**Case C-461/23**

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

**Date lodged:**

24 July 2023

**Referring court:**

Niedersächsisches Oberverwaltungsgericht (Germany)

**Date of the decision to refer:**

4 July 2023

**Applicant:**

Umweltforum Osnabrücker Land e. V.

**Defendant:**

Landkreis Osnabrück

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**Subject matter of the main proceedings**

Environmental legislation – Directive 92/43/EEC – Assessment of the effects of certain plans and programmes on the environment – Directive 2001/42/EC – Strategic environmental assessment – Regulation designating a landscape conservation area – Components triggering an obligation to carry out a strategic environmental assessment

**Subject matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU

**Questions referred for a preliminary ruling**

1. Is Article 3(2)(b) of Directive 2001/42/EC (SEA Directive) in conjunction with Article 6(3) of Directive 92/43/EEC (Habitats Directive) to be interpreted as meaning that all the provisions in a legislative act by which a Member State designates a site as a special area of conservation under the

Habitats Directive are to be regarded, whatever their regulatory content, as directly connected with or necessary to the management of the site, with the result that the legislative act, as a plan, is not subject to an environmental assessment under Article 3(2)(b) of the SEA Directive in conjunction with Article 6(3) of the Habitats Directive, or is it possible that, depending on the content of the individual provisions, a differentiated approach may be appropriate, so that individual provisions of such an act, as a plan or part of a plan, would have to be regarded as directly connected with or necessary to the management of the site and other provisions of that act, as a plan or part of a plan, would not?

2. If Question 1 is answered as having the second meaning: Is Article 3(2)(b) of the SEA Directive in conjunction with Article 6(3) of the Habitats Directive to be interpreted as meaning that an individual provision contained in a legislative act of a Member State designating a site as a special area of conservation within the meaning of the Habitats Directive, setting conservation objectives and laying down requirements and prohibitions is to be regarded as a plan or part of a plan not directly connected with or necessary to the management of the site if that provision, by establishing specific criteria and procedures, excludes activities in the site from the scope of the requirements and prohibitions laid down, and those activities do not directly serve to fulfil the conservation objectives, but are to be regarded as management or maintenance measures serving other purposes and qualifying as a project within the meaning of Article 6(3) of the Habitats Directive?

3. If Question 2 is answered in the affirmative: Is Article 3(2)(b) of the SEA Directive in conjunction with Article 6(3) of the Habitats Directive to be interpreted as meaning that, based on a provision contained in a legislative act designating a site as a special area of conservation within the meaning of the Habitats Directive, such as that described in Question 2, which establishes in a sufficiently specific manner the criteria and procedures for carrying out the activities covered by it and qualifying as a project within the meaning of Article 6(3) of the Habitats Directive, the occurrence of a significant effect on the site cannot be regarded as excluded if national law does not provide for any authorisation requirement for those activities and by reason of that provision in the legislative act the competent authority also dispenses with prior notification and carrying out a project-related impact assessment pursuant to Article 6(3) of the Habitats Directive for those activities in individual cases, or else carries out a project-related impact assessment in individual cases and, in the process, assesses the project's impact against the yardstick of whether the criteria and procedures contained in the provision, such as that described in Question 2, are fulfilled?

4. If Question 2 is answered in the affirmative: Is Article 3(2)(b) of the SEA Directive in conjunction with Article 6(3) of the Habitats Directive to be interpreted as meaning that, based on a provision contained in a legislative act designating a site as a special area of conservation within the meaning of

the Habitats Directive, such as that described in Question 2, there is no reason to fear the occurrence of a significant effect on the site if the activities covered by such a provision have, as a general rule, already been carried out for a long time and, in any event, based on the criteria and procedures for carrying them out established by the provision, no intensification or expansion of those activities in the site is made possible?

5. If, on the basis of the answers to the preceding questions, an obligation to carry out an environmental assessment pursuant to Article 3(2)(b) of the SEA Directive in conjunction with Article 6(3) of the Habitats Directive is to be assumed to exist by reason of the content of individual provisions of a legislative act designating a site as a special area of conservation within the meaning of the Habitats Directive: Is Article 3(3) of the SEA Directive to be interpreted as meaning that, if designating the site is to be regarded as determining the use of small sites at local level, on the basis of the pre-existing classification of the site as a site of Community importance within the meaning of the third subparagraph of Article 4(2) of the Habitats Directive, an authority of a Member State must, as a general rule, presume that the designation of an area of conservation is likely to have significant effects on the environment?

6. If, on the basis of the answers to the preceding questions, an obligation to carry out an environmental assessment is to be assumed to exist by reason of the content of individual provisions of a legislative act designating a site as a special area of conservation within the meaning of the Habitats Directive: Is Article 3(2)(b) of the SEA Directive in conjunction with Article 6(3) of the Habitats Directive to be interpreted as meaning that only those individual provisions are to be made the subject of the environmental assessment or should such an environmental assessment relate to the entire content of the legislative act?

7. If, on the basis of the answers to the preceding questions, an obligation to carry out an environmental assessment is to be assumed to exist by reason of the content of individual provisions of a legislative act designating a site as a special area of conservation within the meaning of the Habitats Directive: Is Article 4(1) of the SEA Directive, which provides that the environmental assessment referred to in Article 3 of the directive is to be carried out during the preparation of a plan or programme and before its adoption, to be interpreted as meaning that failure to carry out an environmental assessment of a plan or components of a plan cannot be subsequently remedied by means of a supplementary procedure after the plan or components of the plan have been adopted, thereby rectifying *ex post* the procedural error of failure to carry out an environmental assessment?

**Provisions of European Union law relied on**

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive'), in particular the third subparagraph of Article 4(2) and Article 6(3) thereof

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 ('the SEA Directive'), in particular Article 3(2) and Article 4(1) thereof

**Provisions of national law relied on**

Gesetz über Naturschutz und Landschaftspflege – Bundesnaturschutzgesetz (Law on Nature Conservation and Landscape Management – Federal Nature Conservation Law; 'the BNatSchG') of 29 July 2009 (Bundesgesetzblatt (Federal Law Gazette; 'BGBl.') I p. 2542), as last amended by Article 3 of the Law of 8 December 2022 (BGBl. I p. 2240), in particular Paragraphs 22(2a), 26, 32, 33, 34 and 36 of the BNatSchG

Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG – Umwelt-Rechtsbehelfsgesetz (Law on Supplementary Provisions on the Remedies Available in Environmental Matters Pursuant to Directive 2003/35/EC – Law on Remedies in Environmental Matters; 'the UmwRG') in the version published on 23 August 2017 (BGBl. I p. 3290), as last amended by Article 2 of the Law of 14 March 2023 (BGBl. 2023 I No 71), in particular point 4 of the first sentence of Paragraph 1(1), Paragraph 4 and Paragraph 7(3) of the UmwRG

Gesetz über die Umweltverträglichkeitsprüfung (Law on Environmental Impact Assessment; 'the UVPG') in the version published on 18 March 2021 (BGBl. I p. 540), as last amended by Article 2 of the Law of 22 March 2023 (BGBl. 2023 I No 88), in particular Paragraphs 35 to 37 of the UVPG

Verordnung über das Landschaftsschutzgebiet „Bäche im Artland" in den Städten Quakenbrück, Fürstenau und Bersenbrück sowie den Gemeinden Menslage, Nortrup, Badbergen, Berge, Bippen, Eggermühlen, Kettenkamp, Ankum und Merzen, Landkreis Osnabrück (Regulation on the Landscape Conservation Area 'Bäche im Artland' (Streams in Artland) in the towns of Quakenbrück, Fürstenau and Bersenbrück and in the municipalities of Menslage, Nortrup, Badbergen, Berge, Bippen, Eggermühlen, Kettenkamp, Ankum and Merzen, Administrative District of Osnabrück; 'the LSG Regulation') of 30 September 2019 (Amtsblatt für den Landkreis Osnabrück (Official Gazette of the Administrative District of Osnabrück) No 20 of 30 October 2019).

**Succinct presentation of the facts and procedure in the main proceedings**

1 The questions referred for a preliminary ruling arise in the context of an action for a judicial review of legality (Normenkontrollverfahren) in which the applicant, an environmental association recognised under Paragraph 3(1) of the UmwRG, and the defendant are in dispute as to the validity of a regulation relating to a landscape conservation area.

2 The designation of the landscape conservation area serves to protect the site of fauna, flora and habitats ('the FFH site') 'Bäche im Artland' (Site Code DE-3312-331), which is located in the physiographic region of 'Ems-Hunte-Geest and Dümmer-Geestniederung' and comprises several courses of streams and adjacent landscape areas. The FFH site 'Bäche im Artland' is a system of heavily interconnected watercourses with some very natural streams, which are, in particular, an important habitat of the species of fish listed in Annex II of the Habitats Directive. Forests, meadows and bogs that are priority and non-priority habitat types within the meaning of the Habitats Directive are situated close to the streams.

3 In the procedure for drawing up the LSG Regulation the defendant conducted a public participation procedure with the submission for consultation of the draft regulation and the related maps as well as an explanatory memorandum and also involved, inter alia, the applicant, which submitted observations on the draft regulation by letter of 19 February 2019. A strategic environmental assessment ('SEA') with the preparation of an environmental report or preliminary SEA screening was not carried out before the adoption of the LSG Regulation.

4 The LSG Regulation entered into force upon its publication in the Official Gazette of the defendant on 31 October 2019. It governs, inter alia, the prohibition of any acts which alter the character of the site or which run counter to the conservation objective of that regulation, and specifies the acts and uses which are exempt from that prohibition.

5 On 13 October 2020, the applicant lodged an application for a judicial review of the legality of the LSG Regulation. Under national law, a recognised environmental association may – subject to the possibility of redress provided for in Paragraph 4(1b) of the UmwRG – request the annulment of a decision adopting plans and programmes if a required SEA or preliminary SEA screening has been neither carried out nor subsequently remedied (the first sentence of Paragraph 4(4) in conjunction with the first point of the first sentence of Paragraph 4(1) of the UmwRG).

6 The referring court asks whether it follows from the SEA Directive and the Habitats Directive that an SEA must be carried out, or in any event a decision by the Member State to carry out such an assessment must be taken, based on Paragraph 36 of the UVPG in conjunction with the second point of the first sentence of Paragraph 36 and the first sentence of Paragraph 34(1) of the

BNatSchG, before the adoption of a conservation area regulation such as the one in the present case. That depends on the interpretation of the provisions of EU law underlying the national provisions, namely Article 3(2)(b) of the SEA Directive in conjunction with Article 6(3) of the Habitats Directive, and the answers to the questions referred in that regard.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

7 Similar questions arise in many actions for a judicial review of legality pending before the referring court. The assessment of the validity of the majority of the regulations placing fauna, flora and habitats under protection in Lower Saxony (here alone 385 FFH sites are affected) and probably also elsewhere in the Federal Republic of Germany depends on the answers to the questions. Far-reaching legal consequences are also conceivable for similarly worded legislative acts from other Member States.

8 With regard to the application of Article 3(2)(b) of the SEA Directive in conjunction with Article 6(3) of the Habitats Directive to the present LSG Regulation, the referring court considers, referring to the case-law of the Court of Justice (judgment of 12 June 2019, *CFE*, C-43/18, EU:C:2019:483, paragraphs 39 and 46), that that regulation falls under the concept of ‘plans and programmes’ as defined in Article 2(a) of the SEA Directive and must also be regarded as a ‘plan’ within the meaning of Article 6(3) of the Habitats Directive.

9 Regarding Question 1: The referring court is uncertain as to the meaning to be given to the considerations developed by the Court of Justice in the judgment of 12 June 2019, *CFE*, C-43/18, EU:C:2019:483, paragraphs 49 and 50, and tends to favour the approach whereby what matters is the content of the individual provisions contained in a designation act. The recitals in the preamble to the Habitats Directive state that an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future.

10 According to the Commission, the term ‘management’ in Article 6(3) of the Habitats Directive is to be understood within the meaning of the interpretation of Article 6(1) of the Habitats Directive. Therefore only activities directly connected with or necessary to fulfilling the conservation objectives are covered by the exemption from the requirement for an assessment. Plans must be subject to a differentiated approach if, in addition to conservation components, they also contain other components (cf. Commission Notice C(2018) 7621 final, p. 39 et seq.).

11 In that regard, the referring court considers that provisions in a legislative act designating a site as a special area of conservation are directly connected with the management of that site in so far as placing it under protection as such, setting protective purposes and conservation objectives and laying down related requirements and prohibitions are concerned. In so far as a legislative act of this

kind, such as the present LSG Regulation, also excludes, by establishing specific criteria and procedures, a number of activities such as watercourse maintenance, fisheries, agriculture and forestry from the scope of the prohibitions laid down, the question arises as to whether such provisions are still directly connected with or necessary to the achievement of the site's conservation objectives. Whether those exempt activities are necessary for the conservation or improvement of the conservation status of the habitat types and species present on the site in the sense of 'conservation management' (cf. Commission Notice C(2018) 7621 final, p. 39), or whether the purpose of the exemption provisions is to not disproportionately restrict those activities and to avoid excessive prohibitions, requires a substantive examination.

12 In the view of the referring court and on the basis of the case-law of the Court of Justice in relation to Natura 2000 contracts (judgment of 4 March 2010, *Commission* v *France*, C-241/08, EU:C:2010:114, paragraph 51), a differentiated approach to the provisions in a legislative act placing a special area of conservation under protection is appropriate.

13 Regarding Question 2: The referring court considers that this concerns provisions enabling activities in the area which, taken in isolation, cannot be regarded as pure 'conservation management' measures. An example of such a case of a conservation management measure – which is not governed by the present LSG Regulation – would be grazing necessary for conserving natural habitat type 4030 – European dry heaths. The referring court assumes that the aim of the exemption provisions at issue in the present LSG Regulation is to enable, within a specific framework, the continuation of the environmental uses which have hitherto been carried out in the area and which are ultimately for commercial purposes (exemptions for fisheries, agricultural land use and forestry) and maintenance measures to ensure the hydraulic operation of watercourses (exemption for watercourse maintenance), so that the rights of the owners and beneficiaries affected by their placement under protection are not disproportionately restricted. Those activities, which are exempt from the prohibitions laid down in the LSG Regulation, are likely to qualify as a project when carried out on a case-by-case basis, given the broad effect-based definition of a project under Article 6(3) of the Habitats Directive. Thus the Court of Justice has already ruled that ordinary agricultural activities, such as the application of fertilisers in or in the vicinity of Natura 2000 sites (cf. judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, ECLI:EU:C:2018:882, paragraph 76) or tree felling for forestry purposes (cf. judgment of 17 April 2018, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-441/17, ECLI:EU:C:2018:255, paragraph 123 et seq.) may be regarded as a project within the meaning of Article 6(3) of the Habitats Directive. It is clear that such activities can be regarded as not connected with or necessary to the management of the site and are likely to have a significant effect on the site, either individually or in combination with other plans or projects.

14 Regarding Question 3: In the case of a plan or part of a plan that is not directly connected with or necessary to the management of the site, the decisive factor in determining whether an impact assessment within the meaning of Article 6(3) of the Habitats Directive must be carried out before the plan is adopted is whether the plan is likely to have a significant effect on the site, either individually or in combination with other plans or projects. According to the case-law of the Court of Justice, such an impact assessment must be carried out in case of doubt (cf. judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 44, and judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 134).

15 According to the case-law of the Bundesverwaltungsgericht (Federal Administrative Court, Germany; 'BVerwG'), the possibility of an adverse effect on a Natura 2000 site by a conservation area regulation can exist only if that regulation contains sufficiently precise and binding requirements to enable an adverse effect on the site to be assessed (cf. BVerwG, judgment of 26 January 2023 – 10 CN 1.23 inter alia, ECLI:DE:BVerwG:2023: 260123U10CN1.23.0, paragraph 17). The referring court considers that requirement to be met in the present case. When carrying out the activities made possible by the exemption provisions of the LSG Regulation, an adverse effect on the natural habitats and species of Community interest present on the site cannot automatically be ruled out. In addition to measures as part of permitted watercourse maintenance, fish restocking measures permitted in the LSG Regulation could also result in an adverse effect on animal species of Community interest listed in that regulation. The same applies to good agricultural practice activities exempted by the LSG Regulation, in relation to which it is questionable whether the provisions are sufficient to adequately prevent the introduction of fertiliser and plant protection products into protected waters. Even where good agricultural practice is exempt it is unclear whether the restrictions in the LSG Regulation are sufficient to regard an adverse effect on forest habitat types specified in that regulation as excluded.

16 In the view of the referring court, before a project is implemented for which a prior impact assessment must be carried out in accordance with the requirements of Article 6(3) of the Habitats Directive, an impact assessment should be carried out either at the individual case level or, if carrying out an impact assessment at that level is dispensed with or the yardstick for the assessment is predetermined by an exemption provision, at the upstream plan level. Due to the intertwining of Article 6(3) of the Habitats Directive with Article (3)(2)(b) of the SEA Directive, a formal assessment should be carried out at the plan level in accordance with the procedural requirements of Articles 4 to 9 of the SEA Directive. The referring court cannot accept reasoning that, with the precise formulation of the exemption provisions of the LSG Regulation, the legislator has already verified that the exempt activities, in the form that is specifically still permitted, do not contravene the prohibition on deterioration laid down in Article 6(2) of the Habitats Directive. There is no documentation on file concerning any such verification.

17 Regarding Question 4: It must be held that the activities of watercourse maintenance, fisheries, agricultural land use and forestry, which are exempted in the FFH site 'Bäche im Artland' under the LSG Regulation, had already been carried out there for a long time before, on the proposal of the Federal Republic of Germany, the Commission included the site in the list of sites of Community importance pursuant to the third subparagraph of Article 4(2) of the Habitats Directive and before it was subsequently designated as a special area of conservation pursuant to Article (4)(4) of the Habitats Directive by means of the LSG Regulation at issue. Moreover, the restrictions provided for in the LSG Regulation should have the effect that intensification or expansion of exempt activities is no longer possible.

18 On the one hand, it could be inferred from this that in any event the current conservation status of the site could also develop under the continuing influence of the activities concerned in the site. On the other hand, the referring court is uncertain as to the extent to which, in this context, the case-law of the Court of Justice on the absence of an obligation to carry out an impact assessment within the meaning of Article 6(3) of the Habitats Directive, which requires the location and the conditions of the activities concerned to be the same, should be taken into account at the case-by-case project level for ongoing and single projects (cf. judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 81 et seq.).

19 Regarding Question 5: According to the case-law of the Court of Justice, in order for a plan to be qualified as a measure which determines the use of a small area at local level, that plan must be prepared and/or adopted by a local authority and the area concerned must be small in size relative to the territorial jurisdiction of that local authority (judgment of 21 December 2016, *Associazione Italia Nostra Onlus*, C-444/15, EU:C:2016:978, paragraph 68). In that regard, the defendant points out that the FFH site 'Bäche im Artland' is about 1 095 hectares (10.95 $km^2$) in size, whereas the district of Osnabrück has a surface area of about 2 121 $km^2$. From a purely quantitative point of view, however, most FFH sites would probably have to be regarded as small areas within the meaning of Article 3(3) of the SEA Directive.

20 Assuming that the conditions laid down in Article 3(3) of the SEA Directive are met, it would have to be clarified whether the Member State authority is obliged to presume that there would likely be significant effects on the environment. In the view of the referring court, when designating a Natura 2000 site on the basis of the protection status conferred by EU law upon the inclusion of the site in the list of sites of Community importance, significant environmental effects must generally also be assumed if the site concerned is to be classified as a small site at local level within the meaning of Article 3(3) of the SEA Directive.

21 Regarding Question 6: Whether, under EU law, a breach in carrying out an SEA can impact the validity of the whole plan or only parts of the plan depends, in the present case, on the answer to the question. Moreover, the answer to this question

is of considerable practical relevance to the authorities that prepare and adopt plans within the meaning of the SEA Directive.

22 Regarding Question 7: In that regard, the referring court asks the Court of Justice to clarify whether its considerations on the admissibility of an *ex post* environmental impact assessment for the purpose of regularising specific projects within the meaning of the EIA Directive are also transferable to programmes and plans within the meaning of the SEA Directive, which are more general and where there is more room for manoeuvre with regard to their adoption than with regard to the approval of specific projects within the meaning of the EIA Directive. The results of an environmental assessment complying with the requirements under Articles 4 to 9 of the SEA Directive have a decisive influence on the latitude for adopting a general programme and plan within the meaning of the SEA Directive, with the result that, in the case of an 'open-ended' environmental assessment carried out *ex post*, significant amendments to the already adopted plan or programme are generally also possible. This indicates that – unlike the environmental assessment for the types of projects under Articles 4 to 10 of the EIA Directive in individual cases – the environmental assessment for a plan or programme under Articles 4 to 9 of the SEA Directive cannot be subsequently remedied after its adoption; rather, it is necessary to start from the premiss of a new plan or programme, and an environmental assessment under Articles 4 to 9 of the SEA Directive must be carried out during its preparation and before its adoption.

23 If, on the other hand, the procedural steps of an SEA can be subsequently remedied for a plan or programme without requiring the adoption or approval of a new plan or programme, the question arises as to whether this can be done only under the same strict conditions as for the subsequent remedy of a project-related environmental assessment under the EIA Directive.