Case C-535/18

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

Date of receipt:

16 August 2018

Referring court:

Bundesverwaltungsgericht (Federal Administrative Court, Germany)

Date of the decision to refer:

25 April 2018

Claimants:

IL and 12 additional claimants

Defendant:

Land North Rhine-Westphalia

Subject matter of the case in the main proceedings

Legal protection against public building projects

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Must Article 11(1)(b) 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 — hereinafter referred to as: EIA Directive — be interpreted as meaning that a provision of national law is consistent with it, according to which a claimant who is not recognised as an environmental association is entitled to apply for the annulment of a decision due to a procedural defect only if the procedural defect has denied the claimant itself

the opportunity — as provided for by statute — of participating in the decision-making process?

2. (a) Must Article 4(1)(a)(i) to (iii) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, most recently amended by Article 1 of Directive 2014/101/EU of the Commission of 30 October 2014 (OJ L 311 p. 32), — hereinafter referred to as: Water Framework Directive (WFD) — be interpreted as meaning that it does not only include substantive criteria for examination but, in addition, specifications regarding the regulatory approval procedure?

(b) If Question (a) is answered in the affirmative,

must the involvement of the public pursuant to Article 6 EIA Directive always relate to the documents regarding the assessment under water law in the aforementioned sense, or is it permissible to differentiate with regard to the time of the creation of the document and its complexity?

3. Must the term ‘deterioration of the status of a body of groundwater’ in Article 4(1)(b)(i) WFD be interpreted as meaning that a deterioration of the chemical status of a body of groundwater exists as soon as at least one environmental quality standard for one parameter is exceeded for project-related reasons and that irrespective of that, if the relevant threshold for one pollutant has already been exceeded, any additional (measurable) increase of the concentration constitutes a deterioration?

4. (a) Taking into account its binding nature (Article 288 TFEU) and the guarantee of effective legal protection (Article 19 TEU), must Article 4 WFD be interpreted as meaning that all members of the public concerned by a project who assert that the approval of a project breaches their rights are also entitled to bring judicial proceedings asserting breaches of the ban on the deterioration of water and the requirement for improvement?

(b) If Question (a) is answered in the negative —

taking into account its objective — must Article 4 WFD be interpreted as meaning that at least such claimants who maintain domestic wells for their private water supply in geographical proximity to the planned road are entitled to bring judicial proceedings asserting breaches of the ban on the deterioration of water and the requirement for improvement?

Provisions of EU law cited

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, in particular Articles 6 and 11

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, in particular Article 4

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in particular Article 6

National legislation cited

Wasserhaushaltsgesetz (German Water Resources Act, 'the WHG'), in particular Paragraphs 27 and 47

Grundwasserverordnung (German Regulation on the Protection of Groundwater, 'the GrwV'), in particular Paragraphs 7 and 9

Gesetz über die Umweltverträglichkeitsprüfung (German Environmental Impact Assessment Act, 'the UVPG'), in particular Paragraphs 6 and 9

Verwaltungsverfahrensgesetz (German Administrative Procedure Act, 'the VwVfG'), in particular Paragraphs 46 and 75

Verwaltungsgerichtsordnung (German Regulations Governing Administrative Courts, 'the VwGO'), in particular Paragraphs 42 and 113

Umweltrechtsbehelfsgesetz (German Environmental Appeals Act, 'the UmwRG'), in particular Paragraphs 1 to 4

Brief summary of the facts and procedure

1 The Claimants challenge the decision of the Bezirksregierung (regional government) Detmold (hereinafter referred to as: Regulatory Authority) of 27 September 2016 which, following an application by the Landesbetrieb Straßenbau Nordrhein-Westfalen (roadbuilding agency for the German state of North Rhine-Westphalia) (hereinafter referred to as: Project Developer), approves the plan for the new construction of a motorway feeder road near Bielefeld, Germany (known as a 'Planfeststellungsbeschluss', i.e. a planning approval decision for regionally-significant building projects which is used to decide on the admissibility of the project under all aspects of administrative law). The road section affected by this decision is approximately 3.7 km long. The road construction project falls within the scope of application of Directive 2011/92.

2 The Claimants are private individuals who own plots of land in the area affected by the plan. Eight Claimants are at risk of having their properties expropriated, i.e. their land is to be used for the project itself to different degrees or for compensatory measures under nature conservation laws. Three of the Claimants who are at risk of expropriation are at risk of losing their homes, others claim to be at risk of losing their livelihoods. In some cases the Claimants who are at risk

of expropriation fear that their land will be flooded. Ten Claimants have a domestic well for their private water supply; they fear a contamination of the water. Almost all of the Claimants cite noise issues.

3 Between 30 August and 29 September 2010, the planning documents were on public display. The notice of 21 August 2010 issued prior to the public display referred to a number of documents but not to the documents regarding noise protection and the planned drainage system. All Claimants raised objections.

4 Following an analysis of the outcomes of the preliminary hearing, the Project Developer decided various amendments to the plan which mainly concerned drainage. The latest plan is to channel the rainwater that collects on the road surfaces into the groundwater in a particular section of the project. As for the rest, the road will be drained in three places by channelling the water into certain defined bodies of water.

5 Between 19 May and 18 June 2014, the amended planning documents were on public display. In the prior notice issued on 10/11 May 2014, reference was again made to various documents but not to the amended water-engineering-related examination. All Claimants again raised objections.

6 Together with the contested planning approval decision, the Regulatory Authority also granted the Project Developer the permission — which is revocable at any time — to channel the rainwater that collects on the road surfaces into three bodies of water and/or into the groundwater. The decision contains a large number of ancillary provisions which are meant to ensure water protection.

7 Prior to the issue of the planning approval decision there was no documented assessment of the requirements of Article 4 of Directive 2000/60 or Paragraphs 27 and 47 WHG, which transposes that provision into German law. The planning approval decision does, however, state in summary that the project was not likely to result either in a deterioration of the status of a body of surface water or in a deterioration of a body of groundwater. According to the planning approval decision, the project therefore did not breach Article 4 of Directive 2000/60 in conjunction with Paragraphs 27 and 47 WHG.

8 Only in the course of the judicial proceedings did the Regulatory Authority issue further instructions regarding the assessment of the ban on the deterioration and the requirement for improvement and submitted a document in that regard without, however, formally declaring it part of the contested planning approval decision. In this document, the affected bodies of water are described and the consequences of the project on its quality components are assessed. In order to justify its approach the Regulatory Authority argued that an assessment of the bodies of water had already been conducted during the planning approval decision procedure; this had not been documented, however.

9 On the basis of the hearing on 17 and 18 April 2018, the Bundesverwaltungsgericht (Federal Administrative Court) has reached the

conclusion that the contested planning approval decision was based on an error in weighing-up as regards the choice of route, which will lead to a finding of unlawfulness and unenforceability of the planning approval decision. This error was pointed out in a separate decision.

Brief summary of the basis for the reference

10 The questions submitted are relevant to the decision although the Bundesverwaltungsgericht (Federal Administrative Court) already considers the decision to be unlawful on the basis of the aforementioned error in weighing-up. Under German administrative procedure law, such error does not lead to an annulment of the decision, but the decision can be annulled in separate proceedings. That is why the Bundesverwaltungsgericht (Federal Administrative Court) must not leave the questions referred to the Court of Justice unanswered but must comprehensively assess the lawfulness of the planning approval decision.

11 Question 1:

The Bundesverwaltungsgericht (Federal Administrative Court) considers the interpretative notices of 21 August 2010 and 10/11 May 2014 to be faulty because, contrary to the requirement under national law following EU law, the public was not sufficiently informed about the documents regarding the environmental impact of the project which have a bearing on the decision. The first notice did not refer to the documents on the topics of noise and water; the second notice did not refer to the amended water-engineering-related document. Moreover, the text of the notice gives the misleading impression that it includes a complete list of all documents.

12 Under national law, these procedural defects do not, however, result in the annulment of the planning approval decision or in it being declared unlawful given that, in the view of the court, they have clearly not influenced the substance of the decision. If — as is the case here — an individual claimant is bringing judicial proceedings it only matters whether *he himself* has been denied the opportunity to participate in the decision-making process; such claimant cannot base the proceedings on the impairment of the procedural rights of other members of the public concerned.

13 In the case of environmental organisations, the legal situation is different. They may rely on the impairment of the procedural rights of the public concerned.

14 The Bundesverwaltungsgericht (Federal Administrative Court) considers this provision to be consistent with Article 11(1)(b) of Directive 2011/92 for the following reasons:

15 In the judgment of 7 November 2013, Gemeinde Altrip and Others (C-72/12, EU:C:2013:712, paragraph 49) the Court set out that not every procedural defect

will necessarily have consequences that can possibly affect the purport of the contested decision. The objective of the Directive of giving the public concerned wide access to justice would therefore not be compromised if, under the law of a Member State, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.

16 Where the Court has pointed out, by way of limitation, that the court deciding on the appeal must not in any way make the burden of proof fall on the applicant, that the court must rely on the evidence provided by the competent authorities and on the case-file documents submitted and that lastly the seriousness of the defect invoked must be taken into account (cf. paragraph 52 et seq. of the aforementioned judgment), the German legislature has taken this into account by enacting differentiated provisions in the Umweltrechtsbehelfsgesetz (German Environmental Appeals Act).

17 According to the Bundesverwaltungsgericht (Federal Administrative Court), the requirement of the Court of Justice to ascertain, in particular, 'whether that defect has deprived the *public concerned* of one of the guarantees introduced with a view to allowing it ... to have access to information and to be empowered to participate in decision-making' (paragraph 54 of the aforementioned judgment; emphasis added), does not preclude the German provision. Instead, this provision covers the option which is expressly granted in Article 11(1)(b) of Directive 2011/92 for statutory provisions of a Member State to require the impairment of a right. In this context, the 'public concerned' for these purposes is therefore only the individual claimant and not the entire potential public.

18 This view is also based on the case-law of the Court of Justice according to which a Member State is entitled to require that the annulment of an administrative decision by the competent court requires the breach of a subjective right on the part of the claimant. This restriction, however, must not be applied to environmental organisations. Those organisations must necessarily be able to rely in legal proceedings on the rules of national law implementing EU environmental law and the rules of EU environmental law having direct effect (judgment of 15 October 2015, Commission v Germany, C-137/14, EU:C:2015:683, paragraph 32 and 92).

19 Question 2:

(a) In the present case the Regulatory Authority has carried out a transparent documentation of the assessment of the ban on the deterioration of water and the requirement for improvement in a transparent manner only in the course of the judicial proceedings. The question arising in that regards is whether Article 4(1)(a)(i) to (iii) of Directive 2000/60, which according the case-law of the Court of Justice (judgment of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland, C-461/13, EU:C:2015:433) is binding, includes substantive criteria for examination as well as specifications regarding the regulatory approval

procedure. Specifically it must be determined whether it only depends on whether the statement in the planning approval decision that the project did not breach Article 4 of Directive 2000/60 in conjunction with Paragraphs 27 and 47 WHG proves to be *ultimately* accurate even if certain documents were only submitted during the judicial proceedings, or whether Directive 2000/60 requires that the ban on deterioration and the requirement for improvement is assessed prior to the approval decision in a transparent official procedure, i.e. a procedure that is open to scrutiny on the basis of corresponding documentation.

20 In the context of assessing the implications within the meaning of Directive 92/43, the Bundesverwaltungsgericht (Federal Administrative Court) — based on the case-law of the Court of Justice (cf. by way of example the judgment of 7 September 2004, Waddenvereniging and Vogelsbeschermingvereniging, C-127/02, EU:C:2004:482, paragraph 53 et seq.) — in its settled case-law assumes that Article 6(3) of this Directive contains certain requirements concerning the approval procedure. According to this case-law, the competent authority must not leave the first assessment of the implications until the judicial proceedings or document its scientific findings for the first time during such proceedings.

21 The Bundesverwaltungsgericht (Federal Administrative Court) tends to apply these requirements, at least in principle, to the assessment of the ban on the deterioration of water in order to ensure effective judicial protection and to avoid overloading the judicial proceedings.

22 (b) In relation to sub-question 2(b), the Bundesverwaltungsgericht (Federal Administrative Court) considers a differentiated solution to be appropriate, which differentiates both according to the time when the document is created and the complexity of the water-related questions.

23 If the Project Developer creates a document that includes an assessment of the requirements laid down in Directive 2000/60 and submits this to the Regulatory Authority together with the application for approval, this is likely to usually constitute one of the ‘main reports’ (Article 6(3)(b) of Directive 2011/92) to which the involvement of the public applies.

24 In cases where the water-related document has been created only due to the judgment of the Court of Justice of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland (C-461/13, EU:C:2015:433), in ongoing approval proceedings and after involvement of the public, the Bundesverwaltungsgericht (Federal Administrative Court) has answered the question of whether a further involvement of the public was required by differentiating whether this document contains a new examination of the environmental impact that significantly exceeds the previous examination.

25 In other contexts, too, this court has decided that a further involvement of the public was not required if the amended documents are limited to minor changes

and a more in-depth examination of any impacts, without changing the overall concept of the plan or arriving at fundamentally different assessment results. Otherwise the approval procedure, which is regularly aimed at safeguarding significant public interests, would be unreasonably delayed.

26 Question 3:

The Bundesverwaltungsgericht (Federal Administrative Court) assumes that the ban on deterioration is also binding in relation to groundwater (Article 4(1)(b)(i) to (ii) of Directive 2000/60) and that the remarks made by the Court of Justice in the judgment of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland (C-461/13, EU:C:2015:433, paragraph 43 et seq.) regarding the deterioration of the status of a body of surface water are transferable to groundwater. Moreover, the Bundesverwaltungsgericht (Federal Administrative Court) assumes that the point of reference of the assessment of the ban on deterioration is the body of groundwater *as a whole* given that no. 2.4.5 of Annex V to Directive 2000/60 bases the 'interpretation and presentation of groundwater chemical status' on this. Changes that are limited to certain locations are therefore not relevant provided that they have no effect on the whole body of groundwater.

27 The Court of Justice has not yet — at least not expressly — clarified whether the remarks made in the judgment of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland (C-461/13, EU:C:2015:433) are transferable with regard to the assessment criteria. In paragraph 69 of this judgment, the Court of Justice held that there is a deterioration of the status of a body of surface water within the meaning of Article 4(1)(a)(i) of Directive 2000/60 as soon as the status of at least one of the quality elements, within the meaning of Annex V, falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. If, however, the quality element concerned, within the meaning of that Annex, is already in the lowest class, any deterioration of that element constitutes a deterioration of the status of a body of surface water.

28 This assessment criterion cannot readily be transferred to groundwater. Contrary to bodies of surface water, for which Directive 2000/60 provides an ecological quality ratio scale with five classes (cf. Annex V no. 1.4.1 iii of that Directive), for groundwater it only differentiates between good and poor in relation to its quantitative status and chemical status, respectively (cf. Annex V no. 2.2.4 and no. 2.4.5).

29 Taking into account the objective of the Water Framework Directive as determined by the Court of Justice in its judgment of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland (C-461/13, EU:C:2015:433) — achieving a 'good status' of all bodies of water — it would seem fair to say that a deterioration of the chemical status of a body of groundwater exists as soon as at least one environmental quality standard for one parameter is exceeded. As regards pollutants, however, which already exceed the relevant threshold as they currently

are, any further (measurable) increase in the concentration constitutes a deterioration.

30 In the present case, it is anticipated that no deterioration will be found to exist. This is because the body of groundwater affected by the project is classified as good as regards its quantitative status and poor as regards its chemical status. The latter is due to the thresholds of the substances nitrate and ammonium being exceeded for agricultural reasons. The other relevant thresholds are met. Due to the use of road salt in winter the project would lead to a minor increase in chloride content without, however, resulting in the threshold being exceeded.

31 Question 4:

In the view of the Bundesverwaltungsgericht (Federal Administrative Court), questions 4(a) and (b) must be answered in the negative, contrary to different views held in academic writing.

32 a) In the view of the Bundesverwaltungsgericht (Federal Administrative Court), EU law does not require Member States to structure their national law in a way that all members of the public concerned by a project who claim a breach of their own rights are also entitled to bring judicial proceedings asserting breaches of the ban on the deterioration of water and the requirement for improvement.

33 Under German law, an administrative court will only annul an administrative decision if it is unlawful and breaches a claimant's own rights. Accordingly, while a claimant may bring judicial proceedings against a planning decision by asserting a faulty weighing-up of his own protected interests, he may not demand a weighing-up process and planning that is fault-free in every way, including objectively.

34 While, in cases where the property of an individual claimant is concerned because he is threatened with expropriation, he may — in view of the constitutionally protected property right (Article 14 of the German constitution) — principally demand a full judicial review of the planning approval decision, i.e. including an incorrect application of objective law or an incorrect weighing-up of public interests. This does not, however, apply if even an error-free consideration of these matters would not result in a change of planning in the area of the claimant's plot of land.

35 In contrast to that, recognised environmental associations may assert legal remedies in accordance with the provisions of the German Environmental Appeals Act in the context of their areas of responsibility as per their statutes without having to assert a breach of their own rights. These legal remedies are justified on the merits if there is a breach of objective law.

36 Against this background, the Bundesverwaltungsgericht (Federal Administrative Court) is of the opinion that individual claimants whose real property is not affected are, in principle, not entitled to assert breaches of the ban on the

deterioration of water and the requirement for improvement. In accordance with German legal understanding the provisions of Paragraphs 27 and 47 WHG, which transpose Article 4 of Directive 2000/60, only protect public interests and do not confer any subjective rights.

37 In the view of the Bundesverwaltungsgericht (Federal Administrative Court) there are good arguments in favour of the fact that EU law does not require any deviation from this legal understanding. This view is based principally on the case-law of the Court of Justice, according to which the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings although such a limitation cannot be applied as such to environmental protection organisations (judgment of 12 May 2011, Bund für Umwelt und Naturschutz, Landesverband Nordrhein-Westfalen, C-115/09, EU:C:2011:289, paragraph 45).

38 Even though in its judgment of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation (C-664/15, EU:C:2017:987, paragraph 34) the Court of Justice has set out that the practical effectiveness of Directive 2000/60 and its aim of protecting the environment require that 'individuals or, where appropriate, a duly constituted environmental organisation' be able to rely on it in legal proceedings, in the view of the Bundesverwaltungsgericht (Federal Administrative Court) the alternative as highlighted by use of the word 'or' is evidence for the fact that Members States have a broad scope for policy-making in that regard. Such scope would seem to be exceeded only if environmental organisations are also precluded from appealing the decision in question.

39 Similarly, the Bundesverwaltungsgericht (Federal Administrative Court) understands the remarks made by the Court of Justice regarding the guarantee of effective legal protection provided for in Article 19(1) TFEU and Article 47 of the Charter of Fundamental Rights and also in Article 9(3) of the Aarhus Convention to mean that environmental organisations must not be denied the opportunity to have compliance with legal provisions protecting the public interest reviewed (cf. judgment of the Court of Justice of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation, C-664/15, EU:C:2017:987, paragraph 35 et seq. and 45 et seq.).

40 The judgment of the Court of Justice of 8 November 2016, Lesoochranárske zoskupenie VLK (C-243/15, EU:C:2016:838) also only concerns the legal position of recognised environmental organisations.

41 In the view of the Bundesverwaltungsgericht (Federal Administrative Court), the mere fact that all members of the public concerned — same as the public generally — rely on drinking water that is fit for human consumption does not result in any additional rights for individuals to bring judicial proceedings with regard to Article 4 of Directive 2000/60.

42 True, this Directive is intended to guarantee, inter alia, the supply of drinking water and public health which means that, in all cases where non-implementation of the measures required by a directive could endanger human health, the person immediately concerned must be in a position to rely on mandatory rules in order to request a judicial review of whether the authority which has approved a project has complied with its obligations under Article 4 of Directive 2000/60 (judgments of the Court of Justice of 12 December 1996, Commission/Germany, C-298/95, EU:C:1996:501, paragraph 16, of 25 July 2008, Janecek, C-237/07, EU:C:2008:447, paragraph 38, of 8 November 2016, Lesoochranárske zoskupenie VLK, C-243/15, EU:C:2016:838, paragraph 44, and of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation, C-664/15, EU:C:2017:987, paragraph 34).

43 The conditions for what constitutes concern and the associated need for recourse to judicial protection has, however, neither been defined in Directive 2000/60 nor in previous case-law of the Court of Justice. Member States have a broad scope for policy-making in that regard. In particular, the national legislature is entitled to confine the rights whose infringement may be relied on by an individual in legal proceedings contesting a decision to individual public-law rights, that is to say, to individual rights which, under national law, can be categorised as individual public-law rights (judgments of the Court of Justice of 16 April 2015, Gruber, C-570/13, EU:C:2015:231, paragraph 40, and of 15 October 2015, Commission/Germany, C-137/14, EU:C:2015:683, paragraph 32 and 33). It follows from the foregoing that members of the public concerned who obtain their drinking water from the public water supply are not ‘directly’ concerned (cf. Judgment of the Court of Justice of 25 June 2008, Janecek, C-237/07, EU:C:2008:447, paragraph 39) in the sense that under EU law they have to have the mandatory right to bring judicial proceedings for breaches of the ban on the deterioration of water and the requirement for improvement.

44 (b) In the view of the Bundesverwaltungsgericht (Federal Administrative Court), individual claimants who maintain domestic wells for their private water supply in geographical proximity to the planned road and who fear a deterioration of such wells due to road surface water seeping away must, in accordance with Article 4 of Directive 2000/60, not be given the mandatory right to base their claims on possible breaches of the ban on the deterioration of water or the requirement for improvement. These claimants are sufficiently protected by national law

45 Given that, in accordance with settled case-law of the Bundesverwaltungsgericht (Federal Administrative Court), they may bring judicial proceedings against the water permit itself provided that they are affected by this in a qualified and individualised way. This means that, independently of EU law, they may claim that the permit poses a threat to the drinking water quality of the groundwater pumped up by their domestic wells.

46 If Article 4 of Directive 2000/60 must be interpreted as meaning that individual owners of a domestic well may assert a breach of the ban on deterioration and the

requirement for improvement under EU law, he would only have this right to the extent to which he is affected in each individual case. Accordingly, he would not just have to be affected by the project itself but, in addition, specifically by the (alleged) breach of the ban on deterioration and the requirement for improvement.

47 A claimant would be affected in this way if, as a result of a failure to comply with the provisions of Directive 2000/60, his health was threatened. He would not, however, be able to rely on compliance with the ban on deterioration and the requirement for improvement in any other way, independently of the health risk.