COURT OF JUSTICE
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EN

Fact sheet

Environmental Impact Assessment

Introduction

Considering that the best environmental policy consists in preventing pollution or nuisances at source, rather than subsequently trying to counteract their effects, the EU legislature has developed a system of preventive environmental protection, the cornerstone of which is the obligation for Member States to carry out environmental assessments before taking certain decisions that may have a negative impact on the environment.

As a first step, the Council adopted Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, [1] which was repealed, codified and replaced by Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment. [2] In accordance with those directives, the projects referred to in Annexes I and II thereto must be made subject to an environmental assessment before consent is granted if they are likely to have a significant effect on the environment. In that regard, Annex I lists the projects which present an inherent risk of significant effects on the environment and must, in principle, be made subject to an environmental impact assessment. Annex II, on the other hand, specifies projects likely to present a risk of significant effects on the environment, which are to be made subject to assessment only where Member States consider, in accordance with the requirements of the Directives, that their characteristics so require.

As a second step, the European Parliament and the Council adopted Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, [3] which provides that the plans and programmes listed in that directive are to be made subject to an environmental impact assessment if they present a risk of significant effects on the environment. As the plans and programmes covered by Directive 2001/42 include those in certain sectors laying down a framework for development consent of projects covered by Directive 85/337 and Directive 2011/92, Directive 2001/42 introduced a mechanism for environmental assessments which operates at an earlier stage than that established by Directive 85/337 and Directive 2011/92 in the areas concerned.

From a methodological standpoint, and in keeping with the approach followed by Directive 85/337 and Directive 2011/92, Directive 2001/42 distinguishes between, on the

1 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

2 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).

3 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).

one hand, plans and programmes which are, in principle, always subject to an environmental assessment and, on the other, plans and programmes which are to be made subject to such an assessment only where the Member States establish that they are liable to have significant effects on the environment.

The three above-mentioned directives have been the subject of a fairly extensive body of case-law, and the main approaches which the Court has taken therein are set out in this fact sheet.

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I. Assessment of the effects of public and private projects under Directives 85/337 and 2011/92

1. Scope of Directives 85/337 and 2011/92

a) Definition of 'project'

Judgment of 29 July 2019 (Grand Chamber), Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen (C-411/17, EU:C:2019:622) [4]

(Reference for a preliminary ruling – Environment – Espoo Convention – Aarhus Convention – Conservation of natural habitats and of wild fauna and flora – Directive 92/43/EEC – Article 6(3) – Definition of 'project' – Assessment of the effects on the site concerned – Article 6(4) – Meaning of 'imperative reasons of overriding public interest' – Conservation of wild birds – Directive 2009/147/EC – Assessment of the effects of certain public and private projects on the environment – Directive 2011/92/EU – Article 1(2)(a) – Definition of 'project' – Article 2(1) – Article 4(1) – Environmental impact assessment – Article 2(4) – Exemption from assessment – Phasing out of nuclear energy – National legislation providing, first, for restarting industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the date initially set by the national legislature for deactivating and ceasing production at that power station, and second, for deferral, also by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station – No environmental impact assessment)

By its judgment in *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, delivered on 29 July 2019, the Grand Chamber of the Court of Justice ruled on the interpretation of the definition of 'project' within the meaning of Directive 2011/92 Directive 92/43 on the conservation of natural habitats and of wild fauna and flora. [5]

That judgment was delivered in connection with proceedings between, on the one hand, two associations, Inter Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL, whose purpose is the protection of the environment and living conditions, and on the other, the Conseil des ministres (Council of Ministers, Belgium) in relation to legislation whereby the Kingdom of Belgium, first, provided for the restarting of industrial production of electricity, for a period of almost 10 years, at a nuclear power station that had previously been shut down, and second, for deferral by 10 years of the date initially set for deactivating and ceasing industrial production of electricity at an active nuclear power station. Those associations complained, essentially, that the

[4] That judgment is also presented in Section I.2.(a) 'Projects presenting a risk of significant effects on the environment (Annex I)', Section I.2.(c) 'Exemptions from the requirement for an impact assessment', and Section III.1. 'National measures adopted in breach of Directive 2011/92'.

[5] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

Belgian authorities adopted that legislation without complying with the requirements to conduct a prior assessment laid down in those directives.

In that context, the Court held that the measures at issue concerning the extension of industrial production of electricity by a nuclear power station constitute a 'project' within the meaning of Directives 2011/92 and 92/43, since they necessarily involve major works, altering the physical aspect of the sites concerned. Such a project must, in principle, be made subject to an assessment of the effects on the environment and on the protected sites concerned prior to the adoption of those measures. The fact that the implementation of those measures involve subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be made subject to such an assessment before the adoption of the measures if the nature and potential effects of that work on the environment and on the protected sites are sufficiently identifiable at that stage.

Judgment of 24 October 1996 (Full Court), Kraaijeveld and Others (C-72/95, EU:C:1996:404)[6]

(Environment - Directive 85/337/EEC - Assessment of the effects of certain public and private projects)

In *Kraaijeveld*, the Court, sitting in plenary session, observed that the EU legislature intended to adopt a broad interpretation of the scope of Directive 85/337.

An action was brought before the Nederlandse Raad van State (Council of State, Netherlands) for the annulment of a decision approving a zoning plan relating to the 'partial modification of zoning plans in connection with dyke reinforcement'. The purpose of that zoning plan was to allow works to reinforce the dykes along the Merwede river in the territory of a Dutch municipality. No environmental impact assessment of those works was carried out.

Against that background, the national court decided to refer for a preliminary ruling the question whether works on dykes running alongside waterways fell within the concept of 'canalization and flood-relief works' in point 10(e) of Annex II to Directive 85/337. In accordance with Article 4(2) thereof, projects of the classes listed in Annex II are to be made subject to an assessment where Member States consider that their characteristics so require.

In that regard, the Court observed that, although no clear answer to the question referred emerges from an examination of the various language versions of Annex II to Directive 85/337, the wording of that directive indicates that it has a wide scope and a broad purpose. It follows that, even if that is not clear from all the language versions,

[6] That judgment is also presented in Section I.2.(b) i. 'Determination of the need for an environmental impact assessment'.

point 10(e) of Annex II to the Directive is to be interpreted as including works on dykes, particularly since such works can have a significant effect on the environment within the meaning of the directive.

Similarly, the mere fact that the directive does not expressly refer to modifications to projects included in Annex II does not justify the conclusion that they are not covered by Directive 85/337. The very broad purpose of the directive would be undermined if 'modifications to development projects' were so construed as to enable certain works to escape the requirement of an impact assessment although, by reason of their nature, size or location, such works were likely to have significant effects on the environment.

Consequently, the expression 'canalization and flood-relief works' in point 10(e) of Annex II to Directive 85/337 is to be interpreted as including not only construction of a new dyke, but also modification of an existing dyke involving its relocation, reinforcement or widening, replacement of a dyke by constructing a new dyke in situ, whether or not the new dyke is stronger or wider than the old one, or a combination of such works.

b) Projects excluded from the scope of Directives 85/337 and 2011/92

Judgment of 16 September 1999, WWF and Others (C-435/97, EU:C:1999:418)

(Environment – Directive 85/337/EEC – Assessment of the effects of certain public and private projects)

In response to a reference for a preliminary ruling from the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Division for the Province of Bolzano, Italy), the Court clarified the scope of the exception provided for in Article 1(4) of Directive 85/337, under which the Directive does not cover projects serving national defence purposes.

In the main proceedings, the national court heard an action for the annulment of the administrative development consent for a project for the restructuring of Bolzano-St Jacob airport. The purpose of the project was to transform the airfield, which since 1925/26 has been used for military purposes, for private flying and, during a certain period and to a limited extent, also for civil purposes, into an airport that can be used commercially, with the aim of having regular scheduled flights as well as charter and cargo flights.

In support of their action for annulment, the applicants in the main proceedings argued that the restructuring project was likely to have significant effects on the environment and should therefore have been subject to an environmental impact assessment within the meaning of Directive 85/337.

In that context, the national court referred for a preliminary ruling the question whether Article 1(4) of Directive 85/337 is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of that directive.

In that regard, the Court observed that Article 1(4) of Directive 85/337 introduces an exception to the general rule that the environmental effects of projects intended to safeguard national defence are to be assessed in advance. Such an exclusion, which therefore introduces an exception to the general rule, must be interpreted restrictively. Therefore, only projects which mainly serve national defence purposes may be excluded from the assessment obligation.

Thus, the Court concluded that the directive covers projects, such as that at issue in the main proceedings that has the principal objective of restructuring an airport in order for it to be capable of commercial use, even though it may also be used for military purposes.

2. Obligation to carry out an impact assessment where there is a risk of significant effects on the environment

a) Projects presenting a risk of significant effects on the environment (Annex I)

Judgment of 29 July 2019 (Grand Chamber), Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen (C-411/17, EU:C:2019:622)

(Reference for a preliminary ruling – Environment – Espoo Convention – Aarhus Convention – Conservation of natural habitats and of wild fauna and flora – Directive 92/43/EEC – Article 6(3) – Definition of 'project' – Assessment of the effects on the site concerned – Article 6(4) – Meaning of 'imperative reasons of overriding public interest' – Conservation of wild birds – Directive 2009/147/EC – Assessment of the effects of certain public and private projects on the environment – Directive 2011/92/EU – Article 1(2)(a) – Definition of 'project' – Article 2(1) – Article 4(1) – Environmental impact assessment – Article 2(4) – Exemption from assessment – Phasing out of nuclear energy – National legislation providing, first, for restarting industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the date initially set by the national legislature for deactivating and ceasing production at that power station, and second, for deferral, also by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station – No environmental impact assessment)

In that judgment, the factual context of which is set out above, [7] the Court recalled that before consent is granted, in respect of any project within the meaning of Article 1(2)(a) of Directive 2011/92, an environmental impact assessment must be conducted on that project pursuant to Article 2(1) thereof, if it is likely to have significant effects on the environment, by virtue of its nature, size or location.

However, the requirement imposed by Article 2(1) of Directive 2011/92 is not that all projects likely to have a significant effect on the environment be made subject to the assessment procedure provided for in that directive, but only those mentioned in Article 4 of that directive, which refers to the projects listed in Annexes I and II thereto.

In that regard, Article 2(1) and Article 4(1) of Directive 2011/92, read together, indicate that projects covered by Annex I to that directive present an inherent risk of significant effects on the environment and therefore an environmental impact assessment is indispensable in those cases.

b) Projects likely to present a risk of significant effects on the environment (Annex II)

i. Determination of the need for an environmental impact assessment

Judgment of 24 October 1996, Kraaijeveld and Others (C-72/95, EU:C:1996:404)

(Environment - Directive 85/337/EEC - Assessment of the effects of certain public and private projects)

In that judgment, the factual context of which is set out above, [8] the Court was also asked to interpret Article 4(2) of Directive 85/337. In accordance with that provision, projects of the classes listed in Annex II to the directive are to be made subject to an assessment where Member States consider that their characteristics so require.

On that point, the Court held that, although the second paragraph of Article 4(2) of Directive 85/337 allows Member States to specify certain types of projects as being subject to an assessment, and to establish the criteria or thresholds necessary to determine which projects are to be subject to an assessment, the limits of that discretion are to be found in the obligation set out in Article 2(1) thereof, that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment.

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7 As regards the factual and legal context of the dispute, see Section I.1.(a) 'Definition of "project"'. That judgment is also included in Section I.2.(c) 'Exemptions from the requirement for an impact assessment' and Section III.1. 'National measures adopted in breach of Directive 2011/92'.

8 As regards the factual and legal context of the dispute, see Section II.1.(a) 'Definition of "project"'.

Thus, a Member State that establishes the criteria or thresholds necessary to classify projects that are to be subject to an assessment at a level such that, in practice, all projects in one of the classes listed in Annex II would be exempted in advance from the requirement of an impact assessment, would exceed the limits of its discretion under Article 2(1) and Article 4(2) of the directive, unless all projects excluded could, when viewed as a whole, be regarded as unlikely to have significant effects on the environment.

Judgment of 21 March 2013, Salzburger Flughafen (C-244/12, EU:C:2013:203)

(Assessment of the effects of certain projects on the environment – Directive 85/337/EEC – Articles 2(1) and 4(2) – Projects listed in Annex II – Extension works to the infrastructure of an airport – Examination on the basis of thresholds or criteria – Article 4(3) – Selection criteria – Annex III, point 2(g) – Densely populated areas)

The findings made in the judgment in *Kraaijeveld and Others*, [9] on the interpretation of Article 4(2) of Directive 85/337, were confirmed and developed in the judgment in *Salzburger Flughafen*, in which the Court was asked to determine whether a project, such as the project to expand the infrastructure of Salzburg Airport (Austria) at issue in that case, is to be made subject to an environmental impact assessment within the meaning of Directive 85/337. [10]

In that regard, the Austrian legislation transposing Directive 85/337 provided that, apart from certain modifications relating to runways, only modifications of airports expected to increase the number of aircraft movements by 20 000 or more per year were to be subject to an environmental assessment.

Hearing an action brought by the operator of Salzbourg airport against the decision of the competent administrative authority that the airport infrastructure expansion project submitted by that operator required an environmental impact assessment, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) decided to ask the Court whether Directive 85/337 precludes the abovementioned Austrian transposing legislation.

In answering that question in the affirmative, the Court recalled that, although Article 4(2)(b) of Directive 85/337 confers on the Member States a measure of discretion to establish thresholds or criteria to determine whether projects, such as that at issue, in the classes listed in Annex II to the Directive, must be made subject to an environmental impact assessment, Austria had exceeded the limits of that discretion, since the establishment of a threshold of at least 20 000 aircraft movements per year meant that changes to the infrastructure of small or medium-sized airports could never, in practice,

[9] Judgment of 24 October 1996, *Kraaijeveld and Others* (C-72/95, *EU:C:1996:404*).
[10] As amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5).

give rise to an environmental impact assessment, despite the fact that it could not be excluded that such works may have significant effects on the environment.

Furthermore, by establishing such a threshold in order to decide on the need for an environmental assessment of projects such as those at issue in the main proceedings, the Austrian transposing legislation, despite the obligation placed on Member States by Article 4(3) of Directive 85/337, takes into consideration only the quantitative aspect of the consequences of a project, without taking account of the other selection criteria in Annex III to that directive, particularly that laid down in point 2(g) of that annex, namely the population density of the area affected by the project.

ii. Reasons for the determination not to make a project subject to an assessment

Judgment of 30 April 2009, Mellor (C-75/08, EU:C:2009:279)

(Directive 85/337/EEC – Assessment of the effects of projects on the environment – Obligation to make public the reasons for a determination not to make a project subject to an assessment)

Having received a reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division), the Court clarified how a competent administrative authority's decision not to subject a project falling within Annex II to Directive 85/337 to an environmental impact assessment must be reasoned.

In October 2006, Partnerships in Care submitted an application for planning permission to construct a medium secure hospital unit on a site in the open countryside of the Nidderdale Area of Outstanding Natural Beauty.

By letter dated 4 December 2006, the Secretary of State for Communities and Local Government ('the Secretary of State') made public a determination that an environmental impact assessment would be unnecessary. The reason given for this decision was that the project in question was a 'Schedule 2 Development' which would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. No more specific reasons were given.

Mr Mellor brought an action against the Secretary of State's decision, which was dismissed by the High Court of Justice (England & Wales), Queen's Bench Division. The Court of Appeal (England & Wales) (Civil Division), hearing the appeal, decided to make a request for a preliminary ruling as to whether it is necessary to give reasons for a

determination not to carry out an environmental impact assessment under Directive 85/337, [11] and, if so, how those reasons must be given.

In that regard, the Court held that Article 4 of Directive 85/337 must be interpreted as not requiring that a decision, that it is unnecessary to subject a project falling within Annex II to that directive to an environmental impact assessment, should itself contain the reasons for the competent authority's decision that such an evaluation was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him/her the reasons for the decision or the relevant information and documents in response to the request made. That subsequent communication may take the form, not only of an express statement of the reasons, but also of the making available of information and relevant documents in response to the request made.

The Court further stated that, if a decision of a Member State not to subject a project falling within Annex II to Directive 85/337 to an environmental impact assessment in accordance with Articles 5 to 10 thereof states the reasons on which it is based, that decision is sufficiently reasoned where the grounds that it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information that the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.

c) Exemptions from the requirement for an impact assessment

Judgment of 29 July 2019 (Grand Chamber), Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen (C-411/17, EU:C:2019:622)

(Reference for a preliminary ruling – Environment – Espoo Convention – Aarhus Convention – Conservation of natural habitats and of wild fauna and flora – Directive 92/43/EEC – Article 6(3) – Definition of 'project' – Assessment of the effects on the site concerned – Article 6(4) – Meaning of 'imperative reasons of overriding public interest' – Conservation of wild birds – Directive 2009/147/EC – Assessment of the effects of certain public and private projects on the environment – Directive 2011/92/EU – Article 1(2)(a) – Definition of 'project' – Article 2(1) – Article 4(1) – Environmental impact assessment – Article 2(4) – Exemption from assessment – Phasing out of nuclear energy – National legislation providing, first, for restarting industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the date initially set by the national legislature for deactivating and ceasing production at that power station, and second, for

[11] As amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

deferral, also by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station – No environmental impact assessment)

In that judgment, the factual background of which is set out above, [12] the Court also interprets Article 2(4) of Directive 2011/92, under which Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in that directive.

In that regard, the Court stated that a Member State may, under that provision, exempt a project concerning the extension of industrial production of electricity by a nuclear power station from the requirement to conduct an environmental impact assessment in order to ensure the security of its electricity supply only where it can demonstrate that the risk to the security of that supply is reasonably probable and that the project in question is sufficiently urgent to justify not carrying out the assessment. However, the possibility of granting such an exemption is without prejudice to the obligation to conduct an environmental impact assessment in respect of projects which, like that at issue in the main proceedings, have transboundary effects.

3. Scope of the impact assessment

Judgment of 14 March 2013, Leth (C-420/11, EU:C:2013:166)

(Environment – Directive 85/337/EEC – Assessment of the effects of certain public and private projects on the environment – Consent for such a project without an appropriate assessment – Objectives of that assessment – Conditions to which the existence of a right to compensation are subject – Whether protection of individuals against pecuniary damage is included)

In response to a reference for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria), the Court clarified the scope of the impact assessment under Directive 85/337 [13] when the project in question also creates abnormal neighbourhood nuisances.

The applicant in the main proceedings, Ms Leth, is the owner of a house within the security zone of Vienna-Schwechat airport (Austria). Whilst various versions of Directive 85/337 were in force, that airport was the subject of a number of development and extension projects without the environmental impacts being assessed pursuant to that directive.

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[12] As regards the factual and legal context of the dispute, see Section I.1.(a) 'Definition of "project"'. That judgment is also presented in Section I.2.(a) 'Projects presenting a risk of significant effects on the environment (Annex I)' and Section III.1. 'National measures adopted in breach of Directive 2011/92'.

[13] As amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

Before the Austrian courts, Ms Leth claimed damages from the Austrian State and the Land Niederösterreich (State of Lower Austria) for the loss of value of her property resulting from aircraft noise on the ground that the environmental effects of the extention projects ought to have been assessed pursuant to Directive 85/337.

The Oberster Gerichtshof (Supreme Court), hearing the case, wished to know inter alia whether Article 3 of Directive 85/337 was to be interpreted as meaning that the environmental impact assessment, as provided for in that article, had to include the assessment of the effects which the project under examination had on the value of material assets.

In that regard, the Court finds that, pursuant to Article 3 of Directive 85/337, it is necessary to examine the direct and indirect effects of a project on, inter alia, human beings and material assets and, in accordance with the fourth indent of that article, it is also necessary to examine such effects on the interaction between those two factors. Therefore, it is necessary to examine, in particular, the effects of a project on the use of material assets by human beings.

It follows that, in the assessment of projects such as those at issue in the main proceedings, which are liable to result in increased aircraft noise, it is necessary to assess the effects of the latter on the use of buildings by human beings. However, an extension of the environmental assessment to the pecuniary value of material assets cannot be inferred from the wording of Article 3 of Directive 85/337 and would also not be in accordance with the purpose of that directive.

Accordingly, the Court concluded that the environmental impact assessment provided for in that article must identify, describe and assess the direct and indirect effects of noise on human beings in the event of use of a property affected by a project such as that at issue in the main proceedings. However, that assessment does not cover the effects which such a project has on the value of material assets.

Judgment of 24 February 2022, Namur-Est Environnement (C-463/20, EU:C:2022:121) [14]

(Request for a preliminary ruling – Environment – Directive 2011/92/EU – Assessment of the effects of certain projects on the environment – Directive 92/43/EEC – Conservation of natural habitats – Relationship between the assessment and consent procedure referred to in Article 2 of Directive 2011/92/EU and a national procedure for derogation from the species protection measures provided for by Directive 92/43/EEC – Concept of 'development consent' – Multi-stage decision-making process – Obligation to conduct an assessment – Material scope – Stage of the procedure at which public participation in the decision-making process must be ensured)

[14] That judgment is also presented in Section I.4.(b) 'Determining the procedural conditions under which the impact assessment is to be conducted' and Section I.5.(a) ii 'Public participation during a multi-stage decision-making process'.

Having received a reference for a preliminary ruling from the Conseil d'État (Council of State, Belgium), the Court clarified the scope of the impact assessment under Directive 2011/92 when the project in question requires the developer to obtain a derogation from the animal and plant species protection measures provided for in Directive 92/43.

On 4 November 2008, Sagrex SA submitted, to the competent authority of the Walloon Region, an application for a single permit for a project to resume working a quarry covering an area of over 50 hectares situated at Bossimé (Belgium), to construct installations and related developments, in particular on the banks of the Meuse.

On 1 September 2010, that authority invited Sagrex to submit to it amended plans and a supplementary environmental impact assessment for the project at issue.

On 15 April 2016, Sagrex submitted to the Inspector General of the Department of Nature and Forests of the Walloon Region an application for derogation from the plant and animal species protection measures prescribed by the Belgian law transposing Directive 92/43, in connection with that project. By a derogation decision of 27 June 2016, the Inspector General granted that request, subject to Sagrex implementing a series of mitigation measures.

Three months later, Sagrex submitted to the competent authority of the Walloon Region the amended plans and supplementary assessment for the project that had been requested of it on 1 September 2010. By a decree of 25 September 2017, the Walloon Region's Minister for the Environment and Town and Country Planning nevertheless refused to grant the single permit for which Sagrex had applied.

In the interim, Namur-Est Environnement brought an application for annulment of the derogation decision of 27 June 2016 of the Inspector General before the Conseil d'État (Council of State). In support of its application, the association argues, inter alia, that the derogation decision is part of the development consent procedure within the meaning of Article 1(2) of Directive 2011/92, and should therefore have been preceded by an environmental impact assessment and the accompanying public consultation, which did not take place in this case.

In that context, the Conseil d'Etat (Council of State) decided to refer a number of questions to the Court for a preliminary ruling, relating in particular to the requirement for assessment and development consent laid down in Article 2(1) of Directive 2011/92 for projects likely to have significant effects on the environment.

In that regard, the Court noted that it is apparent from Directive 2011/92 as a whole that the development consent decision for projects likely to have significant effects on the environment is meant to be taken on the conclusion of the entire process for the assessment of those projects. That decision-making process, the end point of which is the grant of development consent, must lead the competent authority to take full account of the effects that projects subject to the dual requirement for assessment and

development consent laid down in Article 2(1) of Directive 2011/92 are likely to have on the environment.

It follows that, in the specific case where the execution of a project subject to that dual requirement for assessment and development consent involves the developer applying for and obtaining a derogation from the plant and animal species protection measures prescribed by the provisions of national law transposing Directive 92/43 and where, consequently, the project is likely to have an impact on those species, the assessment of the project must address, in particular, that impact.

4. Multi-stage consent procedures

a) Stage at which the impact assessment must be conducted

Judgment of 7 January 2004, Wells (C-201/02, EU:C:2004:12) [15]

(Directive 85/337/EEC – Assessment of the effects of certain projects on the environment – National measure granting consent for mining operations without an environmental impact assessment being carried out – Direct effect of directives – Triangular situation)

In its judgment in *Wells*, the Court indicated, inter alia, the stage at which the impact assessment under Directive 85/337 must be carried out in a consent procedure comprising several stages.

The High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), made a reference to the Court for a preliminary ruling in a dispute between Ms Wells and the United Kingdom authorities concerning resumption of the working of Conygar Quarry, a site for the extraction of construction materials located near Ms Wells' dwelling-house.

Conygar Quarry, consent for the operation of which was granted in 1947, had not been operational for a number of years when Ms Wells purchased her house in 1984. However, at the request of the owners of Conygar Quarry, the competent Mineral Planning Authority ('MPA') registered the old mining permission by decision dated 24 August 1992, but stated that no development could lawfully be carried out unless and until an application for the determination of new planning conditions had been made to the MPA and finally determined.

When the owners of Conygar Quarry applied to the MPA to determine new planning conditions, the MPA imposed, by decision of 22 December 1994, more stringent conditions than those submitted by the owners. The latter therefore exercised their

[15] That judgment is also presented in Section I.6.(a) 'Vertical direct effect of directives and adverse repercussions on the rights of third parties'.

right of appeal to the Secretary of State for Transport, Local Government and the Regions ('the Secretary of State').

By decision of 25 June 1997, the Secretary of State imposed 54 planning conditions, leaving some matters to be decided by the competent MPA. Those matters were approved by the competent MPA by decision of 8 July 1999.

Neither the Secretary of State nor the competent MPA examined whether it was necessary to carry out an environmental impact assessment pursuant to Directive 85/337.

In the light of the above, Ms Wells requested the Secretary of State to take appropriate action, namely revocation or modification of the planning permission, to remedy the lack of an environmental impact assessment in the consent procedure. Since she received no reply to her request, she brought proceedings before the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), which referred several questions to the Court for a preliminary ruling.

In that connection, the Court indicated, inter alia, the stage at which the environmental impact assessment is to be carried out in the context of a consent procedure comprising several stages like the one at issue in that case.

In that regard, the Court recalled that, under Article 2(1) of Directive 85/337, the environmental impact assessment is to be carried out 'before consent is given'. According to the first recital in the preamble to the Directive, furthermore, the competent authority is to take account of the environmental effects of the project in question 'at the earliest possible stage' in the decision-making process.

Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

b) Determining the procedural conditions under which the impact assessment is to be conducted

Judgment of 24 February 2022, Namur-Est Environnement (C-463/20, EU:C:2022:121)

(Request for a preliminary ruling – Environment – Directive 2011/92/EU – Assessment of the effects of certain projects on the environment – Directive 92/43/EEC – Conservation of natural habitats –

Relationship between the assessment and consent procedure referred to in Article 2 of Directive 2011/92/EU and a national procedure for derogation from the species protection measures provided for by Directive 92/43/EEC – Concept of 'development consent' – Multi-stage decision-making process – Obligation to conduct an assessment – Material scope – Stage of the procedure at which public participation in the decision-making process must be ensured)

In that judgment, the factual context of which is set out above, [16] the Court also ruled on the discretion that the Member States have to determine the procedural conditions under which an environmental impact assessment is to be conducted under Directive 2011/92 where the decision-making process is carried out in several stages.

In that regard, the Court observed that Article 2(2) of Directive 2011/92 expressly provides that the environmental impact assessment may be integrated into existing national consent procedures. That implies, first, that that assessment need not necessarily be conducted in the context of a procedure specially created for that purpose and, second, that it need not necessarily be conducted in the course of single procedure.

Therefore, although the Member States have discretion enabling them to determine the procedural conditions under which the environmental impact assessment is to be conducted, and to apportion the various competences relating to that assessment among several different authorities, in particular, by conferring on each of them decision-making powers in the matter, that discretion must be exercised in accordance with the requirements laid down by Directive 2011/92 and in full compliance with the Directive's aims. Thus, the environmental impact assessment of a project must, in any event, be a full assessment and must take place before a development consent decision is taken with regard to the project.

Having regard to the particular circumstances of the case in the main proceedings, the Court further stated that, where a Member State confers power to assess some of the environmental effects of a project and to take a decision upon the conclusion of that partial assessment on an authority other than the one on which it confers power to give development consent for the project, that decision must necessarily be adopted before development consent is given. Moreover, the partial assessment must not prejudge the overall assessment that the authority competent for granting development consent must in any event carry out, and the preliminary decision must not prejudge the decision adopted on the conclusion of the overall assessment.

[16] As regards the factual and legal context of the dispute, see Section I.3. 'Scope of the impact assessment'. That judgment is also presented in Section I.5.(a) ii 'Public participation during a multi-stage decision-making process'.

5. Public participation in decision-making and access to justice

a) Public participation in the decision-making process

i. Arrangements for informing the public

Judgment of 7 November 2019, Flausch and Others (C-280/18, EU:C:2019:928)

(Reference for a preliminary ruling – Environment – Assessment of the effects of certain projects on the environment – Public participation in decision-making and access to justice – Date from which the time for bringing proceedings starts to run)

In response to a reference for a preliminary ruling from the Symvoulio tis Epikratias (Council of State, Greece), the Court provided clarification on the arrangements for informing the public and for public participation in decision-making in environmental matters under Directive 2011/92.

The dispute in the main proceedings arose in relation to a project for the creation of a tourist resort on the island of Ios. In accordance with national legislation, a notice inviting any interested person to participate in the environmental impact assessment procedure for that project was published in the local newspaper of the island of Syros (Cyclades, Greece) and posted in the administration offices of the South Aegean region of that island, 55 nautical miles away from the island of Ios, with no daily connection service between the two islands.

A year later, the Minister for the Environment and Energy and the Minister for Tourism adopted the decision approving the project for the creation of the tourist resort. That decision was published on the government portal *Diavgeia* and on the website of the Ministry of the Environment.

A number of property owners on the island of Ios and three environmental protection associations brought an action for annulment of that approval decision more than 18 months after its adoption. They claimed that they did not become aware of the decision until the commencement of works to develop the site.

In that regard, the referring court states that, in accordance with the national legislation transposing Directive 2011/92, until an electronic environmental register has been introduced, the public participation required by that directive is to be initiated by posting an announcement at the administrative headquarters of the region concerned and by publishing, in the local press, information concerning the project and an invitation to all interested persons to examine and comment on the environmental impact assessment.

Greek legislation also provides for a period of 60 days for bringing an action for annulment of decisions such as that authorising the tourist resort on the island of Ios, which starts to run from the date of the publication of that decision on the internet.

In light of the foregoing, the national court decided to refer questions to the Court for a preliminary ruling to establish whether the public participation procedure which preceded the adoption of the contested decision complies with the requirements of Directive 2011/92 and whether the period for bringing an action for annulment of that decision may start to run from the date of its publication on the internet.

In its judgment, the Court observed, first of all, that Directive 2011/92 leaves to the Member States the task of determining the detailed arrangements for informing the public and for public participation in decision-making in environmental matters, provided, however, that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness).

As regards the principle of effectiveness, the Court pointed out that the competent authorities must ensure that the information channels used are appropriate for reaching the citizens concerned, in order to give them a sufficient opportunity to find out about the activities proposed, the decision-making process and the possibility to participate at an early stage of the procedure.

In that regard, the Court held that the posting of a notice in the regional administrative headquarters, located on the island of Syros, even accompanied by publication in a local newspaper of the island of Syros, does not appear to contribute sufficiently to informing the public concerned about a property development project which is to be carried out on another island 55 nautical miles away.

The Court observed, next, that the conditions for access to the participation procedure file must enable the public concerned to exercise its rights effectively, which entails accessibility to the file under easy conditions. It is for the referring court to determine whether such requirements were complied with in the main proceedings, taking account in particular of the effort which the public concerned must make in order to cross between the island of Ios and the island of Syros, and of the possibilities that were open to the competent authorities for enabling, with proportionate effort, the file to be made available on the island of Ios.

Lastly, the Court held that Directive 2011/92 precludes national legislation which results in a period for bringing proceedings that starts to run from the announcement of consent for a project on the internet being relied on against members of the public concerned where they did not previously have an adequate opportunity to find out about the consent procedure in accordance with the requirements of that directive.

ii. Public participation during a multi-stage decision-making process

Judgment of 24 February 2022, Namur-Est Environnement (C-463/20, EU:C:2022:121)

(Request for a preliminary ruling – Environment – Directive 2011/92/EU – Assessment of the effects of certain projects on the environment – Directive 92/43/EEC – Conservation of natural habitats – Relationship between the assessment and consent procedure referred to in Article 2 of Directive 2011/92/EU and a national procedure for derogation from the species protection measures provided for by Directive 92/43/EEC – Concept of 'development consent' – Multi-stage decision-making process – Obligation to conduct an assessment – Material scope – Stage of the procedure at which public participation in the decision-making process must be ensured)

In that judgment, the factual context of which is set out above, [17] the referring court also asked the Court about public participation, under Directive 2011/92, in a multi-stage decision-making process where a given authority is called upon to assess, at a preliminary or intermediate stage of such a decision-making process, only some of the environmental effects of the project concerned.

On that point, the Court recalled that Articles 6 and 8 of Directive 2011/92 require the Member States to take the necessary measures to ensure that, in the course of the procedure for assessing and granting consent for projects subject to that directive, public participation takes place in accordance with a set of requirements. In that regard, those articles require that public participation in the decision-making process takes place at an early stage, that it is effective and that the results of that participation are taken into account by the competent authority when deciding whether or not to grant development consent for the project concerned.

However, it may prove more difficult to reconcile those various requirements in the context of a multi-stage decision-making process, in particular, where a given authority is called upon to assess, at a preliminary or intermediate stage, only some of the environmental effects of the project concerned.

Thus, the Court observed that, in such a situation, the requirement of early public participation in the decision-making process must be interpreted and applied in a manner which accommodates the equally important requirement of effective public participation in the process.

It follows that, in the context of a multi-stage decision-making process such as that described by the referring court, the requirement of early participation by the public in the decision-making process provided for in Article 6 of Directive 2011/92 does not mean that the adoption of a preliminary decision relating to some of the project's effects on the environment must be preceded by such participation, provided that public

[17] As regards the factual and legal context of the dispute, see Section I.3. 'Scope of the impact assessment'. That judgment is also presented in Section I.4.(b) 'Determining the procedural conditions under which the impact assessment is to be conducted'.

participation is effectively ensured during the procedure. That requirement of effectiveness implies, first, that the participation takes place before the adoption of the decision to be taken by the competent authority on development consent for that project, second, that it enables the public to express its views in a useful and comprehensive manner on all the environmental effects of that project and, third, that the authority competent for granting consent for the project may take full account of that participation.

b) Access to justice

i. Obligations on Member States

Judgment of 15 October 2015, Commission v Germany (C-137/14, EU:C:2015:683)

(Failure of a Member State to fulfil obligations – Directive 2011/92/EU – Assessment of the effects of certain public and private projects on the environment – Article 11 – Directive 2010/75/EU – Industrial emissions (integrated pollution prevention and control) – Article 25 – Access to justice – Non-compliant national procedural rules)

In 2014, the European Commission brought an action against Germany for failure to fulfil, in particular, its obligations under Article 11 of Directive 2011/92. [18]

According to the first paragraph of that provision, Member States are to ensure that, in accordance with the relevant national legal system, members of the public concerned, having a sufficient interest, or maintaining the impairment of a right, where administrative procedural law of a Member State requires that as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Directive 2011/92.

In that regard, the Commission complained, inter alia, that Germany had failed to fulfil the obligations under that provision, by restricting:

(1) the situations in which annulment of an administrative decision falling within the scope of Directive 2011/92 may be sought on the ground of procedural defect; and
(2) the standing to bring proceedings and the scope of the review by the courts to objections made during the administrative procedure.

[18] In that action for failure to fulfil obligations, the Commission also relied on an infringement of Article 25 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

In upholding those complaints, the Court pointed out, in the first place, that Article 11 of Directive 2011/92 precludes the Member States from limiting the applicability of the provisions transposing that article to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability of those provisions to cases in which such an assessment was carried out but was irregular.

Furthermore, Germany has also failed to fulfil its obligations under that article by restricting the annulment of decisions on the ground of procedural defect to where there has been no environmental impact assessment or pre-assessment and to cases where the applicant establishes that there is a causal link between the procedural defect and the outcome of the decision. Such a restriction makes it excessively difficult to exercise the right to bring proceedings provided for in Article 11 of Directive 2011/92 and undermines the objective of that directive which seeks to provide members of the public concerned with a broad access to justice.

In the second place, the Court found that Article 11 of Directive 2011/92 precludes the restriction, under a national provision, of the standing to bring proceedings and the scope of the review by the courts to the objections which have already been raised within the time limit set during the administrative procedure which led to the adoption of the decision which is the subject matter of the action.

In that regard, the Court stated that, although Article 11(4) of Directive 2011/92 does not exclude an action before an administrative authority preceding the legal proceedings and does not prevent national law from requiring the applicant to exhaust all administrative review procedures before being authorised to bring legal proceedings, that provision of EU law does not, however, allow restrictions on the pleas in law which may be raised in support of legal proceedings.

Furthermore, such a restriction laid on the applicant as to the nature of the pleas in law which he is permitted to raise before the court reviewing the legality of the administrative decision which concerns him cannot be justified by considerations of compliance with the principle of legal certainty. It is in no way established that a full review by the courts of the merits of that decision would undermine that principle.

Moreover, as regards the efficiency of administrative procedures, although it is true that the fact of raising a plea in law for the first time in legal proceedings may, in certain cases, hinder the smooth running of that procedure, the very objective pursued by Article 11 of Directive 2011/92 is not only to ensure that the litigant has the broadest possible access to review by the courts, but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety.

In that context, the Court stated that, nonetheless, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings.

ii. Admissibility of actions brought by individuals

Judgment of 16 April 2015, Gruber (C-570/13, EU:C:2015:231)

(Reference for a preliminary ruling – Environment – Directive 2011/92/EU – Assessment of the effects of certain public and private projects on the environment – Construction of a retail park – Binding effect of an administrative decision not to carry out an environmental impact assessment – No public participation)

Ruling on a request for a preliminary ruling from the Verwaltungsgerichtshof (Administrative Court, Austria), the Court found that Directive 2011/92 precludes national legislation under which neighbours affected by a project for the construction and operation of a retail park can neither challenge a decision that the project does not require an environmental impact assessment, nor object to the consent given for the project on the basis that it ought to have been subject to such an assessment.

In February 2012, the Unabhängiger Verwaltungssenat für Kärnten (Independent Administrative Board for Carinthia, Austria) granted a development consent for the construction and operation of a retail park in Klagenfurt am Wörthersee (Austria) on land bordering property belonging to Ms Gruber. In accordance with a decision of the Province of Carinthia's government of 21 July 2010, that development consent was not preceded by an environmental impact assessment.

Ms Gruber brought an action for annulment of the development consent decision before the Verwaltungsgerichtshof (Administrative Court) on the ground, inter alia, that that consent should have been made contingent on an environmental impact assessment being carried out. In support of that action, she pleaded the unlawfulness of the decision of the Province of Carinthia's government, by which that government declared that no environmental impact assessment needed to be carried out in relation to the project at issue.

In that regard, the Verwaltungsgerichtshof (Administrative Court) stated that, under Austrian legislation, neighbours such as Ms Gruber do not have the right to bring an action directly against the decision concerning the need to carry out an environmental impact assessment of the construction and operation project at issue, or the right to challenge that decision in the context of an action against the development consent decision concerning that project.

In those circumstances, the national court decided to refer to the Court the question whether such national legislation complies with Directive 2011/92.

In that regard, the Court recalled that Article 11(1) of that directive provides that Member States are to ensure that, in accordance with the relevant national legal system, members of the 'public concerned', within the meaning of Article 1(2), who have a

'sufficient interest' or who claim the impairment of a right, where administrative procedural law of a Member State requires that as a precondition, have access to a review procedure as regards the decisions, acts or omissions falling within the scope of Directive 2011/92 to challenge their substantive or procedural legality.

On the other hand, the Court observed that, while the Member States have a wide margin of discretion to determine what constitutes 'sufficient interest' or 'impairment of a right', that discretion is limited by the need to respect the objective of ensuring wide access to justice for the public concerned. In that regard, although the national legislature is entitled, inter alia, to confine the rights whose infringement may be relied on by an individual contesting one of the decisions, acts or omissions referred to in Article 11 of Directive 2011/92 to individual public-law rights, the provisions of that article relating to the rights to bring actions of members of the public concerned by the decisions, acts or omissions that fall within the scope of that directive cannot be interpreted restrictively.

It follows that national legislation, such as that at issue in the main proceedings, which deprives a very large number of individuals, including in particular neighbours who may meet the conditions laid down in Article 11(1) of Directive 2011/92, of the right to bring an action against decisions examining whether an environmental impact assessment need be carried out in relation to a project is incompatible with that directive.

iii. Admissibility of actions brought by environmental protection associations

Judgment of 15 October 2009, Djurgården-Lilla Värtans Miljöskyddsförening (C-263/08, EU:C:2009:631)

(Directive 85/337/EEC – Public participation in environmental decision-making procedures – Right of access to a review procedure to challenge decisions authorising projects likely to have significant effects on the environment)

In its judgment in *Djurgården-Lilla Värtans Miljöskyddsförening*, the Court found that Article 10a of Directive 85/337 [19] precludes national legislation which reserves the right to bring an appeal against decisions on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2 000 members.

In the case in the main proceedings, the Municipality of Stockholm (Sweden) concluded a contract for the construction of a tunnel approximately one kilometre in length through the hills in order to house electric cables replacing overground high tension cables.

[19] As amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

The Stockholm Regional Authority concluded, on the basis of the environmental impact assessment carried out for that project, that it was likely to have significant effects on the environment.

Nevertheless, development consent to carry out the works at issue was granted, and an environmental protection association appealed against the development consent decision. However, the appeal was held to be inadmissible because the appellant association did not meet the condition, laid down by national legislation, that it should have a minimum of 2 000 members.

After an appeal was brought against that decision of inadmissibility, the Högsta domstolen (Supreme Court, Sweden), decided to refer a number of questions to the Court for a preliminary ruling, including the question whether Directive 85/337 allows Member States to provide that small environmental protection associations have no right of access to a review procedure to challenge a decision on a project falling within the scope of that directive.

On that point, the Court recalled that it is clear from Directive 85/337 that it distinguishes between the public concerned by one of the projects falling within its scope in a general manner and, on the other hand, a sub-group of natural or legal persons within the public concerned who, in view of their particular position vis-à-vis the project at issue, are, in accordance with Article 10a of that directive, to be entitled to challenge the decision which authorises it.

While it is true that that article leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal, the national rules thus established must, first, ensure ‘wide access to justice’ and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify EU provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

Noting that the Swedish Government had acknowledged that only two environmental associations had at least 2 000 members, the Court thus concluded that Article 10a of Directive 85/337 precludes a provision of Swedish law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2 000 members.

Judgment of 12 May 2011, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (C-115/09, EU:C:2011:289)

(Directive 85/337/EEC – Assessment of the effects of projects on the environment – Aarhus Convention – Directive 2003/35/CE – Access to justice– Non-governmental organisations for the protection of the environment)

Having been requested to give a preliminary ruling, the Court further clarified the scope of the right of environmental protection associations to bring proceedings under Directive 85/337. [20]

The case in the main proceedings arises from a project for the construction and operation of a coal-fired power station in Lünen (Germany), which was the subject of an environmental impact assessment. As part of that procedure, a preliminary decision and a partial permit were issued by the competent authority, which stated there were no legal objections to the project.

In June 2008, an environmental NGO called Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV ('BUND') brought an action before the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Land of North Rhine-Westphalia, Germany) for the annulment of the preliminary decision and partial permit for the project in question. It relies, in particular, on an infringement of the provisions transposing Directive 92/43.

According to that court, BUND is not entitled to bring that action for annulment, because it is not maintaining the impairment of a substantive individual right, as is required in German law to obtain *locus standi*. However, the court wonders whether the German requirement that an environmental NGO must maintain the impairment of a right in that sense is itself compatible with European Union law; in particular, with Article 10a of Directive 85/337.

In response to those questions, the Court recalled that the first paragraph of Article 10a of Directive 85/337 provides that the decisions, acts or omissions subject to the public participation provisions of that directive must be actionable before a court of law through a review procedure 'to challenge [their] substantive or procedural legality', without in any way limiting the pleas that could be put forward in support of such an action.

With regard to the conditions for the admissibility of such actions, Article 10a of Directive 85/337 provides for two possibilities: the admissibility of an action may be conditional on 'a sufficient interest in bringing the action' or on the applicant alleging 'the impairment of a right', depending on which of those conditions is adopted in the national legislation. The first sentence of the third paragraph of Article 10a of Directive

[20] As amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

85/337 further states that what constitutes a sufficient interest and impairment of a right is to be determined by the Member States consistently with the objective of giving the public concerned 'wide access to justice'.

With regard to actions brought by environmental protection organisations, the second and third sentences of the third paragraph of Article 10a of Directive 85/337 add that, to that end, such organisations must be regarded as having either a sufficient interest or rights which may be impaired, depending on which of those conditions for admissibility is adopted in the national legislation.

In the light of that legal framework, the Court pointed out that, although 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 contesting one of the decisions, acts or omissions referred to in Article 10a of Directive 85/337, such a limitation cannot be applied as such to environmental protection organisations without disregarding the objectives of the last sentence of the third paragraph of Article 10a of Directive 85/337.

If, as is clear from that provision, those organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. As the dispute in the main proceedings shows, that very largely deprives those organisations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.

Consequently, the Court concluded that Article 10a of Directive 85/337 precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule flowing from EU environment law and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.

iv. The 'not prohibitively expensive' requirement

a. Scope

Judgment of 15 March 2018, North East Pylon Pressure Campaign and Sheehy (C-470/16, EU:C:2018:185)

(Reference for a preliminary ruling – Assessment of the effects of certain projects on the environment – Directive 2011/92/EU – Right of members of the public concerned to a review procedure – Premature challenge – Concepts of a not prohibitively expensive procedure and of decisions, acts or omissions subject to the public participation provisions of the directive – Applicability of the Aarhus Convention)

In the context of a reference for a preliminary ruling, the Court ruled on the scope of the requirement for judicial procedures in environmental matters to be 'not prohibitively expensive', as enshrined in Directive 2011/92 and the Aarhus Convention. [21]

In 2015, EirGrid plc, an Irish state-owned electric power transmission operator, requested authorisation to erect approximately 300 pylons carrying high-voltage cables, with a view to connecting the electricity grids of Ireland and Northern Ireland and ensuring reliable electricity supply throughout the island. Following the formal application for development consent and the submission of the environmental impact assessment, An Bord Pleanála, the Irish planning appeals board, convened an oral hearing on 7 March 2016.

On 4 March 2016, a landowner and a lobby group made an application for leave to seek judicial review in order to challenge the development consent process. However, the High Court (Ireland) refused to grant the leave sought on the grounds that the action would be premature.

In the context of the proceedings concerning the determination of costs, the parties disagree on the allocation of the costs incurred in the procedure concerning the application for leave to apply for judicial review, which amount to more than EUR 500 000. In that context, the High Court decided to ask the Court about the compatibility of Irish law with the provisions of Directive 2011/92 and the provisions of the Aarhus Convention laying down the requirement that certain judicial procedures not be prohibitively expensive.

In that regard, the Court recalled out that the requirement that costs not be prohibitive, laid down in Article 11(4) of Directive 2011/92, concerns all the costs arising from participation in the judicial proceedings. It follows that that requirement must be

[21] Convention on access to information, public participation in decision- making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1, 'the Aarhus Convention').

interpreted as applying to a procedure before a court of a Member State, such as that in the main proceedings, in which it is determined whether leave may be granted to bring a challenge in the course of a development consent process, especially where that Member State has not established at what stage a challenge may be brought.

The Court also pointed out that where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that costs not be prohibitive applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation. In such a case, it is for the national court to distinguish – on a fair and equitable basis and in accordance with the applicable national procedural rules – between the costs relating to each of the two types of arguments, so as to ensure that the requirement that costs not be prohibitive is applied to the part of the challenge based on the rules on public participation.

In that context, the Court stated that Article 9(3) and (4) of the Aarhus Convention must be interpreted as meaning that that requirement applies to the part of a challenge that would not be covered by Directive 2011/92, in so far as the applicant seeks, by that challenge, to ensure that national environmental law is complied with. Although those provisions do not have direct effect, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with them.

Lastly, the Court held that a Member State cannot derogate from the requirement that costs not be prohibitive, laid down by the Aarhus Convention and Directive 2011/92, where a challenge is deemed frivolous or vexatious, or where there is no link between the alleged breach of national environmental law and damage to the environment. It is nevertheless open to the national court to take account of factors such as, in particular, whether the challenge has a reasonable chance of success, or whether it is frivolous or vexatious, provided that the amount of the costs imposed on the applicant is not unreasonably high.

b. Assessment criteria

Judgment of 11 April 2013, Edwards and Pallikaropoulos (C-260/11, EU:C:2013:221)

(Environment – Aarhus Convention – Directive 85/337/EEC – Directive 2003/35/EC – Article 10a – Directive 96/61/EC – Article 15a – Access to justice in environmental matters – Meaning of 'not prohibitively expensive' judicial proceedings)

In answer to a reference for a preliminary ruling from the Supreme Court of the United Kingdom, the Court clarified the criteria for assessing the requirement for judicial procedures in environmental matters to be 'not prohibitively expensive', as provided for

in the fifth paragraph of Article 10a of Directive 85/337 [22] and the fifth paragraph of Article 15a of Directive 96/61. [23]

After dismissing an appeal brought in the context of environmental proceedings, the referring court asked the Court how it should apply the abovementioned 'not prohibitively expensive' requirement in the present case, having regard to the considerable risks in terms of costs to which the appellant had been exposed under the applicable national legislation.

In that regard, the Court observed that the requirement, under the fifth paragraph of Article 10a of Directive 85/337 and the fifth paragraph of Article 15a of Directive 96/61, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.

In making that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him for the purposes of Directives 85/337 and 96/61.

Lastly, the requirement that judicial proceedings should not be prohibitively expensive cannot be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal.

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[22] As amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

[23] Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

6. Direct effect and conforming interpretation

a) Vertical direct effect of directives and adverse repercussions on the rights of third parties

Judgment of 7 January 2004, Wells (C-201/02, EU:C:2004:12)

(Directive 85/337/EEC – Assessment of the effects of certain projects on the environment – National measure granting consent for mining operations without an environmental impact assessment being carried out – Direct effect of directives – Triangular situation)

In that case, the factual context of which is set out above, [24] the Court was also asked to rule on whether, in circumstances such as those of the main proceedings, an individual such as Ms Wells may, where appropriate, rely on Article 2(1) of Directive 85/337, read together with Articles 1(2) and 4(2) thereof, against the United Kingdom authorities.

In accordance with Article 2(1) of Directive 85/337, Member States are to adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4 of that directive.

In that context, the United Kingdom Government argued that acceptance that an individual such as Ms Wells is entitled to rely on that provision against the authorities in a case such as that in the main proceedings would amount to 'inverse direct effect', directly obliging the United Kingdom to deprive the private owners of the Conygar Quarry of their rights.

In that regard, the Court recalled that the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights. Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party.

On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned.

Accordingly, the Court observed that, in so far as concerns the main proceedings, the obligation on the United Kingdom to ensure that the competent authorities carry out an

[24] As regards the factual and legal context of the dispute, see Section I.4.(a) 'Stage at which the impact assessment must be conducted'.

assessment of the environmental effects of the working of the Conygar Quarry is not directly linked to the performance of any obligation which would fall, pursuant to Directive 85/337, on the quarry owners. The fact that mining operations must be halted to await the results of the assessment is admittedly the consequence of the belated performance of that State's obligations. Such a consequence cannot, however, be described as 'inverse direct effect' of the provisions of that directive in relation to the quarry owners.

The Court therefore concluded that an individual such as Ms Wells may, where appropriate, rely on Article 2(1) of Directive 85/337, read together with Articles 1(2) and 4(2) thereof, against the United Kingdom authorities.

b) Interpretation of national law in conformity with EU law

Judgment of 17 October 2018, Klohn (C-167/17, EU:C:2018:833)

(Reference for a preliminary ruling – Environment – Assessment of the effects of certain projects on the environment – Right to challenge a development consent decision – Requirement for a procedure which is not prohibitively expensive – Concept – Temporal application – Direct effect – Effect on a national decision on the taxation of costs which has become final)

Having received a reference for a preliminary ruling from the Supreme Court (Ireland), the Court recalled that, although the rule that judicial procedures in environmental matters must be 'not prohibitively expensive', laid down in the fifth paragraph of Article 10a of Directive 85/337, [25] does not have direct effect, the national courts are nonetheless required to interpret national law so far as possible in conformity with that provision.

In the course of 2004, An Bord Pleanála (Planning Appeals Board, Ireland) ('the Board') granted planning permission to construct, in Achonry, in County Sligo (Ireland), an inspection unit for fallen animals from across Ireland.

Mr Klohn, the owner of a farm close to the site of that facility, sought judicial review of that planning permission and his application was dismissed by judgment of 23 April 2008 of the High Court. On 6 May 2008, that court ordered Mr Klohn to pay the costs incurred by the Board.

By decision of 24 June 2010, the Taxing Master of the High Court assessed the costs which Mr Klohn would have to reimburse the Board at approximately EUR 86 000. That decision was upheld by judgment of the High Court, and Mr Klohn has appealed against that judgment to the Supreme Court (Ireland).

[25] As amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

In view of the amount of the costs involved, the Supreme Court decided to refer questions to the Court to establish, inter alia,

– whether the 'not prohibitively expensive' rule in laid down in Article 10a of Directive 85/337 has direct effect or whether there is an obligation to interpret national law in conformity with it, and
– whether the Taxing Master or the national court reviewing his decision must apply the not prohibitively expensive rule, notwithstanding that the order for costs has become final.

After noting that the question of the direct effect of the not prohibitively expensive rule arises in the main proceedings on account of Ireland's late transposition of the fifth paragraph of Article 10a of Directive 85/337, as amended, the Court found that that provision does not have direct effect. In accordance with the obligation to interpret national law in conformity with EU law, the Irish courts are nonetheless required to interpret national law to the fullest extent possible, once the time limit for transposing the fifth paragraph of Article 10a of Directive 85/337 has expired, in such a way that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts, which falls within the scope of that article, by reason of the financial burden that might arise as a result.

In that regard, the Court also stated that the Irish courts are required to interpret national law, as soon as the time limit for transposing the fifth paragraph of Article 10a of Directive 85/337 has expired, so as to render the future effects of situations which arose under the old rule immediately compatible with that provision. It follows that those courts are under an obligation to interpret national law in conformity with the not prohibitively expensive rule laid down in that provision when deciding on the allocation of costs in judicial proceedings which were ongoing as at the date on which the time limit for transposing that rule expires, irrespective of the date on which those costs were incurred during the proceedings concerned.

Noting that the Irish costs procedure takes place in two stages, the Court held, furthermore, that the principle of interpreting national law in conformity with EU law has certain limitations, including those which follow from the principle of *res judicata*. In the present case, it is therefore for the referring court to assess the force of *res judicata* attaching to the decision of 6 May 2008 by which the High Court ordered Mr Klohn to bear the costs of the proceedings, without fixing the precise amount of those costs, so as to determine if and to what extent national law may be interpreted in conformity with the not prohibitively expensive rule in the main proceedings.

II. Impact assessment of plans and programmes under Directive 2001/42

1. Scope of Directive 2001/42

a) Plans and programmes covered by Directive 2001/42

Judgment of 25 June 2020 (Grand Chamber), A and Others (Wind turbines at Aalter and Nevele) (C-24/19, EU:C:2020:503) [26]

(Reference for a preliminary ruling – Directive 2001/42/EC – Environmental impact assessment – Development consent for the installation of wind turbines – Article 2(a) – Concept of 'plans and programmes' – Conditions for granting consent laid down by an order and a circular – Article 3(2)(a) – National instruments setting the framework for future development consent of projects – Absence of environmental assessment – Maintenance of the effects of national instruments, and consents granted on the basis of those instruments, after those instruments have been declared not to comply with EU law – Conditions)

By the judgment in *A and Others (Wind turbines at Aalter and Nevele)*, the Court, sitting as the Grand Chamber, ruled on the interpretation of Directive 2001/42 and gave important clarifications as to the instruments that are subject to the assessment prescribed by that directive.

The Court received that request for interpretation in the context of proceedings between the neighbours of a site located close to the E40 motorway on the territory of the Aalter (Belgium) and Nevele (Belgium) communes, proposed for the installation of a wind farm by the Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen (regional town planning official of the Flanders Department of Land Planning, East Flanders Division, Belgium), concerning the grant by that official of development consent for the purpose of the installation and operation of five wind turbines ('the consent at issue'). The grant, on 30 November 2016, of the consent at issue had been subject, inter alia, to certain conditions laid down by the provisions of an order of the Flemish government and a circular on the installation and operation wind turbines being satisfied.

In support of an action seeking the annulment of the consent at issue brought before the Raad voor Vergunningsbetwistingen (Council for consent disputes, Belgium), the applicants alleged, in particular, a breach of Directive 2001/42, on the ground that the order and the circular, on the basis of which the consent had been granted, had not been subject to an environmental assessment. The official who had granted the consent

[26] That judgment is also presented in Section II.2.(a) i. 'Plans and programmes covered by Article 3(2)(a) of Directive 2001/42' and Section III.2. 'National measures adopted in breach of Directive 2001/42'.

at issue considered, on the contrary, that the order and circular in question were not required to be subject to such an assessment.

In its judgment, the Court recalled that, in accordance with Article 2(a) of Directive 2001/42, that directive covers plans and programmes, and modifications to them, which are prepared or adopted by an authority of a Member State, in so far as they are 'required by legislative, regulatory or administrative provisions'.

In that regard, it is clear from the settled case-law of the Court that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of that directive. Thus, a measure must be regarded as 'required' where the legal basis of the power to adopt the measure is found in a particular provision, even if the adoption of that measure is not, strictly speaking, compulsory.

Invited by the referring court and the United Kingdom Government to reconsider that line of case-law, the Court observed first of all that to restrict the condition referred to in Article 2(a), second indent, of Directive 2001/42 only to 'plans and programmes' whose adoption is compulsory would be likely to confer a marginal scope on that concept and would not enable the effectiveness of that provision to be maintained. According to the Court, having regard to the diversity of situations that arise and the wide-ranging practices of national authorities, the adoption of plans or programmes and modifications to them is often neither imposed as a general requirement, nor left entirely to the discretion of the competent authorities. Moreover, the high level of protection for the environment that Directive 2001/42 seeks to ensure by subjecting plans and programmes that are likely to have a significant effect on the environment to an environmental assessment meets the requirements of the Treaties and of the Charter of Fundamental Rights of the European Union on the protection and improvement of the quality of the environment. [27] Those objectives would be likely to be compromised by a strict interpretation, which would allow a Member State to circumvent that requirement for an environmental assessment by refraining from providing that competent authorities are required to adopt such plans and programmes. Finally, the Court observed that a broad interpretation of the concept of 'plans and programmes' is consistent with the European Union's international undertakings. [28]

Next the Court examined whether the order and the circular in question satisfied the condition in Article 2(a), second indent, of Directive 2001/42. In that regard it observed that the order was adopted by the Flemish government in its capacity as the executive authority of a federated Belgian entity, pursuant to a legislative power. In addition, the

[27] Article 3(3) TEU, Article 191(2), TFEU, and Article 37 of the Charter of Fundamental Rights of the European Union.

[28] Such as those flowing from Article 2(7) of the Convention on environmental impact assessment in a transboundary context, signed in Espoo (Finland) on 26 February 1991.

circular, which provides a framework for the competent authorities' discretion, also emanates from the Flemish government and amends, by extending or derogating from them, the provisions of the order, subject to the checks that it is for the national court to carry out, as to its exact legal nature and effect. The Court therefore concluded that the order and, subject to those verifications, the circular were covered by the concept of 'plans and programmes', in that they must be regarded as 'required' within the meaning of Directive 2001/42.

Judgment of 22 February 2022 (Grand Chamber), Bund Naturschutz in Bayern (C-300/20, EU:C:2022:102) [29]

(Reference for a preliminary ruling – Environment – Directive 2001/42/EC – Assessment of the effects of certain plans and programmes on the environment – Article 2(a) – Concept of 'plans and programmes' – Article 3(2)(a) – Measures prepared for certain sectors and setting a framework for future development consent of projects listed in Annexes I and II to Directive 2011/92/EU – Article 3(4) – Measures setting a framework for future development consent of projects – Landscape conservation regulation adopted by a local authority)

In its judgment in *Bund Naturschutz in Bayern*, delivered by the Grand Chamber, the Court clarified the concept of plans and programmes that require an environmental assessment under Directive 2001/42.

In 2013, Landkreis Rosenheim (Rural District of Rosenheim, Germany) adopted a regulation relating to a landscape conservation area ('the Inntal Süd Regulation') without having carried out an environmental assessment beforehand in accordance with Directive 2001/42. The Inntal Süd Regulation placed an area of around 4 021 hectares under protection, that is to say an area around 650 hectares smaller than the area covered by the previous regulations.

Bund Naturschutz in Bayern eV, an environmental association, challenged that regulation before the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court, Bavaria, Germany). After its application was dismissed as inadmissible, that association brought an appeal on a point of law (*Revision*) against that decision before the Bundesverwaltungsgericht (Federal Administrative Court, Germany).

That court took the view that the Inntal Süd Regulation constitutes a plan or programme within the meaning of Directive 2001/42. Having doubts, however, as to whether the Rural District of Rosenheim had an obligation to carry out, in accordance with that directive, an environmental assessment prior to the adoption of that regulation, it decided to bring that issue before the Court of Justice by means of the preliminary ruling procedure.

[29] That judgment is also presented in Section II.2.(a) i. 'Plans and programmes covered by Article 3(2)(a) of Directive 2001/42' and Section II.2.(b) ii. 'Plans and programmes covered by Article 3(4) of Directive 2001/42'.

As a preliminary point, the Court recalled that Directive 2001/42 covers plans and programmes which, first, are prepared or adopted by an authority at national, regional or local level, and, second, are required by legislative, regulatory or administrative provisions.

As regards the second condition, it is clear from settled case-law that plans and programmes, the adoption of which is regulated by national legislative or regulatory provisions, that determine the authorities competent to adopt them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of that directive. Thus, a measure must be regarded as 'required' where there exists, in national law, a particular legal basis authorising the competent authorities to adopt that measure, even if such adoption is not mandatory.

Accordingly, as the Inntal Süd Regulation was adopted by a local authority on the basis of a provision of German legislation, it constitutes a plan or programme within the meaning of Directive 2001/42. In that regard, the Court observed that the general nature of that regulation, which contains general and abstract provisions laying down general requirements, does not preclude such a classification. The fact that a national measure is to some extent abstract and pursues an objective of transforming an existing geographical area is illustrative of its planning and programming aspect and does not prevent it from being included in the concept of 'plans and programmes'.

b) Repeal of plans and programmes

Judgment of 22 March 2012, Inter-Environnement Bruxelles and Others (C-567/10, EU:C:2012:159)

(Directive 2001/42/EC – Assessment of the effects of certain plans and programmes on the environment – Concept of plans and programmes 'which are required by legislative, regulatory or administrative provisions' – Applicability of the directive to a procedure for the total or partial repeal of a land use plan)

Having received a reference for a preliminary ruling from the Belgian Cour constitutionnelle (Constitutional Court, Belgium) the Court of Justice confirmed that, in principle, measures repealing plans or programmes within the meaning of Directive 2001/42 also fall within the scope of that directive.

Following the adoption by the Région de Bruxelles-Capitale (the Brussels-Capital Region) of an order amending the Brussels Town and Country Planning Code, a number of not-for-profit associations brought before the Cour constitutionnelle (Constitutional Court) an action for annulment of certain provisions of that order. In support of their action, those associations complained, inter alia, that the contested amendments concerning the repeal of specific land use plans and the preparation of plans for the conservation of

historic monuments do not require an environmental assessment as provided for in Directive 2001/42.

In that context, the Cour constitutionnelle (Constitutional Court) considered inter alia whether the total or partial repeal of a plan or programme falling within Directive 2001/42 must be subject to an environmental assessment within the meaning of that directive.

In that regard, the Court observed that, although Article 2(a) of Directive 2001/42 refers expressly not to repealing measures but only to measures modifying plans and programmes, the fact remains that, given the objective of Directive 2001/42, the provisions which delimit the Directive's scope must be interpreted broadly. In addition, as a repealing measure necessarily entails a modification of the legal reference framework and consequently alters the environmental effects which had, as the case may be, been assessed under the procedure prescribed by Directive 2001/42, such a measure may give rise to significant effects on the environment.

The Court thus concluded that, in light of the characteristics and the effects of the measures repealing plans or programmes within the meaning of Directive 2001/42, to regard those measures as excluded from the scope of that directive would be contrary to the objectives pursued by the European Union legislature and such as to compromise, in part, the practical effect of the Directive.

On the other hand, in principle, that is not the case if the repealed measure falls within a hierarchy of town and country planning measures, as long as those measures lay down sufficiently precise rules governing land use, they have themselves been the subject of an assessment of their environmental effects and it may reasonably be considered that the interests which Directive 2001/42 is designed to protect have been taken into account sufficiently within that framework.

2. Obligation to carry out an impact assessment where there are significant risks to the environment

a) Plans and programmes presenting a risk of significant effects on the environment

i. Plans and programmes covered by Article 3(2)(a) of Directive 2001/42

Judgment of 22 February 2022 (Grand Chamber), Bund Naturschutz in Bayern (C-300/20, EU:C:2022:102)

(Reference for a preliminary ruling – Environment – Directive 2001/42/EC – Assessment of the effects of certain plans and programmes on the environment – Article 2(a) – Concept of 'plans and

programmes' – Article 3(2)(a) – Measures prepared for certain sectors and setting a framework for future development consent of projects listed in Annexes I and II to Directive 2011/92/EU – Article 3(4) – Measures setting a framework for future development consent of projects – Landscape conservation regulation adopted by a local authority)

In that judgment, the factual context of which is set out above, [30] the Court also examined whether a national measure such as the Inntal Süd Regulation, which is intended to protect nature and the landscape and, to that end, lays down general prohibitions and makes provision for compulsory permits, falls within the scope of Article 3(2)(a) of Directive 2001/42.

According to that provision, an environmental assessment must be carried out for all plans and programmes that satisfy two cumulative conditions.

In the first place, the plans or programmes must 'concern' one of the sectors listed in that article. [31] In this instance, it appears to the Court that that first condition is satisfied, which it is, however, for the referring court to ascertain.

In that regard, the Court stated that the fact that the main objective of a plan or programme is the protection of the environment does not mean that that plan or programme may not also 'concern' one of the sectors listed in Article 3(2)(a) of Directive 2001/42. The very essence of measures of general application prepared with a view to the protection of the environment is precisely to regulate human activities having significant environmental effects, including those covered by those sectors.

In the second place, the plans or programmes must set the framework for future development consent of projects listed in Annexes I and II to Directive 2011/92.

That requirement is satisfied where a plan or programme establishes a significant body of criteria and detailed rules for the grant and implementation of one or more of the projects listed in Annexes I and II to Directive 2011/92, inter alia with regard to the location, nature, size and operating conditions of such projects, or the allocation of resources connected with those projects. By contrast, where a plan or programme, such as the Inntal Süd Regulation, merely defines landscape conservation objectives in general terms and makes activities or projects in the conservation area subject to obtaining a compulsory permit, without however setting out criteria or detailed rules for the grant and implementation of those projects, the requirement referred to above is not satisfied, even if that regulation may have a certain influence on the location of projects.

In the light of those considerations, the Court concluded that the Inntal Süd Regulation does not constitute a plan or programme which must be subject to an environmental

[30] As regards the factual and legal context of the dispute, see Section II.1.(a) 'Plans and programmes covered by Directive 2001/42'. That judgment is also presented in Section II.2.(b) ii. 'Plans and programmes covered by Article 3(4) of Directive 2001/42'.

[31] Namely agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use.

assessment in accordance with Article 3(2)(a) of Directive 2001/42, in so far as it does not lay down sufficiently detailed rules regarding the content, preparation and implementation of the projects referred to in Annexes I and II to Directive 2011/92, which it is, however, for the referring court to ascertain.

Judgment of 25 June 2020 (Grand Chamber), A and Others (Wind turbines at Aalter and Nevele) (C-24/19, EU:C:2020:503)

(Reference for a preliminary ruling – Directive 2001/42/EC – Environmental impact assessment – Development consent for the installation of wind turbines – Article 2(a) – Concept of 'plans and programmes' – Conditions for granting consent laid down by an order and a circular – Article 3(2)(a) – National instruments setting the framework for future development consent of projects – Absence of environmental assessment – Maintenance of the effects of national instruments, and consents granted on the basis of those instruments, after those instruments have been declared not to comply with EU law – Conditions)

In the judgment in *A and Others (Wind turbines at Aalter and Nevele)*, the factual context of which is set out above, [32] the Court confirmed that an order and a circular such as those at issue in that case, both of which contained various provisions concerning the installation and operation of wind turbines, including measures on shadow flicker, safety, and noise level standards, constitute plans and programmes that must be subject to an environmental assessment in accordance with Article 3(2)(a) of Directive 2001/42.

In that regard, the Court held that the importance and scope of the requirements laid down in the order and circular in question regarding the installation and operation of wind turbines are sufficiently significant for the determination of the conditions subject to which consent would be granted for the installation and operation of wind farms, whose environmental impact is undeniable. It adds that that interpretation could not be called into question by the particular legal nature of the circular.

ii. Plans and programmes covered by Article 3(2)(b) of Directive 2001/42

Judgment of 12 June 2019, CFE (C-43/18, EU:C:2019:483)

(Reference for a preliminary ruling – Environment – Directive 2001/42/EC – Assessment of the effects of certain plans and programmes on the environment – Decree – Designation of a special area of conservation pursuant to Directive 92/43/EEC – Setting of conservation objectives and provision of certain preventive measures – Concept of 'plans and programmes' – Obligation to carry out an environmental assessment)

[32] As regards the factual and legal context of the dispute, see Section II.1.(a) 'Plans and programmes covered by Directive 2001/42'. That judgment is also presented in Section III.2. 'National acts adopted in breach of Directive 2001/42'.

Hearing a reference for a preliminary ruling from the Belgian Conseil d'État (Council of State, Belgium), the Court interpreted Article 3(2)(b) of Directive 2001/42, which provides that an environmental assessment must be carried out under that directive whenever an assessment is required pursuant to Articles 6 and 7 of Directive 92/43.

In the main proceedings, Compagnie d'entreprises CFE SA ('CFE') sought the annulment of a decree of the Région de Bruxelles-Capitale (Brussels-Capital Region, Belgium) designating the 'Complexe Forêt de Soignes – Vallée de la Woluwe' ('Sonian forest complex – Woluwe valley') as a special area of conservation within the meaning of Directive 92/43. In support of that action, CFE challenged the decision of the Government of the Brussels-Capital Region not to subject this decree to an environmental assessment, on the grounds that an appropriate impact assessment was not required under Article 6(3) of Directive 92/43.

The national court having referred a question in that connection, the Court observed that, under Article 6(3) of Directive 92/43, only plans or projects not directly connected with or necessary to the management of a site are to be subject to an appropriate impact assessment pursuant to that directive. A decree such as that at issue in the main proceedings, by which a Member State designates a site as a special area of conservation, is, by its nature, directly connected with or necessary to the management of the site in question.

It follows that a decree such as that at issue in the main proceedings may be exempt from the requirement for an appropriate assessment under Article 6(3) of Directive 92/43, and consequently from the requirement for an environmental assessment under Article 3(2)(b) of Directive 2001/42.

However, the fact that such a decree is not subject to a requirement for a prior environmental assessment under Article 6(3) of Directive 92/43, together with Article 3(2)(b) of Directive 2001/42, does not mean that it cannot be subject to any requirements in that area, since the possibility remains that it may lay down rules such that it can be regarded as a plan or programme within the meaning of the latter directive, in respect of which an assessment of the effects on the environment may be required.

b) Plans and programmes likely to present a risk of significant effects on the environment

i. Plans and programmes covered by Article 3(3) of Directive 2001/42

Judgment of 21 December 2016, Associazione Italia Nostra Onlus (C-444/15, EU:C:2016:978)

(Reference for a preliminary ruling – Environment – Directive 2001/42/EC – Assessment of the effects of certain plans and programmes on the environment – Article 3(3) – Plans and programmes which require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects – Validity in the light of the TFEU and the Charter of Fundamental Rights of the European Union – Meaning of use of 'small areas at local level' – National legislation referring to the size of the areas concerned)

Having been requested to give a preliminary ruling, the Court confirms the validity of Article 3(3) of Directive 2001/42 in the light of both Article 191 TFEU, which defines the objectives of the European Union's policy on the environment, and Article 37 of the Charter of Fundamental Rights of the European Union, which guarantees environmental protection.

In accordance with Article 3(3) of Directive 2001/42, plans and programmes referred to in paragraph 2 of that article which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

In accordance with the national legislation transposing Article 3(3), the Municipal Council of the Comune di Venezia (municipality of Venice, Italy) had approved a plan for construction works on an island in the Venetian Lagoon which had been subjected to an environmental assessment, pursuant to Directive 92/43, but not to an environmental assessment for the purposes of Directive 2001/42. In that regard, the competent regional authority had considered, first, that the plan in question concerned only the use of small areas at local level, and second, that that plan had no significant effects on the environment.

By decision of 2 October 2014, the commissario straordinario (special commissioner) of the Comune di Venezia had approved that plan without making any modifications.

The Associazione Italia Nostra Onlus, whose aim is to support the protection and promotion of Italy's historical, artistic and cultural heritage, brought an action before the Tribunale amministrativo regionale per il Veneto (Regional Administrative Court for Venice, Italy) against the decision approving the plan and against other measures, in particular, by challenging, the validity of Article 3(3) of Directive 2001/42 in the light of EU law.

Taking the view that Article 3(3) of Directive 2001/42 is invalid in the light of Article 191 TFEU and Article 37 of the Charter of Fundamental Rights of the European Union, the Tribunale amministrativo regionale per il Veneto (Regional Administrative Court for Venice) referred the question regarding validity to the Court.

On that point, the Court observed that it follows from Article 3(3) of Directive 2001/42, read together with recital 10 thereof, that, for plans and programmes which determine the use of small areas at local level, the competent authorities of the Member State concerned must carry out a prior examination of whether a particular plan or programme is likely to have significant effects on the environment, and that those authorities must then require an environmental assessment of that plan or programme, pursuant to that directive, if they reach the conclusion that the plan or programme is likely to have such effects on the environment.

By not excluding any plan or programme likely to have significant effects on the environment from an environmental assessment under that directive, that provision is in line with the objective pursued by that directive of providing a high level of environmental protection. In that regard, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that all plans or programmes likely to have significant environmental effects within the meaning of Directive 2001/42 are subject, before adoption, to an environmental assessment in accordance with the procedural requirements and the criteria laid down by that directive. In any event, the mere risk that the national authorities, through their conduct, could circumvent the application of Directive 2001/42, is not such as to render Article 3(3) of that directive invalid.

Accordingly, the Court took the view that it does not appear that the Parliament or the Council, by adopting Article 3(3) of Directive 2001/42, committed a manifest error of assessment in the light of Article 191 TFEU. Therefore, nothing in that provision could affect its validity in the light of Article 191 TFEU. It follows that that nothing in that provision could affect its validity in the light of Article 37 of the Charter of Fundamental Rights of the European Union.

In answer to a question of interpretation raised in the alternative by the referring court, the Court further states that Article 3(3) of Directive 2001/42, read together with recital 10 of that directive, must be interpreted to the effect that the term ‘small areas at local level’ in paragraph 3 must be defined with reference to the size of the area concerned where the following conditions are fulfilled:

– the plan or programme is prepared and/or adopted by a local authority, as opposed to a regional or national authority, and
– that area inside the territorial jurisdiction of the local authority is small in size relative to that territorial jurisdiction.

Judgment of 22 September 2011, Valčiukienė and Others (C-295/10, EU:C:2011:608) [33]

(Directive 2001/42/EC – Assessment of the effects of certain plans and programmes on the environment – Plans which determine the use of small areas at local level – Article 3(3) – Documents relating to land planning at local level relating to only one subject of economic activity – Assessment under Directive 2001/42/EC precluded in national law – Member States' discretion – Article 3(5) – Link with Directive 85/337/EEC – Article 11(1) and (2) of Directive 2001/42/EC)

In its judgment in *Valčiukienė and Others*, the Court clarified the margin of discretion enjoyed by Member States pursuant to Article 3(5) of Directive 2001/42 to specify whether plans or programmes referred to in paragraph 3 of that article are likely to have significant environmental effects.

By decisions of 23 March and 20 April 2006, the Pakruojo rajono savivaldybė (Pakruojas District Council, Lithuania) approved detailed plans concerning the construction of two intensive pig-rearing complexes with capacity for 4 000 pigs and the proper use of plots of land where the complexes would be based.

The actions brought against those two decisions were dismissed by the Šiaulių apygardos administracinis teismas (Šiauliai Regional Administrative Court, Lithuania). In that context, the latter held that, according to national law, the procedure for the strategic assessment of environmental effects does not apply to land planning documents, such as the two detailed plans at issue, which mention only one subject of economic activity.

The Vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania), before which an appeal was brought, confirmed that the national legislation applicable at the time of the facts in the main proceedings did not require that a strategic assessment of the effects on the environment be carried out in respect of the two plans at issue. However, in view of the fact that that legislation constituted an implementation of Directive 2001/42, that court decided to refer a question to the Court of Justice for a preliminary ruling to establish whether that national transposing measure was compatible with Directive 2001/42.

In that regard, the Court observed that plans such as those at issue in the main proceedings are referred to in Article 3(2)(a) of Directive 2001/42 as plans for which, subject to Article 3(3), an environmental assessment must be carried out.

According to the Court, the plans at issue in the main proceedings are, moreover, capable of falling within the scope of Article 3(3) of Directive 2001/42, under which plans referred to in paragraph 2 of that article which determine the use of small areas at local level require an environmental assessment only where the Member States 'determine that they are likely to have significant environmental effects'. In that context, pursuant to

[33] That judgment is also presented in Section IV. 'Cumulative application of directives requiring an impact assessment'.

Article 3(5) of Directive 2001/42, Member States may determine whether plans referred to in paragraph 3 of that article are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes, or by combining both approaches.

The margin of discretion thus enjoyed by Member States pursuant to Article 3(5) of Directive 2001/42 to specify certain types of plans which are likely to have significant environmental effects is nevertheless limited by the requirement under Article 3(3) of Directive 2001/42, together with Article 3(2), to subject the plans likely to have significant effects on the environment to environmental assessment, in particular on account of their characteristics, their effects and the areas likely to be affected.

Consequently, a Member State which establishes a criterion which leads, in practice, to an entire class of plans being exempted in advance from the requirement of environmental assessment would exceed the limits of its discretion under Article 3(5) of Directive 2001/42, together with Article 3(2) and (3), unless all plans exempted could, on the basis of relevant criteria such as, inter alia, their objective, the extent of the territory covered or the sensitivity of the landscape concerned, be regarded as not being likely to have significant effects on the environment.

Thus, the Court concluded that Article 3(5) of Directive 2001/42, together with Article 3(3) thereof, must be interpreted as precluding national legislation, such as that in question, which provides, in general terms and without assessment of each case, that assessment under that directive is not to be carried out where mention is made, in the land planning documents applied to small areas of land at local level, of only one subject of economic activity. Such a criterion is not one which can determine whether or not a plan has significant effects on the environment.

ii. Plans and programmes covered by Article 3(4) of Directive 2001/42

Judgment of 22 February 2022 (Grand Chamber), Bund Naturschutz in Bayern (C-300/20, EU:C:2022:102)

(Reference for a preliminary ruling – Environment – Directive 2001/42/EC – Assessment of the effects of certain plans and programmes on the environment – Article 2(a) – Concept of 'plans and programmes' – Article 3(2)(a) – Measures prepared for certain sectors and setting a framework for future development consent of projects listed in Annexes I and II to Directive 2011/92/EU – Article 3(4) – Measures setting a framework for future development consent of projects – Landscape conservation regulation adopted by a local authority)

In its judgment in *Bund Naturschutz in Bayern*, the factual context of which is set out above, [34] the Court also ruled that a national measure such as the Inntal Süd Regulation, which is intended to protect nature and the landscape and, to that end, lays down general prohibitions and makes provision for compulsory permits without laying down sufficiently detailed rules regarding the content, preparation and implementation of the projects does not fall within the scope of Article 3(4) of Directive 2001/42. The In accordance with that provision, it is for the Member States to determine whether plans and programmes, other than those referred to in paragraph 2 of that article, which set the framework for future development consent of projects, are likely to have significant environmental effects and therefore require an environmental assessment to be carried out.

3. Consultations

Judgment of 20 October 2011, Seaport (NI) and Others (C-474/10, EU:C:2011:681)

(Reference for a preliminary ruling – Directive 2001/42/EC – Article 6 – Designation, for consultation purposes, of an authority likely to be concerned by the environmental effects of implementing plans and programmes – Possibility of authority to be consulted conceiving plans or programmes – Requirement to designate a separate authority – Arrangements for the information and consultation of the authorities and the public)

Ruling on a request for a preliminary ruling from the Court of Appeal in Northern Ireland (United Kingdom), the Court clarified the conditions under which an authority designated by national law for purposes of the consultation procedure provided for in Article 6(3) of Directive 2001/42 may itself be responsible for preparing a plan or programme covered by that procedure.

In accordance with Article 6(3) of Directive 2001/42, Member States are to designate the authorities which are to be consulted when a report on the environmental effects of a plan or programme is prepared pursuant to that directive and which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.

Pursuant to that obligation, the law of Northern Ireland had designated the Department of the Environment (Northern Ireland) as a consultation body within the meaning of Article 6(3) of Directive 2001/42. However, in the proceedings before the referring court, the Department of the Environment was itself responsible for the conception of a plan which is subject to an environmental assessment is under that directive. In those

[34] As regards the factual and legal context of the dispute, see Section II.1.(a) 'Plans and programmes covered by Directive 2001/42'. That judgment is also presented in Section II.2.(a) i. 'Plans and programmes covered by Article 3(2)(a) of Directive 2001/42'.

circumstances, the national court decided to refer to the Court the question whether, where a national authority is both the authority responsible for the plan in question and the authority designated by national law for purposes of the consultation procedure, the Member State is required to designate a new authority to be consulted, separate from and independent of the first.

On that point, the Court held that, in circumstances such as those at issue in the main proceedings, Article 6(3) of Directive 2001/42 does not require that another authority to be consulted as provided for in that provision be created or designated, provided that, within the authority usually responsible for undertaking consultation on environmental matters and designated as such, a functional separation is organised so that an administrative entity internal to it has real autonomy, meaning, in particular, that it is provided with administrative and human resources of its own and is thus in a position to fulfil the tasks entrusted to authorities to be consulted as provided for in Article 6(3) of that directive and, in particular, to give an objective opinion on the plan or programme envisaged by the authority to which it is attached.

The referring court had also asked the Court to specify the time limits set for the purposes of the consultation procedure. In that regard, Article 6(2) of Directive 2001/42 requires the authorities designated and the public affected or likely to be affected to 'be given an early and effective opportunity' to express their opinions on the draft plan or programme concerned and on the accompanying environmental report.

According to the Court, that provision must be interpreted as not requiring that the national legislation transposing the Directive lay down precisely the periods within which the authorities designated and the public affected or likely to be affected for the purposes of Article 6(3) and (4) should be able to express their opinions on a particular draft plan or programme and on the environmental report upon it. Consequently, Article 6(2) does not preclude such periods from being fixed on a case-by-case basis by the authority which prepares the plan or programme. However, in that situation, Article 6(2) requires that, for the purposes of consultation of those authorities and the public on a given draft plan or programme, the period actually laid down be sufficient to allow them an effective opportunity to express their opinions in good time on that draft plan or programme and on the environmental report upon it.

III. Temporarily maintaining in force the effects of national measures adopted in breach of the obligation to carry out an impact assessment

1. National measures adopted in breach of Directive 2011/92

Judgment of 29 July 2019 (Grand Chamber), Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen (C-411/17, EU:C:2019:622)

(Reference for a preliminary ruling – Environment – Espoo Convention – Aarhus Convention – Conservation of natural habitats and of wild fauna and flora – Directive 92/43/EEC – Article 6(3) – Definition of 'project' – Assessment of the effects on the site concerned – Article 6(4) – Meaning of 'imperative reasons of overriding public interest' – Conservation of wild birds – Directive 2009/147/EC – Assessment of the effects of certain public and private projects on the environment – Directive 2011/92/EU – Article 1(2)(a) – Definition of 'project' – Article 2(1) – Article 4(1) – Environmental impact assessment – Article 2(4) – Exemption from assessment – Phasing out of nuclear energy – National legislation providing, first, for restarting industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the date initially set by the national legislature for deactivating and ceasing production at that power station, and second, for deferral, also by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station – No environmental impact assessment)

In that judgment, the factual context of which is set out above, [35] the Court ruled that, if domestic law allows it, a national court may, by way of exception, maintain the effects of measures, such as those at issue in the main proceedings, adopted in breach of the obligations laid down by Directive 2011/92 and Directive 92/43, where such maintenance is justified by overriding considerations relating to the need to nullify a genuine and serious threat of rupture of the electricity supply in the Member State concerned, which cannot be remedied by any other means or alternatives, particularly in the context of the internal market. The effects may, however, be maintained only for as long as is strictly necessary to remedy the breach.

[35] As regards the factual and legal context of the dispute, see Section I.1.(a) 'Definition of "project"'. That judgment is also presented in Section I.2.(a) 'Projects presenting a risk of significant effects on the environment' and Section I.2.(c) 'Exemptions from the requirement for an impact assessment'.

2. National measures adopted in breach of Directive 2001/42

Judgment of 28 February 2012 (Grand Chamber), Inter-Environnement Wallonie and Terre wallonne (C-41/11, EU:C:2012:103)

(Protection of the environment – Directive 2001/42/EC – Articles 2 and 3 – Assessment of the effects of certain plans and programmes on the environment – Protection of waters against pollution caused by nitrates from agricultural sources – Plan or programme – No prior environmental assessment – Annulment of a plan or programme – Possibility of maintaining the effects of the plan or programme – Conditions)

In its judgment in *Inter-Environnement Wallonie and Terre wallonne*, the Court held that, in exceptional circumstances, an action programme on environmental matters adopted in breach of Directive 2001/42 may remain in force until the adoption of a replacement measure.

In the main proceedings, two Belgian NGOs, Inter-Environnement Wallonie ASBL and Terre wallonne ASBL, had brought an action before the Conseil d'État (Council of State, Belgium) for annulment of an order of the Walloon Government transposing certain provisions of Directive 91/676. [36]

Taking the view that the order at issue constitutes a 'plan' or 'programme' within the meaning of Article 3(2)(a) of Directive 2001/42, the Conseil d'État (Council of State) found that the absence of a prior environmental assessment, as required by that directive, should, in principle, lead to the annulment of the order in question.

However, since annulling the contested order with retroactive effect would deprive the Belgian legal order of any measure transposing Directive 91/676 in the Region of Wallonia until such time as the annulled measure was redrafted and would thereby give rise to a situation in which the Kingdom of Belgium would be failing to comply with its obligations under that directive, the Conseil d'État (Council of State) decided to ask the Court whether the contested order could remain in force until the adoption of a replacement measure.

In that regard, the Court recalled that, where a national court has before it an action for annulment of a national measure constituting a 'plan' or 'programme' within the meaning of Directive 2001/42, adopted in breach of the obligation to carry out a prior environmental assessment, that court is obliged to take all the measures provided for by its national law in order to remedy the failure to carry out such an assessment, including the possible suspension or annulment of the contested plan or programme.

[36] Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1).

However, in view of the specific circumstances of the main proceedings, the referring court can exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of an annulled national measure in so far as:

– that national measure is a measure which correctly transposes Directive 91/676;
– the adoption and entry into force of the new national measure containing the action programme within the meaning of Article 5 of that directive do not enable the adverse effects on the environment resulting from the annulment of the contested measure to be avoided;
– annulment of the contested measure would result in a legal vacuum in relation to the transposition of Directive 91/676 which would be more harmful to the environment, in the sense that the annulment would result in a lower level of protection of waters against pollution caused by nitrates from agricultural sources and would thereby run specifically counter to the fundamental objective of that directive; and
– the effects of such a measure are exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied.

Judgment of 28 July 2016, Association France Nature Environnement (C-379/15, EU:C:2016:603)

(Reference for a preliminary ruling – Directive 2001/42/EC – Assessment of the effects of certain plans and programmes on the environment – National measure incompatible with EU law – Legal consequences – Power of the national court to maintain certain effects of that measure provisionally – Third paragraph of Article 267 TFEU – Obligation to make a reference to the Court for a preliminary ruling)

Asked to give a preliminary ruling in proceedings brought by the Conseil d'État (Council of State, France), the Court confirms its case-law on the possibility for national courts exceptionally and provisionally to maintain the effects of national measures which are incompatible with the provisions of Directive 2001/42.

The request for a preliminary ruling arises out of proceedings brought before the Conseil d'État (Council of State) disputing the compatibility of the French implementing law with Directive 2001/42. In that context, that court, inter alia, annulled the provisions of Decree No 2012-616 which define the competent authority in environmental matters which must be consulted within the context of the environmental assessment under that directive.

According to the Conseil d'État (Council of State), the retroactive effect of partial annulment of that decree nevertheless presented the risk that the legality not only of the plans and programmes adopted on the basis of the decree, but also the legality of any act taken on the basis of those plans and programmes might be compromised. Such a situation is detrimental both to observance of the principle of legal certainty and to the

attainment of the objectives of the European Union concerning environmental protection.

In those circumstances, the Conseil d'Etat (Council of State) asked the Court to clarify under what circumstances a national court may maintain in force certain effects of a plan or programme which is incompatible with Directive 2001/42, and whether a national court ruling at last instance is, in such a case, always required to request a preliminary ruling from the Court.

Referring to its case-law arising from the judgment in *Inter-Environnement Wallonie and Terre wallonne*, [37] the Court replied, in the first place, that a national court may, when this is allowed by domestic law, exceptionally and case by case, limit in time certain effects of a declaration of the illegality of a provision of national law adopted in disregard of the obligations provided for by Directive 2001/42/EC, provided that such a limitation is dictated by an overriding consideration linked to environmental protection and having regard to the specific circumstances of the case pending before it. That exceptional power may, however, be exercised only if all the conditions flowing from the judgment of 28 February 2012 in *Inter-Environnement Wallonie and Terre wallonne* are satisfied.

In the second place, the Court answered in the affirmative the question whether a national court against whose decisions there is no longer any judicial remedy under law is in principle required to make a reference to the Court for a preliminary ruling before making use of the exceptional power to maintain provisionally provisions of national law held to be contrary to EU law. According to the Court, such a national court is relieved of that obligation only when it is convinced, which it must establish in detail, that no reasonable doubt exists as to the interpretation and application of the conditions set out in the judgment in *Inter-Environnement Wallonie and Terre wallonne.*

Judgment of 25 June 2020 (Grand Chamber), A and Others (Wind turbines at Aalter and Nevele) (C-24/19, EU:C:2020:503)

(Reference for a preliminary ruling – Directive 2001/42/EC – Environmental impact assessment – Development consent for the installation of wind turbines – Article 2(a) – Concept of 'plans and programmes' – Conditions for granting consent laid down by an order and a circular – Article 3(2)(a) – National instruments setting the framework for future development consent of projects – Absence of environmental assessment – Maintenance of the effects of national instruments, and consents granted on the basis of those instruments, after those instruments have been declared not to comply with EU law – Conditions)

As regards the possibility for national courts exceptionally and provisionally to maintain the effects of national measures adopted in disregard of the obligations provided for by Directive 2001/42/EC, the Court recalled in that judgment, the factual context of which is

[37] Judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103).

set out above, [38] that Member States are required to eliminate the unlawful consequences of such a breach of EU law. The Court stated that, having regard to the need to ensure the uniform application of EU law, it alone may, in exceptional cases, for overriding considerations of in the general interest, allow temporary suspension of the ousting effect of a rule of EU law that has been breached, provided that a national law empowers the national court to maintain certain effects of such acts in the context of the dispute before it. Consequently, the Court held that, in circumstances such as those in the present case, the national court could maintain the effects of the order and the circular, and the consent that was adopted on the basis of those instruments, only if the national law permitted it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the electricity supply of the whole of the Member State concerned, in the present case Belgium, and only for the period of time strictly necessary to remedy that illegality.

[38] As regards the factual and legal context of the dispute, see Section II.1.a. entitled 'Plans and programmes covered by Directive 2001/42'. That judgment is also presented in Section II.2.(a) i. 'Plans and programmes covered by Article 3(2)(a) of Directive 2001/42'.

IV. Cumulative application of directives requiring an impact assessment

Judgment of 22 September 2011, Valčiukienė and Others (C-295/10, EU:C:2011:608)

(Directive 2001/42/EC – Assessment of the effects of certain plans and programmes on the environment – Plans which determine the use of small areas at local level – Article 3(3) – Documents relating to land planning at local level relating to only one subject of economic activity – Assessment under Directive 2001/42/EC precluded in national law – Member States' discretion – Article 3(5) – Link with Directive 85/337/EEC – Article 11(1) and (2) of Directive 2001/42/EC)

In that judgment, the factual context of which is set out above, [39] the referring court also asked the Court whether an environmental assessment carried out under Directive 85/337 permits exemption from the obligation to carry out such an assessment under Directive 2001/42.

In that regard, the Court recalled that, according to the very wording of Article 11(1) of Directive 2001/42, an environmental assessment carried out under that directive is without prejudice to any requirements under Directive 85/337. It follows that an environmental assessment carried out under Directive 85/337, when required by its provisions, is in addition to an assessment carried out under Directive 2001/42.

Similarly, an assessment of the effects on the environment carried out under Directive 85/337 is without prejudice to the specific requirements of Directive 2001/42 and cannot dispense with the obligation to carry out an environmental assessment pursuant to Directive 2001/42 in order to comply with the environmental aspects specific to that directive.

It is therefore necessary to comply with the requirements of Directive 2001/42 and Directive 85/337 concurrently.

In that regard, the Court stated that, on the assumption that a coordinated or joint procedure was provided for by the Member State concerned, it is clear from Article 11(2) of Directive 2001/42 that, in the context of such a procedure, it is mandatory to verify that an environmental assessment has been carried out in accordance with the dispositions of the different directives in question.

Under those circumstances, it is for the referring court to assess whether the assessment which, in the main proceedings, was carried out pursuant to Directive 85/337 may be considered to be the result of a coordinated or joint procedure and whether it already complies with all the requirements of Directive 2001/42. If that were

[39] As regards the factual and legal context of the dispute, see Section II.2.(b) i. 'Plans and programmes covered by Article 3(3) of Directive 2001/42'.

to be the case, there would then no longer be an obligation to carry out a new assessment pursuant to Directive 2001/42.

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