáblice), [OMISSIS] **b) Spolek pro Ďáblice** (An Association for Ďáblice) [OMISSIS], against the Defendant: the **Ministerstvo životního prostředí** (the Ministry of the Environment, Czech Republic) [OMISSIS], the intervener being: **FCC Česká republika, s.r.o**., [OMISSIS] challenging a judgment of the Defendant of 21 April 2016, [OMISSIS] in proceedings concerning the appeal on a point of law of the intervener challenging the decision of the Městský soud v Praze (Prague City Court, Czech Republic) of 16 September 2020, ref. No. 10 A 116/2016-143,

a s f o l o w s:

I. The following question **is hereby submitted** to the Court of Justice of the European Union:

Should Article 3(9) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) be interpreted such that a 'substantial change' of a plant includes an extension of the duration of waste disposal at a landfill without the maximum approved dimensions of the landfill or its total potential capacity changing at the same time?

[OMISSIS]

Grounds:

I. Subject of the Proceedings

[1] The joined party, the corporation FCC Česká republika ('the Complainant'), is a Czech business corporation which operates a landfill in the borough of Prague – Ďáblice on the basis of a permit issued pursuant to Zákon č. 76/2002 Sb., o integrované prevenci a omezování znečištění, o integrovaném registru znečišťování a o změně některých zákonů (zákon o integrované prevenci) (Law No 76/2002 on integrated pollution prevention and restriction, on an integrated pollution register, and amending certain laws (the Integrated Prevention Law)).

[2] An integrated permit to operate a landfill was issued in 2007 and subsequently changed on several occasions – above all, the landfill use period has been extended twice. At the end of 2015, the Complainant asked the Magistrát hlavního města Prahy (Prague City Hall) for a thirteenth change in the integrated permit. Among other reasons, the application was filed because the original planned capacity of the landfill had not yet been utilised and, according to the existing permit, waste disposal at the landfill was to be discontinued at the end of 2015. On 29 December 2015, the City Hall decided to amend the integrated permit for operating the landfill and changed the date for the discontinuation of waste disposal at the landfill from 31 December 2015 to 31 December 2017 – i.e., extended the period of waste disposal at the landfill by two years. The overall landfill capacity and its maximum dimensions remained unchanged by the decision. **[OR 2]**

[3] The Applicants (the Prague borough in which the landfill was located and an association as specified in Paragraph 70 of Zákon č. 114/1992 Sb., o ochraně přírody a krajiny (Law No 114/1992 on the protection of nature and landscape), i.e., the association whose main mission is to protect nature and landscape and through which involvement of citizens in protection pursuant to the Law is effected) appealed the decision of Prague City Hall. Nevertheless, the Defendant denied their appeal, due to the fact that neither Applicant was party to the proceedings concerning a change in the integrated permit. Hence, their appeals were inadmissible.

[4] Subsequently, the Applicants challenged the Defendant's decision, by court action. The Městský soud v Praze (Prague City Court, Czech Republic) granted the application, annulling the Defendant's decision and referring the case back to the defendant for re-examination. The key issue in the examination of the Applicant's involvement is whether the change in the integrated permit entailed approval of a 'substantial change' in the plant operated by the Complainant pursuant to Paragraph 2(i) of the Integrated Prevention Law. Dependent on that are the number of parties to the proceedings and involvement of parties pursuant to Paragraph 7(1)(c) and (e) of the Integrated Prevention Law. Furthermore, the scope of involvement of the public concerned, pursuant to Zákon č. 100/2001 Sb., o posuzování vlivů na životní prostředí (Law No 100/2001 on Environmental Impact Assessment), depends on the resolution of this issue. If the extension of waste disposal at a landfill in this case constitutes a 'substantial change' pursuant to the Integrated Prevention Law, the proceedings should be conducted as so-called follow-up proceedings, pursuant to Paragraph 9b et seq of the Environmental Impact Assessment Law and the Applicants should have been able to take part in the proceedings pursuant to the Law.

[5] In interpreting the term 'substantial change', the City Court referred to judgements of the Court of Justice concerning the term 'project' in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, namely in *Brussels Hoofdstedelijk Gewest and Others*, C-275/09, EU:C:2011:154, and *Pro-Braine and Others*, C-121/11, EU:C:2012:225. The City Court inferred that the scope of a 'project' may be defined temporally, as well, and that an extension of the term of operation of a plant must be seen as a change in the scope of a 'project'. If the operation of a plant were originally permitted for a certain period only, its environmental impact after the discontinuation of its permitted time of operation had not been assessed as its 'continued impact' had not been countenanced. An extension of the period of operation means an extension of an environmental intervention. The court then applied such thinking in interpreting the Integrated Prevention Law.

[6] The City Court concluded that the scope of a 'substantial change' pursuant to Paragraph 2(i) of the Integrated Prevention Law cannot be defined only in terms of space or capacity, but also temporally. In assessing whether an extension of waste disposal at a landfill constituted a 'substantial change', it is therefore necessary to consider not only whether the originally planned capacity of the landfill had been filled but also whether the impact on human health and the environment could not have changed by the extension of the period of waste disposal at the landfill (originally restricted to a certain date by the integrated permit). However, neither the City Hall nor the Defendant took that into consideration.

[7] The Complainant lodged an appeal on a point of law against the judgement of the City Court at the Supreme Administrative Court. It claims that, with a view to case-law of the Court of Justice as cited by the City Court, the sole extension of the duration of waste disposal at a landfill by two years cannot in and of itself

constitute a substantial change as defined by Paragraph 2(i) of the Integrated Prevention Law if it does not, at the same time, include works or interventions involving alterations to the physical aspect of the site. The extension of the duration of waste disposal at the landfill changed neither the total permitted extent of the landfill nor the permitted volume of waste deposited – both had been approved previously in the EIA process and the decision to extend the integrated permit does not intervene in them. It was for the purpose of filling the landfill to the originally planned capacity (and hence, also ensuring a stable shape of the landfill and subsequent reclamation) that the Complainant filed the application for the extension of waste disposal at the landfill. According to the Complainant, the EIA opinion for the project of the present stage of the operation of the landfill contained only an informative estimate of the duration of waste disposal at the landfill; essential for the approval of the project was an assessment of the landfill space and capacity. The integrated permit also set out the expected date of landfill operation discontinuation, but that time was stated only in order that the permit not be formally issued for an unlimited period. Even if the extension to the **[OR 3]** landfill's operation did have an environmental impact, it would not constitute a 'substantial change' as defined by Paragraph 2(i) of the Integrated Prevention Law.

[8] The Applicants, on the other hand, maintain that the City Court decided correctly. They point to the fact that the integrated permit defined the duration of waste disposal at the landfill not up to the time when its capacity is filled but, rather, as a fixed date, regardless of whether the landfill capacity will be filled. The Defendant failed to provide its opinion as to the appeal.

II. Applicable European Union Legislation and National Legislation

[9] Pursuant to Article 3(9) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), a *'substantial change'* means:

> *a change in the nature or functioning, or an extension, of an installation or combustion plant, waste incineration plant or waste co-incineration plant which may have significant negative effects on human health or the environment.*

[10] Pursuant to Article 20(2) of Directive 2010/75/EU:

> *Member States shall take the necessary measures to ensure that no substantial change planned by the operator is made without a permit granted in accordance with this Directive.*

[11] Zákon č. 76/2002 Sb., o integrované prevenci a o omezování znečištění, o integrovaném registru znečišťování a o změně některých zákonů (zákon o integrované prevenci) (Law No 76/2002 on integrated pollution prevention and restriction, on an integrated pollution register, and amending certain laws (the Integrated Prevention Law) implements Directive 2010/75/EU in the laws of the

Czech Republic. Pursuant to Paragraph 2(i) of the Integrated Prevention Law, a *'substantial change'* means:

> *A change in the use, method of operation, or scope of an installation that may have a significant adverse effect on human health or the environment; the following shall always constitute a substantial change*
>
> *1. A change in the use, method of operation, or scope of an installation if it in and of itself reaches the limits specified in Annex 1 to this Law;*

[12] Pursuant to Paragraph 7(1) of the Integrated Prevention Law, the following parties are always party to the proceedings concerning the **issue** of an integrated permit:

> *a) the operator of the installation;*
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> *b) the installation owner if not the same as the installation operator;*
>
> *c) the municipality in whose territory the installation is or is to be located;*
>
> …
>
> *e) civil associations, charitable organisations, employers' associations or chambers of commerce whose line of business is the promotion and protection of professional interests or public interests pursuant to special legislation, as well as municipalities or regions in whose territory the installation may have an environmental impact, provided that they report to the authority as parties in writing within 8 days of the day of the publication of a brief summary of data from the application pursuant to Paragraph 8.*

[13] Paragraph 19a of the Integrated Prevention Law regulates proceedings concerning changes in integrated permits. If a change to an installation *is not substantial*, the parties to the proceedings shall be, pursuant to Paragraph 19(4) of the Law, only the parties identified in Paragraph 7(1)(a) and (b), **[OR 4]**, i.e., the installation operator and owner. The decision concerning the issuance and change of an integrated permit is made by a regional authority, in Prague the City Hall. The Ministry of the Environment (the Defendant) is competent to decide on appeals against their decisions.

[14] Pursuant to Paragraph 3 of Zákon č. 100/2001 Sb., o posuzování vlivů na životní prostředí (Law No 100/2001 on environmental impact assessment), the following terms and definitions shall apply for the purpose of the Law:

> *c) territory concerned is the territory whose environment and population could be subject to a significant effect in the event of the execution of the project or plan;*

d) the self-governing territorial unit concerned is the self-governing territorial unit whose administrative district encompasses at least a part of the territory concerned;

…

i) the part of public concerned

…

2. A legal entity under private law whose line of business is, pursuant to its legal deed of establishment, environmental protection or protection of public health and whose main line of business is not enterprise or another gainful activity, which was established at least 3 years prior to the date of the publication of information concerning the follow-up proceedings referred to in Paragraph 9b(1) or prior to the date of the issuance of a decision pursuant to Paragraph 7(6), or which is supported by the signatures of at least 200 persons.

[15] Pursuant to Paragraph 9c(3) of the Environmental Impact Assessment Law:

If it reports to the administrative authority conducting the follow-up proceedings by a written submission within 30 days of the publication of information pursuant to Paragraph 9b(1), the following shall become parties to the follow-up proceedings:

a) the self-governing territorial unit concerned or

b) the part of the public concerned, as specified in the second subparagraph of Paragraph 3(i).

III. Analysis of the Question Submitted for a Preliminary Ruling

[16] In the present case, the Supreme Administrative Court examines whether a 'substantial change' of a plant pursuant to Article 3(9) of the Directive on Industrial Emissions means an extension of the period of waste disposal at a landfill by two years without the maximum approved dimensions or total potential capacity of the landfill changing at the same time.

[17] For the sake of clarity, let us add that, even though the vast majority of the Complainant's argumentation goes in that direction, the Supreme Administrative Court did not specifically examine in this case whether the extension of waste disposal at the landfill constitutes a 'project' as defined by the Environmental Impact Assessment Law (and the EIA Directive). Nevertheless, the Court of Justice has dealt with extensions of plant operation similar to that concerned in this case in terms of environmental impact assessment; by making a request for a preliminary ruling, the Supreme Administrative Court intends to clarify whether a

similar interpretation can apply even in cases of integrated prevention modifications.

[18] For the reasons presented below, the chamber of the Supreme Administrative Court concluded it was necessary to request the Court of Justice for a preliminary ruling.

[19] Court of Justice case-law has yet to examine the term ‘substantial change’ in Directive 2010/75/EU (or in directives preceding it).

[20] In *Brussels Hoofdstedelijk Gewest* the Court of Justice did, however, examine an extension of the operation of an airport that was not linked to any other work or intervention involving alterations to the physical aspect of the site, from the point of view of Directive 85/337/EEC. It ruled that an extension of the validity of the present permit **[OR 5]** cannot be considered to constitute a ‘project’ due to the non-existence of such work or interventions *(Brussels Hoofdstedelijk Gewest and Others*, C-275/09, paragraphs 20, 24, and 38). The Court of Justice has not yet departed from that interpretation. In its most recent case-law (interpreting 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), however, it emphasises that the interpretation is closely linked to the wording of Article 1(2)(a), first indent of the EIA Directive, according to which a ‘project’ means *the execution of construction works or of other installations or schemes* (comp. judgment in *Friends of the Irish Environment Ltd*, C-254/19, ECLI:EU:C:2020:680, paragraph 32, or in *Inter-Environnement Wallonie* and *Bond Beter Leefmilieu Vlaanderen*, C-411/17, ECLI:EU:C:2019:622, paragraph 62). The requirement of ‘works’ and ‘interventions’ involving alterations to the physical aspect of the site is therefore relevant for evaluating whether an activity constitutes a ‘project’.

[21] The Court of Justice confirmed the above when interpreting Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. The definition of the term ‘project’ [as used in Directive 85/337/EEC] is relevant for determining the scope of a similar term ‘project’ as used in Article 6(3) of the Directive, but only the definition of the term ‘project’ [in Directive 85/337/EEC] requires ‘works or interventions involving alterations to the aspect of the site’. Hence, the term ‘project’ [in Directive 92/43/EEC] (for which it is of the essence primarily whether it may have a ‘significant effect’ on the protected site) is broader than the term ‘project’ [in Directive 85/337/EEC] (*Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu*, Joined Cases C-293/17 and C-294/17, ECLI:EU:C:2018:882, paragraphs 59-66).

[22] In the case of Directive 2010/75/EU on industrial emissions, an approach similar to that taken to Directive 92/43/EEC could be taken. Article 3(9) of Directive 2010/75/EU provides a broad definition of the term ‘substantial change’ – it can be (any) change *in the nature or functioning, or an extension, of*

an installation, provided that it *may have significant negative effects on human health or the environment*. The definition does not explicitly require the 'substantial change' to be always connected to physical changes in the installation.

[23] Even though neither the maximum permitted dimensions nor the total capacity of the landfill is changing in the present case, waste will be brought in for an additional two years due to the extension of waste disposal at the landfill (strictly speaking, the landfill will not stay free of any physical changes, they will only fall within previously approved limits). The activity in and of itself constitutes an environmental intervention. As the City Court has already stated in this case, the integrated permit itself reckons with the adverse environmental impact of the landfill and sets conditions for its operation in terms of air protection (including emission limits) or in terms of ground and surface water protection. The environmental intervention will thus continue due to the extension of the time of waste disposal at the landfill.

[24] Furthermore, the objective of Directive 2010/75/EU is, pursuant to recital 12 and Article 1, to ensure a high level of protection of the environment *as a whole*. Hence, there is no reason why changes consisting merely of an extension of the duration of the operation of a plant (i.e., changes that do not concern the remaining maximum limits for the operation of the plant) should, *a priori*, be excluded from the definition of a 'substantial change' – such changes, too, can have a significant negative effects on human health or the environment, which is required by the definition set out in Article 3(9) of the directive on industrial emissions.

[OMISSIS]