Case C-297/19

Request for a preliminary ruling

Date lodged:

11 April 2019

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

26 February 2019

Applicant:

Naturschutzbund Deutschland — Landesverband Schleswig-Holstein e. V.

Defendant:

Kreis Nordfriesland

Copy

Bundesverwaltungsgericht (Federal Constitutional Court)

ORDER

[...]

Delivered on 26 February 2019

[...]

In the administrative-law case of

Naturschutzbund Deutschland

– Landesverband Schleswig-Holstein e. V. –

[...], Neumünster,

applicant, appellant,

respondent to the appeal on a point of law,

and appellant in a cross-appeal on a point of law,

– [...] **[Or. 2]**

v

Kreis Nordfriesland

[...]

defendant, respondent,

appellant on a point of law,

and respondent to a cross-appeal on a point of law,

[...]

joined party:

Deich- und Hauptsielverband Eiderstedt,

Körperschaft des öffentlichen Rechts,

[...]

appellant on a point of law

and respondent to a cross-appeal on a point of law,

[...]

other party:

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht

[...]

the Seventh Chamber of the Bundesverwaltungsgericht

[...]

ordered as follows on 26 February 2019: **[Or. 3]**

The proceedings before the Federal Administrative Court are stayed.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. a) Does the term ‘management’ within the meaning of the second indent of the second paragraph of Annex I to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive) include activities inextricably bound up with direct use for land yield purposes?

If so:

b) Under what conditions is the management of sites, as defined in habitat records or target documents, to be considered ‘normal’ within the meaning of the Environmental Liability Directive?

c) What is the time-scale for deciding if management is ‘as carried on previously’ by owners or operators within the meaning of the Environmental Liability Directive?

d) Should the question of whether management is as carried on previously by owners or operators within the meaning of the Environmental Liability Directive be answered independently of the habitat records or target documents?

2. Does an activity exercised in the public interest on the basis of a statutory delegation of tasks constitute an ‘occupational activity’ within the meaning of Article 2(7) of the Environmental Liability Directive?

Grounds:

I

1 The applicant, which is a recognised environmental association, is seeking an environmental remedy order from the defendant against the joined party under the Umweltschadensgesetz (Law on environmental damage ‘the USchadG’) **[Or. 4]** transposing Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. It submits that, by the operation of a pumping station, the joined party is liable for environmental damage affecting a bird species (black tern) on the Eiderstedt peninsula in Schleswig-Holstein.

2 A total of around 7 000 hectares on the Eiderstedt peninsula, which measures approximately 30 000 hectares, were designated a bird sanctuary (DE 1618-404) in 2006 and 2009 inter alia due to the presence of the black tern. According to the management plan, the bird sanctuary is predominantly managed even today as a grassland area using traditional large-scale methods and, by reason of its size in particular, it is still the most important breeding ground for the black tern in Schleswig-Holstein.

3 The Eiderstedt peninsula has to be drained for the purposes of settlement and agricultural use. It is drained via approximately 5 000 km of ‘plot ditches’ which flow into a network of 900 km of sluice channels. The plot ditches are maintained by the users of the adjacent land, while a total of 17 water and soil associations established in Eiderstedt are responsible for maintenance of the sluice channels (receiving streams).

4 The Deich- und Hauptsielverband Eiderstedt (joined party) is a water and soil association established as a public-law corporation, and is the umbrella association of the 17 water and soil associations established in Eiderstedt. The tasks delegated to it by law include the public service obligation of maintaining the surface waters. In fulfilment of these obligatory tasks, it operates inter alia the Siel- und Schöpfwerk Adamsiel (Adamsiel sluice and pumping station). This drains the entire area covered by the association by means of a pump activated automatically when a certain water level is reached. The pumping operations set in motion then take the water level back down.

5 The Verwaltungsgericht (Administrative Court) dismissed the action initiated following the applicant’s unsuccessful application for a damage limitation and remedy order **[Or. 5]**. On appeal by the applicant, the Oberverwaltungsgericht (Higher Administrative Court) quashed the judgment of the Administrative Court and ordered the defendant to issue a (new) decision with due regard for the court’s legal appraisal. The court found that the black tern, which is a protected species, and its natural habitat had been damaged within the meaning of the Law on environmental damage by the operation of the joined party’s pumping station. As the joined party’s activity could not be categorised as use for land yield purposes, the presence of significant effects could not be denied on the grounds of normal management. The joined party operated its sluice and pumping station as an occupational activity, albeit on the basis of a public law obligation. There was a direct causal link between the joined party’s sluice and pumping station, which remained unchanged before and after 30 April 2007, and the environmental damage. Without the sluice and pumping station, water could not run out of the ditch system. The joined party was also at fault for its contribution to the environmental damage. However, the matter was not ready for a court ruling declaring an obligation. The defendant had a discretion in selecting the person to be responsible and the timing and content of the measures to be taken.

6 By their appeals on a point of law, the defendant and the joined party are seeking to have the judgment delivered at first instance reinstated.

II

7 The dispute must be stayed. A preliminary ruling must be obtained from the Court of Justice of the European Union (‘the Court of Justice’) on the questions formulated in the operative part of the decision (Article 267 TFEU).

8 1. The relevant provisions of EU law are to be found in Article 2(7) of and the second indent of the second paragraph of Annex I to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56) ('the Environmental Liability Directive'). **[Or. 6]**

9 2. The provisions of national law relevant to the first question referred are to be found in point 2 of the second sentence of Paragraph 19(5) and, additionally, in Paragraph 5(2) of the Gesetz über Naturschutz und Landschaftspflege (Law on nature conservation and care of the landscape, 'the BNatSchG') of 29 July 2009 (BGBl. I, p. 2542), last amended by Article 1 of the Law of 15 September 2017 (BGBl. I, p. 3434) (a). The provisions of national law relevant to the second question referred are to be found in point 4 of Paragraph 2 of the Law on environmental damage of 10 May 2007 (BGBl. I, p. 666), last amended by Article 4 of the Law of 4 August 2016 (BGBl. I, p. 1972), in the first sentence of Paragraph 39(1) and in the first sentence of Paragraph 40(1) of the Gesetz zur Ordnung des Wasserhaushalts (Law on water, 'the WHG') of 31 July 2009 (BGBl. I, p. 2585), last amended by Article 2 of the Law of 4 December 2018 (BGBl. I, p. 2254), and in point 1 of the first sentence of Paragraph 38(1) of the Wassergesetz des Landes Schleswig Holstein (Law on water of the *Land* of Schleswig-Holstein, 'the WasG SH') of 11 February 2008 (GVOBl. SH, p. 91), as amended by the Law of 13 December 2018 (GVOBl. SH, p. 773) (b).

a) Point 2 of the second sentence of Paragraph 19(5) of the BNatSchG reads as follows:

As a rule, significant damage shall not be deemed to have occurred in the case of negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators.

Paragraph 5(2) of the BNatSchG reads as follows:

In the case of agricultural use, in addition to requirements arising from provisions applying to agriculture and from Paragraph 17(2) of the Bundes-Bodenschutzgesetz (Federal law on soil protection), the following principles of good practice shall especially be observed:

1. cultivation must be appropriate to the relevant location, and the sustainable fertility of the soil and long-term usability of the land must be ensured;

2. the natural features of the arable land (soil, water, flora, fauna) must not be impaired **[Or. 7]** beyond the extent required to achieve a sustainable yield;

3. the landscape components required for the linking of biotopes shall be preserved and, where possible, their numbers increased;

4. animal husbandry must be in a balanced relationship to crop cultivation, and harmful environmental impacts are to be avoided;

5. on slopes at risk from erosion, in flood plains, in locations with a high groundwater level and in marshy locations, grassland must not be ploughed up;

6. fertilisers and plant protection products shall be applied in accordance with agricultural legislation and the application of fertilisers shall be documented in accordance with Paragraph 10 of the Düngeverordnung (Regulation on fertilisers) of 26 May 2017 (BGBl. I, p. 1305), as amended, and the application of plant protection products shall be documented in accordance with the second sentence of Article 67(1) of Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1).

b) Point 4 of Paragraph 2 of the USchadG reads as follows:

‘occupational activity’ means any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character.

The first sentence of Paragraph 39(1) of the WHG reads as follows:

Maintenance of surface waters includes the care and development thereof as a public-law obligation (maintenance obligation).

The first sentence of Paragraph 40(1) of the WHG reads as follows:

Maintenance of surface waters is the responsibility of the owners of the waters, unless it is a task delegated under *Land* law to local authorities, water and soil associations, municipal special purpose associations or other public law corporations. **[Or. 8]**

Point 1 of the first sentence of Paragraph 38(1) of the WasG SH reads as follows:

Maintenance of a body of water includes, in addition to the measures listed in the second sentence of Paragraph 39(1) of the WHG, the preservation and safeguarding of proper runoff.

III

10 The questions referred are material to the decision. Depending on how the questions referred are answered, the appeals on a point of law will either be successful on legal grounds or the matter will need to be referred back to the Higher Administrative Court as judges of fact for a new hearing and judgment.

11 1. The temporal application of the Law on environmental [damage] or of the Environmental Liability Directive in accordance with Paragraph 13(1) of the USchadG or Article 17 of the Environmental Liability Directive exists. According to the case-law of the Court, it follows from the first and second indents of Article 17 of the Environmental Liability Directive, read in conjunction with recital 30 of the directive, that the directive applies to damage caused by an emission, event or incident which took place on or after 30 April 2007, where the damage derives from activities which took place on or after that date or from activities which took place but which were not brought to completion before that date (Court of Justice, judgment of 1 June 2017, C-529/15, EU:C:2017:419, paragraph 22, with reference to Court of Justice, judgment of 4 March 2015, C-534/13, EU:C:2015:13, paragraph 44; see also Court of Justice, judgment of 9 March 2010, *Raffinerie Méditerranée*, C-378/08, EU:C:2010:126, paragraph 41). In the present case, the environmental damage may have been caused by the operation of a sluice and pumping station by the joined party, which the judge of fact found had remained unchanged before and after 30 April 2007. Thus that operation represents an activity which (also) took place after 30 April 2007. At the same time, the damage in question was caused by events. The pumping processes carried out automatically when a certain water level is reached may be regarded as such events.

12 2. According to the first sentence of Paragraph 1 of the Law on environmental damage, that law applies even where other national law would otherwise take precedence. In particular, **[Or. 9]** provisions of *Land* law available do not go as far as the Law on environmental damage.

IV

13 The questions referred need to be clarified by the Court of Justice, as they have not been clarified in its case-law and there are no obvious answers.

14 The following considerations are relevant to the individual questions referred:

15 1. Question 1:

a) The issue is how the term ‘management’ should be understood within the meaning of the second indent of paragraph 2 of Annex I to the Environmental Liability Directive. Based on the wording of the provision, that term may cover a broad range of economic activities. However, the Higher Administrative Court relied on a narrow understanding of the term and held that only agricultural activity in the sense of use for land yield purposes qualifies as ‘management’. The Chamber takes the view that, at the very least, the operation of a sluice and pumping station for the purpose, as here, of ensuring the necessary irrigation and

drainage of agricultural land is covered by the term ‘management’ as it is inextricably bound up with use for land yield purposes.

16 b) The conditions under which a method of management of sites within the meaning of the second indent of paragraph 2 of Annex I to the Environmental Liability Directive, as defined in habitat records or target documents, is to be considered ‘normal’ within the meaning of the Environmental Liability Directive also need clarification. To that end, a criterion specific to the area should be established, to be determined primarily from the said sources or based on an available management plan. In addition to area-specific documents available, general principles established by law could, if necessary, be applied for the purpose of establishing the criterion. The principles of good practice laid down in German law in Paragraph 5(2) of the BNatSchG are a possibility in connection with direct use for land yield purposes. **[Or. 10]**

17 c) The meaning of ‘management of sites as carried on previously’ by owners or operators within the meaning of the second indent of paragraph 2 of Annex I to the Environmental Liability Directive also needs to be clarified from a temporal perspective. It seems conceivable to assume that any management of sites practised over a period of time before the date stated in Article 19(1) of the Environmental Liability Directive, that is, 30 April 2007, is ‘management of sites as carried on previously’. However, it also seems conceivable that not every instance of management of sites exercised at some time previously should be taken into account and that it should necessarily have still been under way in fact on 30 April 2007.

18 d) It does not follow unequivocally from the wording of the second indent of paragraph 2 of Annex I to the Environmental Liability Directive that the question of whether management of sites is ‘as carried on previously by owners or operators’ should be answered independently of the habitat records or target documents. However, that would appear to be the obvious answer to the Chamber. The provision could then serve as a catch-all rule in the sense that, where the habitat records or target documents do not provide adequate points of reference to establish a criterion, an actual analysis is carried out.

19 2. Question 2:

Nor has the question of whether an activity exercised in the public interest on the basis of a statutory delegation of tasks constitutes an ‘occupational activity’ within the meaning of Article 2(7) of the Environmental Liability Directive been clarified in the case-law of the Court, and there is no obvious answer. It follows from the wording of Article 2(7) of the Environmental Liability Directive that qualification of an activity as an ‘occupational activity’ does not depend on its form under private or public law or whether it is exercised for profit. However, the question of whether an activity exercised in the public interest on the basis of a statutory delegation of tasks constitutes an ‘economic activity’, a ‘business’ or an ‘undertaking’ within the meaning of Article 2(7) of the Environmental Liability

Directive needs to be clarified. In the opinion of the Chamber, it would appear plausible that the three terms ‘economic activity’, ‘business’ and ‘undertaking’ should be understood to mean that **[Or. 11]** an activity included therein should have a market link or be of a competitive nature. There is no such market link or competitive nature in the case of an activity exercised in the public interest on the basis of a statutory delegation of tasks, in this case the maintenance of surface waters by a water and soil association, including the maintenance and safeguarding of proper water runoff (see the first sentence of Paragraph 39(1) and the first sentence of Paragraph 40(1) of the WHG and point 1 of the first sentence of Paragraph 38(1) of the WasG SH), especially as the entity responsible for the task is unable to get out of performing the task delegated to it by law.

[...]