

Case C-216/24

Request for a preliminary ruling

Date lodged:

20 March 2024

Referring court:

Tribunal Superior de Justicia de Galicia (Spain)

Date of the decision to refer:

28 February 2024

Applicant:

Asociación Autónoma Ambiental e Cultural Petón do Lobo

Defendants:

Dirección Xeral de Planificación Enerxética e Recursos Naturais

Eurus Desarrollos Renovables, S. L. U.

Asociación Eólica de Galicia (EGA)

T. S. X. GALICIA CON/AD SEC. 3

(HIGH COURT OF JUSTICE, GALICIA, CHAMBER FOR ADMINISTRATIVE LITIGATION, SECTION 3)

003 – A CORUÑA

[...] [identification of the court, the proceedings, the parties and the parties' representatives]

ORDER

[...] [composition of the court]

In A Coruña, on the twenty-eighth day of February of the year two thousand and twenty-four.

FACTUAL BACKGROUND

FIRST.- An action at law having been brought by the procedural representatives for the environmental association ‘Petón do Lobo’ against the implied decision dismissing the administrative appeal which that association lodged against the decision of the director xeral de Planificación Enerxética e Recursos Naturais de la Vicepresidencia Primeira e Consellería de Economía, Empresa e Innovación (Director-General of Energy Planning and Natural Resources of the Office of the First Vice-President and Regional Department of Economic Affairs, Enterprise and Innovation) of 30 June 2022 granting the company ‘Eurus Desarrollos Renovables, S. L. U.’ prior administrative authorisation and a construction permit for the installations relating to the ‘A Raña III’ wind farm project, situated in the municipal district of Mazaricos (A Coruña), counsel for the parties to the dispute have lodged their application, defence and pleadings.

SECOND.- At the end of the hearing, an order was made to stay the proceedings pending a preliminary ruling on questions the answers to which are necessary to the resolution of the dispute.

LEGAL BASES

SOLE RECITAL.- So far as the judgment to be given on the dispute is concerned, there are doubts as to the interpretation of Community law, in particular Article 6(3) 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 – partially amended by Directive 2014/52/EU of 16 April 2014 – which, for the purposes of the present case, was transposed into Spanish legal system by the following laws:

1.- Ley estatal 27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente (State Law 27/2006 of 18 July 2006 regulating the rights of access to information, public participation and access to justice in environmental matters) [Articles 2(2), 3(2)(e) and 16(2)]; published in Boletín Oficial del Estado (Spanish Official State Gazette) No 171 of 19 July 2006.

2.- Ley estatal 21/2013, de 9 de diciembre, de evaluación ambiental (State Law 21/2013 of 9 December 2013 on environmental assessment) (Articles 36 to 38); published in Boletín Oficial del Estado (Spanish Official State Gazette) No 296 of 11 December 2013.

3.- Ley autonómica 8/2009, de 22 de diciembre, por la que se regula el aprovechamiento eólico en Galicia y se crean el canon eólico y el Fondo de Compensación Ambiental (Autonomous Community Law 8/2009 of 22 December 2009 regulating the use of wind energy in Galicia and creating the wind energy tax and the Environmental Compensation Fund) (Articles 33 and 34); published in Diario Oficial de Galicia (Official Journal of Galicia) No 252 of 29 December 2019.

In accordance with the foregoing, and pursuant to the provisions of Information Note 2009/C 297/01 on references from national courts for a preliminary ruling, published in the Official Journal of the European Union of 5 December 2009, concerning the powers conferred on the Court of Justice of the European Union in Article 19(3)(b) of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union, this reference for a preliminary ruling is made on the basis of the following paragraphs:

SUBJECT MATTER OF THE DISPUTE

1. Decision by way of judgment on the legality or otherwise of the decision of the director xeral de Planificación Enerxética e Recursos Naturais de la Vicepresidencia Primeira e Consellería de Economía, Empresa e Innovación (Director-General of Energy Planning and Natural Resources of the Office of the First Vice-President and Regional Department of Economic Affairs, Enterprise and Innovation) of 30 June 2022 granting the company ‘Eurus Desarrollos Renovables, S. L. U.’ prior administrative authorisation and a construction permit for the installations relating to the ‘A Raña III’ wind farm project, situated in the municipal district of Mazaricos (A Coruña). To that end, it falls to be decided whether the domestic legislation (at State and Autonomous Community level) is compatible with the requirement, laid down in Article 6(3) 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, for the administrative authority involved to offer the persons concerned a hearing process following the issue of the sectoral reports.

ESTABLISHED FACTS

2. On 22 December 2017, the company ‘Eurus Desarrollos Renovables, S. L.U.’ asked the Galician Autonomous Community authority to grant prior administrative authorisation and a construction permit for the ‘A Raña III’ wind farm installations situated in the municipal district of Mazaricos (A Coruña), and, to that end, submitted a number of documents including an environmental impact study.

3. When the first preliminary reports had been drawn up, the procedure was progressed to a public information process lasting for 30 days, the results of which generated a number of representations.

4. At the same time, sectoral reports were obtained from the bodies competent in matters of forestry, water, natural and cultural heritage, tourism, health, electricity and aviation safety, among others.

5. When the environmental proceedings had been completed, the Dirección Xeral de Calidade Ambiental, Sostibilidade e Cambio Climático (Directorate General for Environmental Quality, Sustainability and Climate Change), on 17 June 2022, drew up the Environmental Impact Statement.

6. Finally, after the developer had submitted the technical documentation requested of it, the Dirección Xeral de Planificación Enerxética e Recursos Naturais de la Vicepresidencia Primeira e Consellería de Economía, Empresa e Innovación (Directorate General for Energy Planning and Natural Resources of the Office of the First Vice-President and Regional Department of Economic Affairs, Enterprise and Innovation), on 30 June 2022, granted it prior administrative authorisation and construction permit for the installations relating to the ‘A Raña III’ wind farm project.

7. That decision was challenged by way of administrative appeal by the environmental association ‘Petón do Lobo’, but its appeal was not adjudicated upon.

8. Against the implied decision dismissing the administrative appeal, the aforementioned environmental association brought before this Chamber of the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain), an action at law by which it sought the annulment of the decision of 30 June 2022 granting the authorisation and permit mentioned above. One of the grounds for nullity put forward in the application was the reasoning applied by this Chamber in its judgment of [21] January 2022 (PO [ordinary proceedings] 7419/2020), concerning a case in which, as in this instance, the persons concerned had not been offered a hearing process after the issue of the sectoral reports, and, for that reason, the decision authorising the construction and operation of the wind farm at issue was annulled. That judgment was later set aside by the judgment of the Tribunal Supremo (Supreme Court, Spain) of 21 December 2023 (appeal in cassation 3303/2022).

APPLICABLE NATIONAL LEGISLATION

9. Article 2(2) of Law 27/2006 of 18 July 2006 regulating the rights of access to information, public participation and access to justice in environmental matters, which provides that ‘persons concerned’ means:

‘(a) Any natural or legal persons in the case of whom or which any of the circumstances provided for in Article 31 of Law 30/1992 of 26 November 1992 on the law governing public administrative authorities and the common administrative procedure is present’ (this must now be construed as referring to Article 4 of Law 39/2015 of 1 October 2015 on the common administrative procedure of public administrative authorities).

b) Any not-for-profit legal persons that meet the requirements laid down in Article 23 of this Law’.

10. Article 3(2)(e) of Law 27/2006, which recognises the right *‘of effective and actual participation, in accordance with the provisions of the applicable legislation, in the administrative procedures conducted with a view to granting the authorisations provided for in the legislation on the prevention and integrated control of pollution, granting the administrative permissions provided for in the*

legislation on genetically modified organisms, and issuing the environmental impact statements provided for in the legislation on environmental impact assessment, and in the planning processes provided for in the legislation on water and the legislation on the assessment of the effects of plans and programmes on the environment’.

11. Article 16(2) of Law 27/2006, which compels public administrative authorities that conduct procedures relating to the environment to determine *‘sufficiently in advance so as to enable them to participate effectively in the process, which members of the public qualify as ‘persons concerned’ for the purposes of participating in the procedures referred to in the previous paragraph’* (inter alia, the procedures for expressing comments and opinions that may be taken into account).

12. Articles 36 and 37 of Law 21/2013, concerning, respectively, the process for informing the public about the project and the study into its impact on the environment, and the simultaneous consultation *‘of the public administrative authorities affected and the persons concerned on the possible significant effects of the project’*, both of which must take place within a period of no less than thirty working days.

13. Article 37(2) of Law 21/2013, which lists the reasoned reports which must compulsorily be requested by the competent body, these being:

‘(a) Report from the body responsible for environmental matters in the Autonomous Community in which the project is geographically located.

b) Report on cultural heritage, where appropriate.

c) Report from the bodies responsible for water planning and water assets in the public domain, and for water quality, where appropriate.

d) Report on maritime and land assets in the public domain, and marine strategies, where appropriate, [...].

e) Preliminary report from the body responsible for radiological impact, where appropriate.

f) Report from the bodies responsible for the prevention and management of risks arising from serious accidents or disasters, where applicable.

g) Report on the compatibility of the project with water planning or the planning of subdivisions of marine regions and subregions, where appropriate.

h) Report from the Ministry of Defence in the event that the project impacts on areas declared to be of interest to national defence and on land, buildings and installations, including the protection zones thereof, earmarked for national defence. [...].

i) *Report from the bodies responsible for public health, where appropriate.*

The Autonomous Communities, acting within the scope of their powers, may make any report other than those mentioned above compulsory’.

14. Article 38 of Law 21/2013, concerning the case where the project or environmental impact study is amended and a new public information and consultation process is triggered as a result. Paragraphs (1) and (2) thereof provide as follows:

‘1. Within a maximum period of thirty working days from the end of the processes of informing the public and consulting the public administrative authorities affected and the persons concerned, the competent body shall send the reports and representations received to the developer so that the latter may take these into consideration in the drafting of any new version of the project and in the environmental impact study.

2. If, as a result of the process of informing the public and consulting the public administrative authorities affected and the persons concerned, the developer makes amendments to the project or to the environmental impact study that entail significant environmental effects other than those originally envisaged, a new public information and consultation process shall be conducted within the time limits laid down in Articles 36 and 37, and, in any event, before the environmental impact declaration is drawn up’.

15. Article 33 of Law 8/2009 on conduct of the procedure for obtaining prior authorisation and a construction permit for wind farms in the Autonomous Community of Galicia, in particular paragraphs 10, 11, 12 and 15 thereof, which provide as follows:

‘10. In cases involving ordinary environmental assessment, the processing unit shall release the delivery project and the environmental impact study for public information at the same time, by publishing them in the “Diario Oficial de Galicia” (Official Gazette of Galicia) and on the website of the Autonomous Community ministry competent in matters of energy. [...]

11. During the aforementioned period, any persons, entities or bodies concerned may make as many representations as they deem appropriate or ask to examine the project file and technical documentation, or any such part thereof as may be agreed. The representations so made shall be notified to the person applying [for prior authorisation and a construction permit] so that the latter may respond to the content of those representations and communicate that response to the processing unit within a maximum period of fifteen days.

12. At the same time as conducting the public information process, the processing unit shall conduct the process for hearing and consulting the public administrative authorities affected and the persons concerned, in so doing requesting at least the aforementioned mandatory reports for the purposes of

environmental assessment and giving the municipalities affected an opportunity to be heard. [...]

15. The processing unit shall send the developer the reports and representations received for its consent and/or consideration in the drafting of the delivery project and the environmental impact study, so that it may make the amendments and adjustments necessary to each of those documents. The developer shall have a maximum period of one month to submit the final modified documents in order to progress the procedure. [...]

16. Finally, Article 34(1) of Law 8/2009, which provides that, ‘once the administrative authorisation procedure has been conducted and the applicant has provided proof of access and acquisition of a connection point to the transmission or distribution grid, as appropriate, the directorate general competent in energy matters shall issue a decision on the grant of prior administrative authorisation for the wind farm and the issue of a permit for its construction within a maximum period of two months from receipt of all documentation by the body responsible for adjudicating on the procedure’.

RELEVANT COMMUNITY PROVISIONS

17. Article 1(2) of Directive 2011/92/EU, in particular points (b), (d) and (e) thereof, which defines ‘developer’, ‘public’ and ‘public concerned’ as follows:

‘b) “developer” means the applicant for authorisation for a private project or the public authority which initiates a project; [...]

d) “public” means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

e) “public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest; [...] [repetition of the final part of the sentence]’.

18. Article 6 of Directive 2011/92/EU, as partially amended by Directive 2014/52/EU, in particular paragraphs 1, 2, 3(b), 4, 5 and 7 (new) thereof, which provide as follows:

‘1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent, taking into account, where appropriate, the cases referred to in Article 8a(3). To that end, Member States

shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. [...]

2. In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned: [...] (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article; [...]

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public, for example by bill posting within a certain radius or publication in local newspapers, and for consulting the public concerned, for example by written submissions or by way of a public inquiry, shall be determined by the Member States. [...]

7. The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days’.

REASONING OF THIS COURT WITH RESPECT TO THE
INTERPRETATION OF DIRECTIVE [2011/92/EU]

19. This court takes the view that Article 6 of Directive 2011/92/EU compels bodies adjudicating on applications for development consent having environmental effects to complete three processes beforehand; the first two – for which no timeframe is prescribed – are to give members of the general public a hearing to enable them to express their views on the project and to obtain sectoral reports from the bodies competent in various fields; and the third would be carried out afterwards, inasmuch as it is to notify the main sectoral reports to the persons concerned (a group comprised not only of the developer) so that they may make representations before a decision is taken.

20. It also takes the view that Articles 36, 37 and 38 of State Law 21/2013 and Articles 33 and 34 of Galician Autonomous Community Law 8/2009 meet the requirements to give the general public a hearing and to obtain sectoral reports, but neglect to provide for these to be notified to the persons concerned so that they may make their representations. Those articles provide only for the reports and

representations to be referred to the developer and, should the developer make any amendments to its project that have new environmental effects, for a new public information and consultation process to be conducted, but they make no provision for actually giving the persons concerned a hearing to enable them to express their views on the main sectoral reports, as Article 6(3) of Directive 2011/92/EU requires.

ARGUMENTS OF THE PARTIES

21. The applicant refers to the findings contained in the judgment of this Chamber for Administrative Litigation of the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain) of 21 January 2022 (given in PO [ordinary proceedings] 7419/2020), where, in a similar situation and on the basis of the same State and Autonomous Community legislation, this Chamber held that that legislation was in breach of the requirement laid down in Article 6(3) of Directive 2011/92/UE, which had a ‘clear effect’ inasmuch as it called for the main sectoral reports issued to be made available to the persons concerned so as to enable them to exercise their right under paragraph 4 of that article to express comments and participate in the process of arriving at a decision on the application for development consent for the project before this is adopted.

22. Conversely, the co-defendants (the Autonomous Community Administration of Galicia and the developer) rely on the judgment of the Chamber for Administrative Litigation of the Tribunal Supremo (Supreme Court, Spain) of 21 December 2023 (appeal in cassation 3303/2022), which set aside the judgment of 21 January 2022 on the ground that Directive 2011/92/EU offers Member States various procedural options as to when the public should be informed and the authorities consulted, and State Law 21/2013 had respected this.

POINT OF VIEW OF THE ADJUDICATING BODY

23. In the view of this court, the obligations which Article 6(3) of Directive 2011/92/EU imposes on Member States are clear: they must ensure that the main sectoral reports are made available to the persons concerned so as to enable them to exercise their right under paragraph 4 of that article to express their comments before the decision on environmental effects is taken, for which they must be given a period of not less than 30 days.

24. It is not disputed that recital 21 of Directive 2014/52/EU grants Member States ‘*several options for implementing Directive 2011/92/EU as regards the integration of environmental impact assessments into national procedures*’, meaning that ‘*the elements of those national procedures*’ may be varied. However, it is one thing to empower Member States to outline the procedural pathway for implementing that directive, but quite another to authorise them to dispense with a particular process, such as that of making the main reports issued available to the persons concerned or affected (a group comprised not only of the

developer) so as to enable them to make representations before the decision on environmental effects is taken.

25. For that reason, this court takes the view that Articles 36, 37 and 38 of State Law 21/2013, and Articles 33 and 34 of Galician Autonomous Community Law 8/2009 may not have adequately transposed the requirements laid down in Article 6(3) of Directive 2011/92/EU, in so far as, although those articles provide for the developer to be given a hearing following completion of the processes of informing the public and obtaining sectoral reports, they deny the persons concerned as defined in Article 1(2) thereof the right to make representations before the competent authority adopts the decision on the application for development consent for the project (Article 6(4) of that directive).

In the light of the provisions cited in the foregoing paragraphs, this court submits to the Court of Justice of the European Union a

REFERENCE FOR A PRELIMINARY RULING

on the following three questions:

First.- What is the meaning of the expression '*main reports and advice*' used in Article 6(3) of Directive 2011/92/EU?

Second.- Do the reports referred to in Article 37(2) of Law 21/2013, which the competent body must request, correspond to those mentioned in Article 6(3) of Directive 2011/92/EU?

Third.- Do Articles 36, 37 and 38 of State Law 21/2013 and Articles 33 and 34 of Galician Autonomous Community Law 8/2009 run counter to the requirement, laid down in Article 6(3) of Directive 2011/92/EU, to ensure that the main sectoral reports issued are made available to the members of the public concerned so as to enable them, within a period of not less than 30 days, to exercise their right under paragraph 4 of that provision to make their representations and participate in the process of taking the decision on the application for development consent for the project before that decision has been adopted?

ANNEX

1.- Directive 2011/92/EU of the European Union and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (extract).

2.- Directive 2014/52/EU of 16 April 2014 amending the previous directive (extract).

3.- Law 27/2006 of 18 July 2006 regulating the rights of access to information, public participation and access to justice in environmental matters.

4.- Law 21/2013 of 9 December 2013 on environmental assessment.

5.- Law 8/2009 of 22 December 2009 regulating the use of wind energy in Galicia and creating the wind energy tax and the Environmental Compensation Fund.

6.- Judgment of the Chamber for Administrative Litigation of the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain) of 21 January 2022 (PO [ordinary proceedings] 7419/2020).

7.- Judgment of the Chamber for Administrative Litigation of the Tribunal Supremo (Supreme Court, Spain) of 21 December 2023 (appeal in cassation 3303/2022).

[...] [final procedural formulae and signatures of the judges]

[...] [provisions on the processing of personal data]

WORKING DOCUMENT