Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 8 December 2011 [1]

Case C-41/11

Inter-Environnement Wallonie ASBLand
Terre wallonne ASBL
v
Région wallonne

(Reference for a preliminary ruling from the Conseil d'État, Belgium)

((Protection of the environment — Directive 2001/42/EC — Assessment of the effects of certain plans and programmes on the environment — Directive 91/676/EEC — Protection of waters against pollution caused by nitrates from agricultural sources — Action programmes for zones designated as vulnerable — Annulment of a national measure adopted in breach of Directive 2001/42/EC — Possibility of keeping that measure in force for a short period))

I – Introduction

1. Is it compatible with European Union law to allow an action programme on environmental matters adopted in breach of a procedural directive to remain in force until the adoption of a replacement measure where that programme implements the substance of another directive? That, in essence, is the question which the Court must examine in the present reference for a preliminary ruling.

2. The Belgian Conseil d'État (Council of State) has referred a question on the consequences of an infringement of the directive on the assessment of the effects of certain plans and programmes on the environment [2] ('the SEA Directive', SEA standing for strategic environmental assessment).

3. In the main proceedings, two Belgian NGOs, Inter-Environnement Wallonie and Terre wallonne, are in dispute with the Region of Wallonia concerning the validity of the action programme adopted by that region in implementation of the Nitrates Directive. [3]

1 — Original language: German.

2 — Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 (OJ 2001 L 197, p. 30).

3 — 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), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ 2003 L 284, p. 1).

4. The Nitrates Directive and the action programmes to be adopted on the basis thereof lay down rules on the fertilisation of agricultural land. Farmers fertilise their land not only to promote the growth of their crops but also to dispose of manure. If a farm applies more manure than the crops can process, the result is overfertilisation, which regularly pollutes water. [4]

5. On an initial reference for a preliminary ruling, the Court clarified that an action programme of that kind requires an environmental assessment pursuant to the SEA Directive. [5]

6. As, according to the findings of the Conseil d'État, the action programme of the Region of Wallonia at issue in the present proceedings was adopted in the absence of such an assessment, that court now has to determine whether the programme must be annulled. According to the order for reference, the normal sanction for an infringement of the SEA Directive would be to annul the action programme with retroactive effect. However, the necessary consequence of such a measure would be incomplete implementation of the Nitrates Directive by Wallonia. In practical terms, restrictions on the spreading of fertilisers and possibly also farmers' rights to spread fertilisers might cease to apply.

7. The effect of annulment would be limited in time as, in the meantime, Wallonia has adopted a new action programme [6] and Belgium states, as does the Commission, that this time the requirements of the SEA Directive were satisfied. Thus, the question at issue is whether the previous action programme of the Region of Wallonia must be set aside with retroactive effect for the period from 15 February 2007 to 6 May 2011, the day on which the new programme entered into force.

II – Reference for a preliminary ruling

8. The Conseil d'État wishes to know whether,

— seised of an action seeking the annulment of the order of the Government of Wallonia of 15 February 2007 amending Book II of the Environment Code, which forms the Water Code, as regards the sustainable management of nitrogen in agriculture,

— finding that that order was adopted without compliance with the procedure prescribed by the SEA Directive and that it is, for that reason, contrary to the law of the European Union and must be annulled,

— but finding at the same time that the contested order provides for an appropriate implementation of the Nitrates Directive,

— it may defer in time the effects of the judicial annulment for a short period necessary for the redrafting of the annulled measure in order to maintain in European Union environmental law a degree of specific implementation without any break in continuity.

9. Inter-Environnement Wallonie, Terre wallonne, the Kingdom of Belgium, the French Republic and the European Commission submitted written observations. All, with the exception of Terre wallone, also took part in the hearing on 8 November 2011.

4 — On the requirements of the Nitrates Directive, see Case C-266/00 *Commission* v *Luxembourg* [2001] ECR I-2073; Case C-322/00 *Commission* v *Netherlands* [2003] ECR I-11267; Case C-221/03 *Commission* v *Belgium* [2005] ECR-I-8307; and Case C-526/08 *Commission* v *Luxembourg* [2010] ECR I-6151.

5 — Judgment of 17 June 2010 in Joined Cases C-105/09 and C-110/09 *Terre wallonne* [2010] ECR I-5611.

6 — Arrêté du Gouvernement wallon du 31 mars 2011 modifiant le Livre II du Code de l'Environnement contenant le Code de l'Eau en ce qui concerne la gestion durable de l'azote en agriculture (*Moniteur Belge* of 26 April 2011, p. 25217).

III – Legal framework

10. The objectives of the SEA Directive are defined, in particular, in Article 1:

'The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.'

11. In that regard, the fourth and fifth recitals in the preamble to the SEA Directive state:

'(4) Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

(5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision-making should contribute to more sustainable and effective solutions.'

IV – Legal appraisal

A – *Admissibility of the reference for a preliminary ruling*

12. The Commission contends that, following the adoption of the new Wallonian action programme, an answer to the question referred is no longer necessary. In its view, as the Court does not answer hypothetical questions,[7] the reference is inadmissible.

13. However, in response to an enquiry by the Court, the Conseil d'État indicated that an answer is most certainly necessary in order to deliver a judgment in the case pending. It explains that the new action programme does not have retroactive effect. Consequently, the Conseil d'État must determine whether or not to annul the previous action programme for the period between its adoption and its replacement by the new programme.

14. These circumstances distinguish the present case in particular from the circumstances at issue in *Fluyxs*. That case concerned the question of whether certain provisions of national law were compatible with European Union law.[8] However, the Court held simply that it was no longer in a position to give a ruling after the Belgian Constitutional Court had annulled the provisions at issue with *retroactive effect*[9] and, as a consequence, they could no longer be applied in the proceedings before the national court. In the present case, however, the Conseil d'État still has to decide whether or not the previous action programme must be annulled with retroactive effect.

15. For that reason, a reply must be given to the question referred for a preliminary ruling.

7 — See, for example, Joined Cases C-483/09 and C-1/10 *Gueye* [2011] ECR I-8263, paragraph 40.

8 — On this, see the Opinion of Advocate General Trstenjak in Case C-241/09 *Fluxys* [2010] ECR I-12773.

9 — *Fluxys*, cited in footnote 8, paragraph 32 et seq.

B – *The question referred by the Conseil d'État*

16. The Conseil d'État seeks to establish whether it may order that the Wallonian action programme implementing the Nitrates Directive and adopted contrary to the requirements of the SEA Directive is to remain in force until the adoption of a replacement scheme.

1. The judgment in *Winner Wetten*

17. In this connection, the Conseil d'État and the parties have examined intensively the judgment in *Winner Wetten*.[10] The question arose in that case whether national courts may order that national provisions on games of chance may remain in force on a temporary basis where they are incompatible with the fundamental freedoms.

18. As a rule, it follows from the primacy of European Union law that conflicting national provisions cannot apply.[11] In accordance with the principle of effective legal protection, individuals may also enforce that principle of primacy before the courts.[12]

19. It is only exceptionally that, in application of a general principle of legal certainty which is inherent in the legal order of the European Union, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relations established in good faith. Such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought.[13]

20. In *Winner Wetten*, the Member States submitting observations contended, in essence, that recognition of a principle authorising, in exceptional circumstances, the temporary maintenance of the effects of a national rule held contrary to a directly applicable rule of European Union law is justified by analogy, having regard to the case-law developed by the Court of Justice on the basis of the second paragraph of Article 264 TFEU, with the effect of temporarily maintaining the effects of measures of Community law annulled by the Court under Article 263 TFEU or ruled invalid by it under Article 267 TFEU.[14]

21. However, in that case, the Court did not decide whether the primacy of European Union law may be suspended in the light of other more pressing interests, as overriding considerations of legal certainty capable of justifying a suspension were lacking in the case. It emphasised, however, that in any event it alone may determine the conditions of such a suspension.[15]

22. In the present case, Belgium, France and the Commission deduce from these statements in *Winner Wetten* that it is possible to determine whether the previous action programme may remain in force temporarily by striking a balance.

23. However, the answer to the question referred by the Conseil d'État is not to be found in *Winner Wetten* and similar cases.[16] A provision of national law that is incompatible with the fundamental freedoms or with any other rule of European Union law infringes European Union law every time it is applied. In principle, a provision of that kind may not be applied as otherwise the (uniform) application of European Union law would be threatened.

10 — Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraphs 53 to 69.

11 — *Winner Wetten*, cited in footnote 10, paragraphs 53 to 57.

12 — Ibid., paragraph 58.

13 — Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraphs 35 and 36 and the case-law cited therein.

14 — *Winner Wetten*, cited in footnote 10, paragraph 63.

15 — Ibid., paragraph 67.

16 — *Meilicke and Others*, cited in footnote 13, paragraph 36 and the case-law cited therein.

24. In contrast, the omission of a necessary environmental assessment constitutes primarily a self-contained infringement of European Union law, which is not (necessarily) further aggravated by the implementation of the plan or programme. It is possible that an identical measure would have been adopted following the carrying out of the assessment.

25. For that reason, contrary to the view taken by various parties, the issue is not one of giving precedence to one directive over another or choosing between the infringement of one or other of the directives. The SEA Directive has already been infringed. Only the consequences of that infringement can be tempered. However, if, as a result of the infringement of the SEA Directive, the previous Wallonian action programme to implement the Nitrates Directive were annulled, the infringement of another directive would be added to the infringement of the SEA Directive.

26. For that reason, the judgment in *Winner Wetten* and the principle of the primacy of European Union law do not constitute an appropriate basis on which to answer the question of the Conseil d'État.

2. The principles of effectiveness and equivalence

27. Instead, recourse must be had to the principles of effectiveness and equivalence.

28. The precedence of European Union law establishes the legal consequences resulting from conflicting provisions through its prohibition on the application of national law. [17]

29. In contrast, European Union law does not specify what must be done with a measure which is adopted without the environmental assessment required under the SEA Directive but which, in substantive terms, does not infringe any provision of European Union law.

30. In particular, neither the SEA Directive nor the Nitrates Directive contains provisions on the consequences of procedural errors in the adoption of action programmes.

31. However the Court has held in relation to the directive on environmental impact assessment ('the EIA Directive') [18] that, under the principle of cooperation in good faith laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law. [19] That consideration must also apply in relation to the SEA Directive.

32. In the absence of European Union rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law. Those procedural rules must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law (principle of effectiveness). [20]

33. In the present case, the principle of equivalence is not infringed as the Conseil d'État indicates that in purely domestic cases too it may temporarily maintain in force provisions after annulling them. [21]

17 — Case 6/64 *Costa* [1964] ECR 585, p. 593 et seq.; Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 to 24; Case C-213/89 *Factortame* [1990] ECR I-2433, paragraphs 19 to 21; and Joined Cases C-188/10 and C-189/10 *Melki* [2010] ECR I-5667, paragraph 44.

18 — 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).

19 — Case C-201/02 *Wells* [2004] ECR I-723, paragraph 64.

20 — Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 95; Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 67; and Case C-115/09 *Trianel Kohlekraftwerk Lünen* [2011] ECR I-3673, paragraph 43.

21 — The Conseil d'État relies on Article 14ter of the lois coordonnées sur le Conseil d'État (consolidated laws on the Conseil d'État).

34. However, the principle of effectiveness could preclude maintaining the Wallonian action programme in force on a temporary basis. Each case which raises the question whether a national procedural provision renders application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, viewed as a whole, before the various national bodies, the procedure's conduct and its special features.[22] These constitute assessments on a case by case basis, taking account of each case's own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made.[23]

35. The case of impossibility can be excluded in the present proceedings. Even if the previous action programme remains in force on a temporary basis, the right to an environmental assessment involving public participation will be satisfied when a new programme is adopted in conformity with the requirements of the SEA Directive.

36. However, it must be examined whether maintaining the previous action programme in force on a temporary basis would render it excessively difficult to exercise the right to an environmental assessment.

37. The right to an environmental assessment is not simply a formal step in the procedure but, pursuant to Article 1 of and recitals 4 and 5 in the preamble to the SEA Directive, is intended to ensure that significant environmental effects of implementing plans and programmes are taken into account during their preparation and before their adoption. As a rule, the inclusion of a wider set of factors in decision-making will contribute to more sustainable and effective solutions.

38. Consequently, it cannot be supposed that even after a proper environmental assessment the substance of the measure adopted would have been identical. Instead, it must be presumed that a measure subject to an assessment would be more favourable for the protection of the environment than the measure lacking that assessment. In particular, it should result in fewer adverse effects on the environment.

39. As the Commission points out, potential of that kind exists specifically when adopting action programmes pursuant to the Nitrates Directive since the Member States have a discretion concerning the scope of the measures to be established. In exercising that discretion, the results of the environmental assessment may be applied.

40. The presumption that a measure subject to an assessment would be more favourable supports at first sight suspending the further implementation of a measure lacking an assessment at the very least until an environmental assessment has been carried out. For that reason, the Court has held that, for example, the *revocation* or *suspension* of a consent already granted, in order to carry out an assessment (that had been omitted) of the environmental effects of the project in question as provided for in the EIA Directive, constitutes a suitable measure to remedy a breach of that directive.[24]

41. That consideration — as is the case, similarly, with other findings in relation to the EIA Directive[25] — may be applied to plans and programmes which are a precondition for the implementation of projects which may have adverse environmental effects. Suspension or revocation of the plan or programme — as with consent for a project — would prevent on a temporary basis the implementation of the projects. As a consequence, they would also not be capable of resulting in any adverse effects on the environment.

22 — Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 54; and Case C-246/09 *Bulicke* [2010] ECR I-7003, paragraph 35.

23 — Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 37.

24 — *Wells*, cited in footnote 19, paragraph 65.

25 — See, for example, Case C-295/10 *Valčiukienė and Others* [2011] ECR I-8819, paragraph 47; my Opinion in *Terre wallonne*, cited in footnote 5, point 30; my Opinion of 13 October 2011 in Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, pending before the Court, point 162 et seq. and point 175; and point 31 above.

42. However, in contrast to consents for projects, plans and programmes may also form part of a regulatory structure or replace earlier provisions. If measures of that kind are revoked or suspended, either more general or earlier provisions apply in their place. These may have more serious effects on the environment [26] than the measure adopted incorrectly. If such effects are to be feared, it would contradict the objectives of the SEA Directive to revoke or suspend the contested measure.

43. Therefore, in the case of judicial decisions on plans and programmes adopted without the necessary environmental assessment, consideration should be given to what provisions would apply in their place following annulment or suspension. If these provisions are more disadvantageous for the environment than the contested measure, the court may order, without infringing the principle of effectiveness, that the existing measure is to remain in force temporarily until a replacement measure has been adopted on the basis of an environmental assessment.

44. Such an order presupposes, naturally, that the national court indeed has the power to order that provisions adopted in breach of procedural requirements remain in force. In that regard, the question may be posed as to whether such power is required as a matter of European Union law where the contested measure concerns issues of European Union law. However, in the present case, the Court is not required to answer that question as the Conseil d'État has the necessary powers. [27]

45. Finally, consideration must also be given to the fact that maintaining in force on a temporary basis a measure adopted in breach of procedural requirements may reduce the pressure to replace it with a measure based on an appropriate environmental assessment. The principle of effectiveness would in any event be infringed if, as a result of the previous measure remaining in force, the adoption of a measure subject to an appropriate assessment were unreasonably delayed. However, in the present proceedings, there is also no requirement to determine the sanctions necessary as a matter of European Union law in such a case. Here, it is clear that a replacement measure has already been adopted and, according to Belgium and the Commission, it was preceded by an adequate assessment of its environmental effects.

46. In the present case, it is clear that the provisions that applied prior to the adoption of the previous action programme did not satisfy the requirements of the Nitrates Directive. [28] In contrast, the Commission contends that the previous action programme satisfies the requirements of the Nitrates Directive. Consequently, it is to be supposed that the environment is better protected against nitrate inputs through the maintenance in force on a temporary basis of the previous action programme than it would be if the programme were annulled.

47. However, the question of whether these presumed advantages do, in fact, exist can only be assessed in proceedings before the national court, in particular if justified objections are raised challenging the substance of the previous action programme.

V – Conclusion

48. I therefore propose that the Court answer the question referred for a preliminary ruling as follows:

In the case of a national judicial decision on a plan or programme adopted without an environmental assessment required pursuant to Directive 2001/42/EC, it must be examined what provisions would apply in place of the contested measure if it were annulled. If these provisions are more disadvantageous

26 — In addition to the present case, see the example in my Opinion of 17 November 2011 in Case C-567/10 *Inter-Environnement Bruxelles and Others*, pending before the Court, point 40 et seq.

27 — See footnote 21.

28 — *Commission* v *Belgium*, cited in footnote 4.

for the environment than the contested measure, the court may order, without infringing the principle of effectiveness, that the existing measure is to remain in force temporarily until a replacement measure has been adopted on the basis of an environmental assessment.

In the case of action programmes adopted pursuant to Directive 91/676/EEC, the maintenance in force on a temporary basis of a programme which was adopted without an environmental assessment, but is otherwise not the subject of objections, is, as a rule, to be preferred to the immediate annulment of that programme.