



ELB Blogpost 21/2023, 10 May 2023

Tags: Habitats Directive, Environmental Impact Assessment, Statement of reasons, Mitigation measures, C-721/21, Eco Advocacy CLG
Topics: Environmental Law

AG Opinion on Eco Advocacy Case (C-721/21): the statement of reasons for a decision not to carry out an appropriate assessment or environmental impact assessment

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Disclaimer: John Condon and Juliet Stote are working with the environmental law organisation ClientEarth who is a party in the case at hand.

On 19 January 2023, Advocate General Kokott issued her Opinion in Case C-721/21 Eco Advocacy CLG before the CJEU. The Opinion is significant at least for two reasons: first, it articulates the obligations for public authorities to provide a statement of reasons when refusing to carry out an appropriate assessment under the Habitats Directive. Second, it examines the same duty with respect to an environmental impact assessment under the EIA Directive. Third, AG Kokott seeks to make an important distinction between the different types of 'mitigation measures', (i.e. measures to minimise or cancel the negative impacts on a site) that can be considered during the screening stage of the appropriate assessment. The purpose of an appropriate assessment is to assess the potential adverse effects of an area protected under the Habitats Directive; the 'screening' of an appropriate assessment aims to carry out an initial examination to determine whether the plan is likely to have significant effects on the site such that a full appropriate assessment is required.

These developments are important because they could have an impact on the transparency and accessibility to the public of environmental decision making and the obligations on public authorities when providing reasons for their decisions and the types of environmental assessments they are required to carry out. The case is further notable because two environmental organisations, An Taisce and ClientEarth, were appointed as

amicus curiae by the Irish High Court and made submissions to the Court of Justice. The authors of this post are ClientEarth employees who worked on the case.

The national court asked the ECJ to consider several questions. For this blog post, we are addressing the questions that are significant in relation to the interpretation of the Habitats and EIA Directives. First, the blog post considers the level of information a competent authority needs to provide when deciding not to carry out the above-mentioned assessments, subsequently turning to the differentiation between standard features that have a mitigating effect and specific mitigation measures when screening for an appropriate assessment.

Background to the case

The case arose against the backdrop of the Irish planning authority granting permission for a development of 320 houses to be built around 640 metres from a Natura 2000 protected area – ‘River Boyne and River Blackwater’ – designated under both the Habitats and Birds Directives. The developer included treatment measures for surface water run-off which, according to the developer, would have been installed regardless of its proximity to the Natura 2000 area. Screening assessments were carried out, which concluded that the project would have no likely significant effect on any of the Natura 2000 sites and that it was not necessary to complete an EIA. On the basis of this screening, the planning authority granted permission for the construction without carrying out an EIA or an appropriate assessment.

Advocate General Kokott’s Opinion

On the statement of reasons for a decision not to carry out an EIA or appropriate assessment

Under Article 4(5)(b) of the EIA Directive, where a competent authority decides not to carry out an EIA, the authority must state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III of the Directive (criteria to determine whether certain projects should be subject to an EIA). The Directive, however, does not provide further direction on what the statement of reasons needs to contain e.g. – whether they need to specifically consider each of the headings in Annex III or specify which documents set out the reasons of the authority. In contrast to the EIA Directive, the Habitats Directive does not expressly specify that a decision not to carry out an appropriate assessment should state the main reasons for not requiring such an assessment. Most of the questions put to the CJEU related to the level of information

which the competent authority needs to provide when deciding not to carry out an EIA or an appropriate assessment.

The Advocate General finds that it is not necessary for the competent authority to state expressly, discretely, and/or specifically in which documents exactly its reasons are set out. However, in light of the principle of effectiveness, the reasons must still be recognisable and comprehensible from the point of view of their content. It is not lawful for the statement of reasons to be concealed or misleading. In a similar vein, the statement of reasons does not need to follow the exact structure of Annex III of the Directive. The statement must, however, on the basis of objective circumstances and with reference to the relevant criteria listed in Annex III, rule out the probability or risk that the project concerned will have significant effects on the environment. Should a competent authority's statement fail to do this, it cannot justify a decision not to carry out an EIA (paragraphs 70-74 of the Opinion).

Similar questions were asked about the appropriate assessment procedure under Article 6(3) of the Habitats Directive. As noted above, the Habitats Directive does not expressly specify that a decision not to carry out an appropriate assessment should state the main reasons for not requiring such an assessment. However, AG Kokott finds that the effective judicial review of that decision and the right to effective legal protection presupposes that the domestic court in question will have access to the statement of reasons for the contested decision (paragraph 84 and 86). This obligation to state reasons reflects the right to good administration which the public authorities must observe when implementing EU law, not on the basis of Article 41 of the EU Charter of Fundamental Rights, but on the basis of a general principle of EU law. Furthermore, in the case of decisions on specific activities that may have a significant effect on the environment, such as the appropriate assessment under the Habitats Directive, Article 6 of the Aarhus Convention requires public participation. Article 6(9) of that Convention requires that the public needs to be informed of the decision taken by the competent authority and have access to the "text of the decision along with the reasons and considerations on which the decision is based". Indeed, the decision not to carry out an appropriate assessment is in itself a decision to determine whether a specific activity has such significant effects, and is therefore subject to the requirements of the Aarhus Convention.

The Advocate General finds that the statement of reasons explaining why the competent authority is deciding not to proceed with an appropriate assessment must be able to dispel "all reasonable scientific doubt" concerning the harmful effects of the works envisaged on the integrity of the protected site (paragraph 90). Screening is not supposed to be a mechanism by which actors can circumvent the full assessment, or otherwise implement a plan which would not qualify for approval. A high standard – equivalent to the appropriate

assessment criteria – must therefore be applied to the screening in order to be sure, even without a full assessment, that there will be no significant effects on the site.

Can 'standard features' that have a mitigating effect be considered at the appropriate assessment screening stage?

The Irish court also referred a question about the ability of the competent authority to rely on mitigation measures to determine whether an appropriate assessment is required under Article 6(3) of the Habitats Directive. In *People Over Wind* (C-323/17), the ECJ held that measures intended to mitigate the harmful effects of a plan or project on the site concerned may not be taken into account at the screening stage of the appropriate assessment. Rather, the use of such mitigation measures presupposed that there was a probability of a significant effect such that a full appropriate assessment needed to be carried out. The measures could then be considered at the appropriate assessment stage to inform the decision of whether a project or plan would adversely affect site integrity.

In the present case, the plan included measures for the treatment of surface water run-off before being discharged into a tributary stream of the River Boyne and River Blackwater which form part of the Natura 2000 protected area. The developer asserted that this was a standard environmental measure that was not planned for the purpose of reducing impacts on the protected area in question and would have been included regardless. Could such standard features be taken into account at the screening stage when determining whether an appropriate assessment is needed?

According to the Advocate General, it is possible for such standard features to be included at the screening stage. However, care needs to be taken not to rely solely on the subjective accounts provided by the developer, which could be intended to circumvent the appropriate assessment. Rather, it must be clear, on the basis of objective considerations, that the features in question are incorporated into the design as standard features irrespective of any effect on the protected site concerned and that all reasonable scientific doubt concerning their effectiveness can be ruled out (paragraph 108). This assumption has to be based on objective circumstances, in particular general rules or widespread practices (paragraph 99). Further, for this measure to be considered at the stage of screening as capable of ruling out all scientific doubt that there would be harm to the protected site, there should be sufficient practical experience of the measure (paragraph 105). If such doubts cannot be erased, then the measure is not able to rule out the risk of significant harm to the site and cannot be considered at the screening stage.

Commentary

On the statement of reasons for a decision not to carry out an EIA or appropriate assessment

It is regrettable that the EIA Directive does not provide more specificity on the content and format of the statement of reasons. In practice, a lot of documentation may be produced by a competent authority, including many technical reports, when determining whether or not to carry out an EIA. The absence of an expressly identified and articulated set of reasons in the competent authority's decision does not aid a member of the public attempting to challenge the decision – they may have to sift through hundreds of pages of multiple documents to infer the “justification” behind the decision when making a legal challenge. Consequently, they may also have to include multiple references in the statement of grounds of their legal challenge, further complicating the judicial review. Given that the documentation exists and, in theory, the reasons not to carry out an EIA are justifiable by reference to them, a specific statement as to what documents exactly set out the reasons should be achievable without being overly burdensome on the competent authority. This would enable fairer judicial review and access to justice by the public, and aid the courts in reviewing the authority's decision and considering the complaint. While Advocate General Kokott's Opinion goes some way to clarifying the obligations on the competent authorities, it is likely that effective judicial review will continue to be hindered by the inability of the public to easily identify the justification for competent authority decisions.

The Advocate General's view on the need for a statement of reasons when a competent authority decides not to proceed with an appropriate assessment is a welcome development which should help ensure greater transparency when reviewing decisions of public authorities. The Advocate General also clarifies that, although it is not necessary for the public authorities to expressly specify which documents set out the reasons, they must nevertheless ensure that in the decision the reasons are recognisable and comprehensible from the point of view of their content. Accordingly, the Advocate General takes an analogous approach to the statement of reasons under the EIA Directive, which may also lead to the same practical difficulties for the screening of an appropriate assessment.

On dispelling all reasonable scientific doubt

The Advocate General's finding that the criteria for the screening to dispel all reasonable scientific doubt is just as strict as the criteria for the assessment itself is a welcome development, upholding a high standard in all aspects of environmental decision making. AG Kokott also concludes that the requirement to dispel all reasonable doubts does not extend to dispelling all doubts raised during the public participation procedure. AG Kokott provides the colourful example that public authorities would not be expected to refute an objection from the public that a project will anger the spirits of the ancestors. While this

can be considered a practical approach to dealing with doubts raised about a project's impacts, it does leave open the question as to what exactly constitutes a 'reasonable scientific doubt'. Some insight can be gleaned from AG Kokott's Opinion in *Waddenzee* (Case C-127/02) published almost twenty years ago, where it was stated that account will have to be taken, on the one hand, of the likelihood of harm and, on the other, also of the extent and nature of such harm. Therefore, in principle, greater weight is to be attached to doubts as to the absence of irreversible effects or effects on particularly rare habitats or species than to doubts as to the absence of reversible or temporary effects or the absence of effects on relatively common species or habitats (paragraph 73).

Can 'standard features' that have a mitigating effect be considered at the appropriate assessment screening stage?

It is worth reflecting on how the conclusion of the Advocate General on standard features sits with the precautionary principle in the Habitats Directive. Considering measures as "standard" rather than as "mitigation" or "specific" under a plan or project has the potential to alter whether an appropriate assessment is required. Such measures will need to be carefully scrutinised during the screening stage in order to ascertain whether or not they are actually intended to reduce the harmful effects on a protected area. The competent authority will also need to consider whether it is even possible at the screening stage to rule out the possibility of adverse effects on site integrity given the lack of available evidence in the absence of an appropriate assessment. For many of these 'standard' features, the uncertainty about their possible effects should lead to the conclusion that an appropriate assessment is nevertheless required in order to properly assess the likely significant effects on the protected site in question.

The Advocate General's opinion on providing a statement of reasons when a local authority decides not to carry out an appropriate assessment is a welcome development of the application of the Aarhus Convention, and the public's access to justice. It is hoped that the Court will carefully consider the practical implications of not providing further guidance and detail on the content of the statement of reasons for both the decision not to carry out an EIA and/or appropriate assessment, including how this could hinder effective judicial review of environmental decisions at national level. Care will also need to be taken to ensure that the consideration of 'standard' features during the appropriate assessment screening stage does not create a loophole for developers to circumvent the need to carry out appropriate assessments in accordance with precautionary principle.