Case C-300/20

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

Date lodged:

7 July 2020

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

4 May 2020

Applicant and appellant in the appeal on a point of law:

Bund Naturschutz in Bayern e. V.

Defendant and respondent in the appeal on a point of law:

Landkreis Rosenheim (Germany)

Other party:

Landesanwaltschaft Bayern, representing the interests of the Federal Government in the Bundesverwaltungsgericht (Federal Administrative Court)

Subject matter of the main proceedings

Admissibility and merits of an application from an environmental association seeking review of the lawfulness of a national regulation establishing an area of outstanding natural beauty

Subject matter and legal basis of the reference

Request for a preliminary ruling pursuant to Article 267 TFEU seeking clarification as to whether EU law requires a strategic environmental assessment or, at the very least, a decision by the Member State on the need for such an assessment, prior to the adoption of a regulation establishing an area of outstanding natural beauty.

Questions referred

1. Is Article 3(2)(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30) to be interpreted as meaning that a framework for future development consent of projects listed in Annexes I and II to Directive 2011/92/EU ('the EIA Directive') is set where a regulation on nature conservation and landscape management provides for general prohibitions (with possible exemptions) and compulsory permits which do not specifically relate to projects listed in the annexes to the EIA Directive?

2. Is Article 3(2)(a) of Directive 2001/42/EC to be interpreted as meaning that plans and programmes were prepared for agriculture, forestry, land use, etc. if their objective was to establish a reference framework for one or more of those areas? Or does it suffice if, for the purpose of nature conservation and landscape management, general prohibitions and permit requirements are regulated which have to be assessed in the permit procedure for a variety of projects and uses and which may indirectly impact ('by default') one or more of those areas?

3. Is Article 3(4) of Directive 2001/42/EC to be interpreted as meaning that a framework for future development consent of projects is set if a regulation adopted for the purpose of nature conservation and landscape management lays down prohibitions and permit requirements for a variety of projects and measures in the protected area which are described in abstract terms, where there are no actual foreseeable or envisaged projects when it is adopted and therefore it does not specifically relate to actual projects?

Provisions of EU law cited

Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30, the 'SEA Directive'), in particular the tenth and eleventh recitals and Article 3

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 OJ 2012 L 26, p. 1, the 'EIA Directive'), in particular Annexes I and II

Provisions of national law cited

Verwaltungsgerichtsordnung (Code of Administrative Court Procedure, 'the VwGO'), Paragraph 47

Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Law on supplementary provisions on access to review procedures in environmental matters pursuant to Directive 2003/35/EC, 'the UmwRG'), Paragraphs 1 and 3

Gesetz über die Umweltverträglichkeitsprüfung (Law on environmental impact assessments, 'the UVPG'), Paragraphs 2 and 35

Gesetz über Naturschutz und Landschaftspflege (Law on nature conservation and landscape management, 'the BNatSchG), Paragraphs 20 and 26

Bayerisches Gesetz über den Schutz der Natur, die Pflege der Landschaft und die Erholung in der freien Natur (Bavarian law on nature conservation, landscape management and outdoor recreation, 'the BayNatSchG), Articles 12, 18 and 51

Verordnung des Landkreises Rosenheim über das Landschaftsschutzgebiet „Inntal Süd" vom 10. April 2013 (Regulation of the Rural District of Rosenheim on the 'Inntal Süd' Area of Outstanding Natural Beauty of 10 April 2013, 'the AONB Regulation'), Paragraphs 1, 3, 4, 5 and 7

Brief summary of the facts and procedure

1 These questions have arisen in a dispute between an association recognised under the UmwRG (the applicant) and the Rural District of Rosenheim (defendant) on the validity of a regulation establishing an area of outstanding natural beauty.

2 The defendant issued the AONB Regulation with effect from 27 April 2013. It included the applicant as an other party in the procedure to adopt the regulation, but it did not carry out a strategic environmental assessment or a preliminary assessment.

3 The AONB Regulation protects an area measuring 4 021 hectares. All acts within the area of outstanding natural beauty that alter the character of the area or undermine the protective purpose of the area of outstanding natural beauty are prohibited.

4 The applicant disputes the AONB Regulation by means of an application for review of its lawfulness ('Normenkontrollantrag'). The lower court dismissed the application as inadmissible. The referring court has to rule on the appeal on a point of law.

Brief summary of the basis for the reference

Relevance of the questions

5 The applicant's appeal on a point of law is inadmissible under national law. The applicant has no legal standing to apply for a review of lawfulness under the VwGO, as it cannot assert any infringement of a right. An application for review of environmental lawfulness under the UmwRG is not allowed, as the AONB Regulation is not a decision within the meaning of the UmwRG and there was no obligation to carry out a strategic environmental assessment or a preliminary assessment prior to its adoption.

6 The answers to the questions referred might enable the application to be upheld. The first two questions should help to clarify whether there was an obligation to carry out a strategic environmental assessment in accordance with Article 3(2)(a) of the SEA Directive for the AONB Regulation, in which case review would be admissible under the UmwRG. If a strategic environmental assessment should have been carried out in accordance with Article 3(2)(a) of the SEA Directive prior to the adoption of the AONB Regulation, the applicant's appeal on a point of law would also have merit. In that case the referring court would probably have to find that the AONB Regulation is invalid, as a compulsory procedural stage for the adoption of the regulation was omitted.

7 The third question, concerning Article 3(4) of the SEA Directive, is also relevant. If the AONB Regulation sets a framework for future development consent of projects within the meaning of Article 3(4) of the SEA Directive, the defendant was required under national law to subject the AONB Regulation to a preliminary assessment (that is a case-by-case examination within the meaning of Article 3(5) of the SEA Directive), in which case review would be admissible in application, *mutatis mutandis*, of the UmwRG. That review would have grounds if an obligation to carry out a strategic environmental assessment would necessarily have followed from the preliminary assessment, in which case the AONB Regulation would have to be found to be invalid.

8 The referring court notes that the relevance of the questions goes beyond this particular case. It has always been assumed in practice in the Federal Republic of Germany that the designation of special protection areas, including the designation of special protection areas under Directive 92/43/EEC, is not contingent upon either a strategic environmental assessment or a corresponding preliminary assessment. Therefore, no such assessments have been carried out. If the answers given to the questions by the Court of Justice of the European Union establish an obligation under EU law to carry out a strategic environmental assessment or, at the very least, an obligation under national law to carry out a preliminary assessment, a large number of designations of protection areas made after expiry of the deadline for transposition of the SEA Directive on 21 July 2004 would probably be vitiated by procedural error. Under national law, any such procedural error invalidates the regulation required for the designation as a matter

of course. The assumption of an obligation to carry out a strategic environmental assessment or preliminary assessment might therefore significantly reduce the level of nature conservation and landscape management achieved in Germany (see most recently, in that regard, opinion of Advocate General Campos Sánchez-Bordona, *A and Others*, [wind farms in Aalter and Nevelle], C-24/19, EU:C:2020:143).

First question

9 The referring court has doubts as to whether the obligation to carry out a strategic environmental assessment prior to the adoption of an AONB regulation follows from Article 3(2)(a) of the SEA Directive.

10 Under Article 3(1) of the SEA Directive, an environmental assessment, in accordance with Articles 4 to 9 of the SEA Directive, must be carried out for plans and programmes referred to in Article 3(2) to (4) of that Directive which are likely to have significant environmental effects. Under Article 3(2)(a) of the SEA Directive, an environmental assessment is to be carried out, subject to Article 3(3), for all plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC (now Directive 2011/92/EU, see Article 14(2) of the EIA Directive).

Existence of a plan or programme within the meaning of Article 2(a) of the SEA Directive

11 The referring court assumes, based on the case-law of the Court (judgments of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraphs 94 and 95, and of 27 October 2016, *D'Oultremont and Others*, C-290/15, EU:C:2016:816, paragraph 52; see also judgments of 12 June 2019, *CFE*, C-43/18, EU:C:2019:483, paragraph 54 and the case-law cited, and of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraph 41), that the AONB Regulation is a plan or a programme within the meaning of Article 2(a) of the SEA Directive.

Setting a framework for development consent of projects

12 Article 3(2)(a) of the SEA Directive requires the plan or programme to set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive. According to the case-law of the Court, the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment (judgments of 11 September 2012, *Nomarchiaki Aftodioikisi*

Aitoloakarnanias and Others, C-43/10, EU:C:2012:560, paragraphs 94 and 95; of 27 October 2016, *D'Oultremont and Others*, C-290/15, EU:C:2016:816, paragraph 52; of 8 May 2019, *Verdi Ambiente e Società [VAS] — Aps Onlus and Others*, C-305/18, EU:C:2019:384, paragraph 50; and of 12 June 2019, *CFE*, C-43/18, EU:C:2019:483, paragraph 61). According to the judgments of 7 June 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:403, paragraph 55), and of 7 June 2018, *Thybaut and Others*, C-160/17, EU:C:2018:401, paragraph 55), the concept of 'a significant body of criteria and detailed rules' must be understood qualitatively. Thus, it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in the SEA Directive by splitting measures, thereby reducing the practical effect of that Directive (see also judgment of 8 May 2019, *Verdi Ambiente e Società [VAS] — Aps Onlus and Others*, C-305/18, EU:C:2019:384, paragraph 51).

13 In order to establish whether a plan or a programme sets the framework for future development consent of projects listed in Annexes I and II to the EIA Directive, it is necessary to examine the content and purpose of the plan or programme, taking into account the scope of the environmental assessment of projects as provided for by that Directive (judgment of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie*, C-105/09 and C-110/09, EU:C:2010:355, paragraph 45).

14 By those standards, the referring court has doubts as to whether the AONB Regulation sets a framework within the meaning of Article 3(2)(a) of the SEA Directive.

15 Although it establishes a series of general prohibitions and compulsory permits for numerous projects and uses, Paragraph 4 of the AONB Regulation prohibits all acts within the area of outstanding natural beauty that alter the character of the area or undermine its protective purpose. Paragraph 5(1) and (2) of the AONB Regulation provide for permits authorising various measures prohibited under Paragraph 4 of the AONB Regulation. Lastly, Paragraph 6 of the AONB Regulation provides for exceptions from the restrictions established in the regulation and Paragraph 7 of the AONB Regulation provides for exemptions.

16 However, the question arises as to whether that suffices to assume that a framework is set within the meaning of the Directive. Considering the scheme of Article 3 of the SEA Directive, the purpose of requiring a framework to be set for future development consent of projects listed in Annexes I and II to the EIA Directive and of allocation to one of the areas listed in Article 3(2)(a) of the SEA Directive is to establish a dividing line between those plans and programmes and plans and programmes that fall under Article 3(4) of the SEA Directive. That dividing line is necessary because the rules have different legal consequences. A strategic environmental assessment is always required for plans and programmes that fall under Article 3(2) of the SEA Directive, whereas a strategic environmental assessment is only required for plans and programmes covered by Article 3(4) of the SEA Directive where the Member States have determined, in

accordance with Article 3(5) of the SEA Directive, that they are likely to have significant environmental effects; otherwise an environmental assessment is not necessary (see also the eleventh recital of the SEA Directive).

17 In the opinion of the referring court, a framework set within the meaning of Article 3(2)(a) of the SEA Directive must actually target or must specifically relate to projects listed in Annexes I and II to the EIA Directive. The plans and programmes must set the reference or regulatory framework for future development consent of projects which tend to have environmental effects as understood by the legislature and whose environmental effects should therefore be assessed at a higher level, which ranks above and precedes the authorisation of an actual project (see opinion of Advocate General Campos Sánchez-Bordona, *A and Others* [wind farms in Aalter and Nevelle], C-24/19, EU:C:2020:143, paragraphs 33, 35 and 74). The Court has assumed that a reference/regulatory framework for development consent of projects in that sense is set if the plan refers to technical standards, operating conditions, noise level standards, etc., thereby determining the conditions applicable to the area concerned under which actual projects may be authorised (see judgment of 27 October 2016, *D'Oultremont and Others*, C-290/15, EU:C:2016:816, paragraph 50). Advocate General Sánchez-Bordona cites that case-law in his opinion in *A and Others* (wind farms in Aalter and Nevelle), C-24/19, EU:C:2020:143, paragraph 93) and notes that the Flemish legislation at issue in that case lays down detailed requirements on sensitive issues such as noise, shadow flicker, safety and the nature of wind turbines. In light of that, the referring court is of the opinion that the fact that a plan or programme (coincidentally) also covers 'projects listed in Annexes I or II to Directive 2011/92/EU', for example due to its scope, cannot suffice if it is not predicated on them or does not influence their authorisation in a targeted manner.

18 If a plan or programme has to relate to projects, then the AONB Regulation does not set a framework for future development consent of projects listed in Annexes I and II to the EIA Directive. That is immediately evident from the protective purpose of the AONB Regulation. Moreover, the regulation does not contain any specific rules for the authorisation of projects within the meaning of Annexes I and II to the EIA Directive. This form of AONB regulation does not influence the authorisation of projects; instead it serves primarily to prevent projects or, at the very least, to ensure that they are ecologically sound.

Second question

19 The second question concerns the additional condition of Article 3(2)(a) of the SEA Directive requiring plans and programmes to be prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use. The referring court has doubts as to whether that is the case here, as the AONB Regulation was prepared in the area of nature conservation and landscape management, not in one of the above areas.

20 Based on the tenth recital of the SEA Directive, Article 3(2)(a) of the SEA Directive stipulating the areas concerned assumes that those areas are likely to be at risk of significant environmental effects and plans should therefore be subject to a strategic environmental assessment as a matter of course. That presupposes that the plan or programme can be unequivocally allocated to the area concerned. That is expressed in Article 3(2)(a) of the SEA Directive by stating that the plan or programme must be 'prepared' for that area, that is it must target and be predicated on that area. Article 5 of the SEA Directive supports that finding. It states that the environmental report must identify, describe and evaluate the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives (paragraph 1) and include information on the stage of the plan or programme in the decision-making process (paragraph 2). These requirements are tailored to plans and programmes for the areas named in Article 3(2)(a) of the SEA Directive, but are unsuited to a regulation for the purpose of nature conservation and landscape management. In light of that, it is consistent that the areas of nature conservation and landscape management are not named in Article 3(2)(a) of the SEA Directive.

21 Little attention has been paid to the requirement of 'preparation' for a particular area in the case-law of the Court to date (see, for example, judgment of 12 June 2019, *CFE*, C-43/18, EU:C:2019:483, paragraphs 61 and 62; see also judgment of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraphs 43 and 44 on the areas of town and country planning and land use). That being so, the referring court is of the opinion that clarification by the Court is required as to whether 'preparation' presupposes that a plan targets or is predicated on one of the areas named in Article 3(2)(a) of the SEA Directive or whether it suffices that the plan or programme actually has effects on the named areas (in this case, agriculture, forestry and land use), even if it was prepared for a different area not covered by Article 3(2)(a) of the SEA Directive (in this case, nature conservation and landscape management). Clarification of this question is particularly important as 'preparation' for one of the named areas distinguishes plans and programmes within the meaning of Article 3(2)(a) of the SEA Directive from those under Article 3(4) of the SEA Directive.

Third question

22 The third question concerns the interpretation of Article 3(4) of the SEA Directive. It need only be answered if the Court holds that a plan or programme must specifically relate to projects listed in Annexes I and II to the EIA Directive (Question 1) or must target and be predicated on an area named in Article 3(2)(a) of the SEA Directive (Question 2), as then it would have to be assumed that there was no obligation to carry out a strategic environmental assessment in accordance with Article 3(2)(a) of the SEA Directive for the AONB Regulation.

23 Article 3(4) of the SEA Directive requires the Member States to determine in accordance with Article 3(5) of the SEA Directive whether plans and programmes, other than those referred to in Article 3(2) of the SEA Directive,

which set the framework for future development consent of projects are likely to have significant environmental effects. According to the case-law of the Court, the requirement in Article 3(4) of the SEA Directive ('set a framework') is to be interpreted in the same way as the requirement in Article 3(2)(a) of the SEA Directive (see judgment of 12 June 2019, *CFE*, C-43/18, EU:C:2019:483, paragraph 60). Thus, the issues addressed in the first question also arise with regard to Article 3(4) of the SEA Directive. Based on the above considerations, therefore, those plans and programmes must also specifically relate to the 'projects' for which the framework is set as, without any such connection, there would ultimately be no plans or programmes, with the exception of those only containing specifications for projects not requiring consent (judgment of 12 June 2019, *CFE*, C-43/18, EU:C:2019:483, paragraph 65) that do not fall within the scope of the SEA Directive. That would conflict with the eleventh recital of the SEA Directive.

24 Therefore, the third question seeks clarification as to just how specifically the plans and programmes must relate to the 'projects' for which the framework is set.