Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 19 December 2012 [1]

Case C-463/11

L
v
M

(Reference for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg (Germany))

(Directive 2001/42/EC — Assessment of the effects of certain plans and programmes on the environment — Determining the types of plans likely to have significant environmental effects — Article 3(5) of Directive 2001/42 — Building plan 'for development within an urban area' drawn up pursuant to a national procedure without an environmental assessment under Directive 2001/42 — Maintaining in force a building plan which, following an error of assessment, was described as being 'for development within an urban area' — Practical effect of Article 3 of Directive 2001/42)

1. 'Municipality M' adopted a building plan that in its view complied with the conditions laid down in German law for the application of what is termed an 'accelerated' procedure, which, in accordance with European Union law, exempts the author of the plan from carrying out an environmental assessment. Since the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) (Germany), before which L has brought proceedings, might find that that procedure was used unlawfully, would not Directive 2001/42/EC [2] ('the SEA Directive', 'SEA' standing for 'strategic environmental assessment') be denied practical effect by another provision of German law which states that 'infringement of procedural and formal provisions of [the Planning Code] [3] shall be irrelevant for the legal validity of the [building] plan'?

2. A question has therefore been referred to the Court of Justice concerning the interpretation of Article 3(4) and (5) of the SEA Directive. In the dispute before the national court, the applicant, L, seeks, in proceedings for review of a legal rule, annulment of a 'building plan for development within an urban area' [4] prepared by the respondent in the main proceedings, namely municipality M.

1 — Original language: French.

2 — Directive 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).

3 — The Planning Code (Baugesetzbuch), in the version published on 23 September 2004 (BGBl. I, p. 2414), as amended by the Law of 22 July 2011 (BGBl. I, p. 1509) ('the BauGB').

4 — In German 'Bebauungsplan der Innenentwicklung'. These words refer to the concept in German town-planning law of the 'Innenbereich' (inner area), which describes the parts of the town already forming a built-up area (Paragraph 34 of the BauGB).

I – Legal background

A – *European Union law*

3. Article 3 of the SEA Directive, which defines the directive's scope, provides:

'1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes:

(a) which are prepared for agriculture, … town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to [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], or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 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. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

...'

4. Annex II to the SEA Directive lists the criteria for determining the likely significance of the effects referred to in Article 3(5) of that directive.

B – *German law*

5. Paragraph 1(6) of the BauGB provides that, when urban development plans are being drawn up, the following, in particular, must be taken into account:

'...

7. environmental protection interests, including nature protection and preservation of the countryside, in particular

...

(b) the conservation objectives and protective purpose of Natura 2000 sites within the meaning of the Federal Law on Nature Protection (Bundesnaturschutzgesetz),

...

(d) the environmental impact on cultural heritage and other physical assets,

...'

6. Paragraph 1(7) of the BauGB provides that, 'when urban development plans are being drawn up, public and private interests must be fairly balanced, one against the other and within both categories of interests'.

7. Urban development plans are drawn up, supplemented or amended under a 'standard procedure' (Paragraph 2 et seq. of the BauGB), unless it is possible to use the'simplified procedure' (Paragraph 13 of the BauGB) or, in the case of building plans for development within an urban area, an 'accelerated procedure' (Paragraph 13a of the BauGB).

8. The SEA Directive was transposed into German law by the Law on the adaptation of town-planning law to European Union law.[5] Under that law, environmental assessment was integrated into the standard procedure for drawing up urban development plans.

9. As regards that standard procedure, Paragraph 2 of the BauGB, entitled 'Drawing up urban development plans', provides:

'…

(3) When drawing up urban development plans, it is necessary to identify and assess the interests which it is material to weigh up [inter alia public and private interests].[6]

(4) For the environmental protection interests referred to in Paragraph 1(6)(7) and Paragraph 1a, an environmental assessment shall be carried out, in which the likely significant environmental effects shall be identified, and described and assessed in an environmental report …. The municipality shall for this purpose establish, in respect of each urban development plan, the extent and the level of detail required in the identification of the interests to be weighed up. The environmental assessment shall be based on what can reasonably be required in the light of current knowledge and generally recognised methods of assessment, and of the content and level of detail of the urban development plan. The result of the environmental assessment must be taken into account when weighing up the interests. ...'

10. As regards the simplified procedure, Paragraph 13(3), first sentence, of the BauGB provides that in this procedure 'there shall be no environmental assessment under Paragraph 2(4), no environmental report under Paragraph 2a, no statement of the types of environmental information available under Paragraph 3(2), second sentence, and no summary statement under Paragraph 6(5), third sentence, and Paragraph 10(4). Paragraph 4c shall not apply'.

5 — Europarechtsanpassungsgesetz Bau, Law of 24 June 2004 (BGBl. 2004 I, p. 1359).

6 — See, inter alia, point 6 of this Opinion.

11. Paragraph 13a of the BauGB, entitled ‘Building plans for development within an urban area’, provides:

‘(1) A building plan for site remediation, more intensive development, or other development measures within an urban area (“Bebauungsplan der Innenentwicklung” – building plan for development within an urban area) may be drawn up under the accelerated procedure. The building plan may be drawn up under the accelerated procedure only where it specifies authorised building land within the meaning of Paragraph 19(2) of the Regulation on Land Use (Baunutzungsverordnung), or a surface area, comprising in total

1. less than 20 000 m^2 ..., or

2. 20 000 m^2 or more but less than 70 000 m^2, where it is considered on the basis of a rough assessment made in the light of the criteria set out in Annex 2 to the present code that the building plan is not likely to have significant environmental effects that would need to be taken into account in the weighing up of interests in accordance with Paragraph 2(4), fourth sentence (prior examination on a case-by-case basis) ...

...

(2) Under the accelerated procedure

1. The provisions relating to the simplified procedure which are laid down in Paragraph 13(2) and Paragraph 13(3), first sentence, shall apply by analogy;

...’

12. In short, Paragraph 13a of the BauGB thus provides for (i) a quantitative condition (a maximum land area threshold) and (ii) a qualitative condition (the plan must be ‘for development within an urban area’).[7]

13. Paragraph 214 of the BauGB, which is in the section entitled ‘Maintaining plans in force’, provides:

‘(1) Infringement of procedural and formal provisions of the present code *shall be irrelevant for the legal validity* of the land-use plan and the municipal regulations adopted in pursuance of this code *save where*:

1. in breach of Paragraph 2(3), essential aspects of the interests affected by the planning, being interests of which the municipality was or ought to have been aware, were not properly identified or assessed, and that failure is evident and has influenced the outcome of the procedure;

...

7 — Paragraph 13a(1), second sentence, point 1, and Paragraph 13a(1), first sentence, of the BauGB, respectively.

(2a) For building plans that have been drawn up under the accelerated procedure in accordance with Paragraph 13a, the following provisions shall apply in addition to those of subparagraphs 1 and 2 above:

1. Infringement of procedural and formal provisions and of the provisions concerning the relationship between the building plan and the land-use plan shall *also* be irrelevant for the legal validity of the building plan *where the infringement stems from the fact that the condition in Paragraph 13a(1), first sentence, has been incorrectly assessed.* [emphasis added]

...'

II – The dispute in the main proceedings and the question referred for a preliminary ruling

14. L is the owner of plots of land and a farm in an area to which the building plan contested in the main proceedings relates.

15. On 14 September 2005, M's municipal council decided to draw up a building plan, under the standard procedure, for an area that was larger than the area to which the plan now in dispute relates but included that area, with a view to amendment of the existing urban development and the addition to it of new residential areas on the outskirts.

16. That decision was published on 16 September 2005. In the course of the public consultation which followed, L and others raised objections, in particular on environmental grounds. The Landratsamt (District Administrator's Office) called for an assessment to be carried out of the impact on natural habitats on the land situated to the south of road 'S'.

17. On 25 April 2007, M's municipal council decided to carry out a separate procedure for the land situated south of road 'S'.

18. On 23 April 2008, the municipal council decided upon a project for a smaller area and resolved to draw up the building plan relating to it under the accelerated procedure provided for in Paragraph 13a of the BauGB.

19. According to the statement of reasons for M's resolution, the plan is not likely to have lasting negative effects on the environment and it provides for authorised building land totalling approximately 11 800 m^2, which is below the threshold set in Paragraph 13a(1), second sentence, point 1, of the BauGB.

20. On 26 April 2008, municipality M made the building plan available to the public for one month, giving an opportunity to submit comments. While it was available to the public, L and others repeated their objections and called for an environmental report.

21. The Landratsamt stated that, although the planning at issue could be classed as 'for development within an urban area' within the meaning of Paragraph 13a of the BauGB, the inclusion of land that had not been built upon, located on the outskirts of the built-up area, was not strictly necessary. It added that it had reservations about the finding that the plan was not likely to have lasting negative effects on the environment.

22. On 23 July 2008, M's municipal council adopted the building plan in the form of a municipal regulation. The decision was published on 2 August 2008.

23. On 31 July 2009, L lodged an application for review of a legal rule ('Normenkontrollantrag') with the national court. He claimed that the contested building plan was vitiated by formal and substantive irregularities. He maintained inter alia that the municipality had failed to take into account the fact that it was urbanising areas outside the built-up area. Consequently, the environmental interests were identified and assessed incorrectly.

24. Municipality M disputed L's assertions and maintained that recourse to the accelerated procedure established by Paragraph 13a of the BauGB was legitimate.

25. The national court considers that the contested building plan is not a building plan 'for development within an urban area' within the meaning of Paragraph 13a of the BauGB and that it was not therefore permissible to adopt it by means of an accelerated procedure without an environmental assessment, because the land included in the plan falls partly outside the area already built upon, encompassing a steep slope situated outside the town.

26. It therefore considers that that plan was incorrectly assessed in respect of the 'qualitative' condition in Paragraph 13a(1), first sentence, of the BauGB (namely that it must be a plan for development within an urban area), but that, according to Paragraph 214(2a)(1) of the BauGB, that assessment is irrelevant for the legal validity of the plan.

27. In that context, the Verwaltungsgerichtshof Baden-Württemberg is uncertain whether the limits of the discretion which Article 3(5) of the SEA Directive confers on Member States are not exceeded where a Member State introduces national provisions having the effect of maintaining in force plans adopted under an accelerated procedure without all the relevant conditions being complied with. It thus decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Does a Member State exceed the limits of its discretion under Article 3(4) and (5) of [the SEA Directive] if, in respect of a municipality's building plans which determine the use of small areas at local level and set the framework for future development consent of projects but do not fall within the scope of Article 3(2) of [the SEA Directive], it determines – having regard to the relevant criteria of Annex II to the directive – by specifying a particular type of building plan which is characterised by a threshold based on surface area and by a qualitative condition, that when drawing up such a building plan the procedural provisions on environmental assessment otherwise applicable to building plans are to be waived and also provides that an infringement of those procedural provisions which stems from the fact that the municipality has incorrectly assessed the qualitative condition is irrelevant for the legal validity of a building plan of that particular type?'

III – Analysis

A – *The relevance of the question for the purposes of resolving the dispute in the main proceedings*

28. Without expressly raising an objection of inadmissibility, the German Government contends that the question referred is 'probably not' relevant for the purposes of resolving the dispute in the main proceedings. Municipality M considers, similarly, that the relevance of the question referred as regards the outcome of the dispute is problematic.

29. I am of the view that clearly the question is relevant.

30. In that regard, according to settled case-law,[8] in proceedings under Article 267 TFEU it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling. Nevertheless, the Court has also held that in exceptional circumstances it may examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to provide a useful answer to the questions submitted.

31. It is not clear that the interpretation that is sought bears no relation to the actual facts of the main action or its purpose.

32. On the contrary, it is clear from the order for reference that the answer to the question referred to the Court is decisive for the judgment of the national court. If the German legislature exceeded the limits of the discretion conferred by the SEA Directive, by the combined effects, on the one hand, of the decision to waive an environmental assessment in the context of building plans[9] and, on the other hand, of Paragraph 214(2a)(1) of the BauGB, which maintains in force building plans in respect of which the accelerated procedure and the waiver of an environmental assessment have been wrongly applied, the national court would have to be able to rule on the application for review of a legal rule by disapplying one or other of the national provisions at issue. In that case, the requirement under national law to subject building plans to an environmental assessment in the context of the standard procedure would arise.

B – *Substance*

33. In essence, L and the European Commission consider that, by combining the accelerated procedure (Paragraph 13a of the BauGB) with maintaining in force a plan which, following an incorrect assessment, proves not to be a plan for development within an urban area (Paragraph 214(2a)(1) of the BauGB), the Member State concerned exceeded the limits of its discretion under Article 3(5) of the SEA Directive. Municipality M and the German Government, on the other hand, consider that those national provisions are compatible with the requirements of Article 3 of the directive. Although the Greek Government seems prepared to accept the position of the German Government, it none the less sees that it entails a risk that the objective of the directive might not be achieved.

34. After analysing Paragraph 13a(1), second sentence, point 1, of the BauGB (in section 1 below) and Paragraph 214(2a)(1) of the BauGB and the combined application of both those provisions (in section 2), I shall consider the rules and principles of European Union law which might be undermined in the present case, namely the practical effect of the SEA Directive and the principles of effectiveness, sincere cooperation and effective judicial protection (in section 3). In my final comments, I shall refute the arguments of municipality M and of the German Government (in section 4).

8 — See, for example, Case C-440/08 *Gielen* [2010] ECR I-2323, paragraphs 27 to 29 and the case-law cited. See also Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited.

9 — In accordance with Paragraph 13a(1), second sentence, point 1, of the BauGB (Paragraph 13a(2)(1), in conjunction with Paragraph 13(3), first sentence, of the BauGB), which according to the national court was not applied correctly.

1. Paragraph 13a(1), second sentence, point 1, of the BauGB (the use of an accelerated procedure for drawing up building plans for development within an urban area)

35. The question referred, although not concise (the sentence is no less than 17 lines long), is in actual fact very precise, namely does a Member State exceed the limits of the discretion conferred upon it by the SEA Directive [10] if, in respect of building plans drawn up by a municipality, [11] it determines – having regard to the relevant criteria of Annex II to the directive – a particular type of building plan [12] while providing (i) that when drawing up such a building plan the procedural provisions on environmental assessment otherwise applicable to building plans are to be waived and (ii) that an infringement of those procedural provisions [13] is irrelevant for the legal validity of a building plan of that particular type?

36. It should be noted first of all that, as is apparent from Article 1 of the SEA Directive, the fundamental objective of that directive is, where plans and programmes are likely to have significant effects on the environment, to require an environmental assessment to be carried out at the time they are prepared and before they are adopted. [14]

37. In the present case, the national court states that, so far as building plans are concerned, the German legislature established, in pursuance of Article 3(5) of the SEA Directive, that the drawing up or amendment of such plans, including for the purposes of supplementing them, was in principle subject to the requirement of an environmental assessment, in the context of a standard procedure. [15]

38. On the other hand, the German legislature exempts from that requirement, inter alia, building plans which meet the qualitative condition of development within an urban area [16] and remain below the land area threshold laid down in Paragraph 13a(1), second sentence, point 1, of the BauGB, unless there is a ground for exclusion under Paragraph 13a(1), fourth and fifth sentences, of the BauGB.

39. The order for reference states that in so doing the German legislature used the power granted to it under the second option in the first sentence of Article 3(5) of the SEA Directive and established that exception by specifying a particular 'type' of plan, whilst taking into account – as required by the second sentence of Article 3(5) of the SEA Directive – the relevant criteria set out in Annex II to that directive. I would add that the German Government also confirmed in its written observations that that provision of Paragraph 13a of the BauGB was adopted in order to transpose the SEA Directive, in particular the second option in the first sentence of Article 3(5).

40. The national court considers that the German legislature's decision to regard that type of plan as not, in principle, likely to have significant effects on the environment falls within the limits of the discretion which Article 3(5) of the SEA Directive confers on Member States.

10 — Pursuant to Article 3(4) and (5) of that directive.

11 — Which determine the use of small areas at local level, set the framework for future development consent of projects and do not fall within the scope of Article 3(2) of the SEA Directive.

12 — Characterised by a quantitative condition (namely a maximum land area threshold) and a qualitative condition (namely that it must be 'for development within an urban area'). See points 11 and 12 of this Opinion.

13 — In the present case the national court considers that the municipality incorrectly assessed the qualitative condition.

14 — See Joined Cases C-105/09 and C-110/09 *Terre wallonne and Inter-Environnement Wallonie* [2010] ECR I-5611, paragraph 32; Case C-295/10 *Valčiukienė and Others* [2011] ECR I-8819, paragraph 37; and Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne* [2012] ECR, paragraph 40.

15 — Paragraph 2(4) of the BauGB.

16 — Paragraph 13a(1), first sentence, of the BauGB. See in that regard case-law concerning the unlawfulness of using size thresholds as the only criterion (in the context of the similar provision in the second subparagraph of Article 4(2) of Directive 85/337), inter alia Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403; Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135; Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901; and Case C-427/07 *Commission* v *Ireland* [2009] ECR I-6277.

41. In that regard, it is clear from the judgment in *Valčiukienė and Others*[17] – delivered just after the reference was made in the present case – that the margin of discretion enjoyed by Member States pursuant to Article 3(5) of the SEA Directive to specify the types of plans which are likely or not likely to have significant environmental effects 'is limited by the requirement under Article 3(3) of that directive, in conjunction 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' (paragraph 46).

42. Consequently, again according to that judgment (paragraph 47), 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 the SEA Directive 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.

43. In the light of that case-law, I am not convinced that, in the context of Paragraph 13a(1), second sentence, point 1, of the BauGB, the German legislature did in fact act within the limits of the discretion which Article 3(5) of the SEA Directive confers on Member States in the case of plans and programmes which fall within the scope of Article 3(3) and (4) of that directive.

44. I note, as does the Commission, that in the present case the question arises whether the German legislature properly took into consideration all the relevant criteria set out in Annex II to the SEA Directive, in particular the criterion expressly referred to by the Court in *Valčiukienė and Others*, namely the sensitivity of the landscape concerned (mentioned in the sixth indent of point 2 in Annex II to the SEA Directive[18]). The statement of reasons to which the German Government refers does not, moreover, in any way go into the substance of that criterion.

45. Be that as it may, for the purposes of this Opinion and in order to give the national court a helpful answer to the question referred, it is necessary, first, to take note of the finding by that court concerning the conformity of Paragraph 13a(1), second sentence, point 1, of the BauGB with the SEA Directive – a matter which that court will anyhow need to examine in depth in the main proceedings – and, second, to concentrate on the fact that clearly the issue raised by the national court is that of the combined application of the two provisions at issue, namely Paragraph 13a(1), second sentence, point 1, and Paragraph 214(2a)(1) of the BauGB.

2. Paragraph 214(2a)(1) of the BauGB (maintaining plans in force)

46. According to the national court, the first, qualitative, condition in Paragraph 13a(1), first sentence, of the BauGB is not complied with in the circumstances of the case in the main proceedings, since the plan at issue includes measures for development outside, not merely within, a built-up area. It is that finding by the national court which gives relevance to the question referred.

47. Moreover, if it were genuinely a plan for development within a built-up area, it would have been appropriate to use the accelerated procedure and there would not in principle be any problem.

48. If we also accept the national court's finding that Paragraph 13a(1) of the BauGB is in conformity with the SEA Directive, the problem then relates to the practical effect of that directive in a situation in which Paragraph 214(2a)(1) of the BauGB applies and the condition in Paragraph 13a(1), second sentence, point 1, of the BauGB is incorrectly assessed.

17 — Paragraphs 46 and 47. See also the judgment of 16 March 2006 in Case C-332/04 *Commission* v *Spain*, paragraphs 77 to 81.

18 — That is to say, 'the value and vulnerability of the area likely to be affected'.

49. It is apparent from the documents submitted to the Court that the effect of Paragraph 214(2a)(1) of the BauGB concerning maintaining plans in force is that plans for the drawing up of which an environmental assessment should have been carried out remain valid even though they were drawn up without an environmental assessment.

50. It is clear that the German system then deprives Article 3(1) of the SEA Directive, which requires an environmental assessment for such plans, of all practical effect.

51. In order for the provisions of the SEA Directive to have practical effect, the Member States must guarantee inter alia that an environmental impact assessment takes place for all plans and programmes in respect of which it cannot be excluded that they may have an effect on the environment. I am of the view that such a risk exists in the case in the main proceedings and, as I explain in this Opinion, that German law does not provide that guarantee.

52. A plan which does not meet the conditions of Paragraph 13a of the BauGB is not a plan which, for the purposes of the SEA Directive, is not likely to have effects on the environment. According to that directive there must therefore be an environmental impact assessment for such a plan. However, under German law, and specifically because Paragraph 214(2a)(1) of the BauGB provides that no legal sanction is possible for such an irregularity, that is not the case.

53. As a result, application by a municipality of Paragraph 13a of the BauGB is not amenable to review by the courts.

54. In the main proceedings the court has no opportunity to stay the proceedings (in order to have an environmental assessment carried out, for example) or to ensure in some other way that the infringement of the requirement to carry out an environmental impact assessment is remedied. Hence the question referred by national court.

55. Since there is no such opportunity for judicial review, there is nothing to ensure that, when making its assessment, the municipality will in any event comply with criteria listed in Annex II to the SEA Directive which the German legislature specifically intended to take into account when introducing the concept of 'development within an urban area'.

56. Clearly, therefore, application of Paragraph 214(2a)(1) of the BauGB thwarts application of the first sentence of Article 3(5) of the SEA Directive by making it impossible to impose any sanction in the event of the national authorities exceeding the limits of the discretion which that directive confers on them.

3. Infringement of the principles of effectiveness, sincere cooperation and effective judicial protection

57. The case-law of the Court, in particular the recent judgment in *Inter-Environnement Wallonie and Terre wallonne*,[19] which was delivered after the date of the order for reference, supports the conclusion which I have reached in points 50 and 56 of this Opinion.

19 — Paragraphs 44 to 47. See what academic legal writers have said in that regard: De Waele, H., *Jurisprudentie bestuursrecht 2012*, No 99; Gazin, F., 'Directive', *Europe 2012*, April, Comm. No 4, p. 14; Koufaki, I., 'Stratigiki ektimisi epiptoseon skhedion kai programmaton sto perivallon', *Nomiko Vima*, 2012, pp. 461 and 462; and Aubert, M., et al. 'Chronique de jurisprudence de la CJUE – Maintien provisoire d'une norme nationale incompatible avec le droit de l'Union', *L'actualité juridique; droit administratif*, 2012, pp. 995 and 996.

58. It is now clear from the Court's case-law (paragraph 44 of that judgment) 'that where a "plan" or "programme" should, prior to its adoption, have been subject to an assessment of its environmental effects in accordance with the requirements of [the SEA Directive], the competent authorities are obliged to take *all* general or particular *measures for remedying the failure to carry out such an assessment* (see, by analogy, *Wells*, [20] paragraph 68)' (emphasis added).

59. In paragraph 45 of the judgment in *Inter-Environnement Wallonie and Terre wallonne* the Court added that '[*n*]*ational courts* before which an action against such a national measure has been brought *are also under such an obligation*, and, in that regard, it should be recalled that the detailed procedural rules applicable to such actions which may be brought against such "plans" or "programmes" are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided 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 European Union legal order* (principle of effectiveness) (see *Wells*, paragraph 67 and the case-law cited)' (emphasis added).

60. Consequently, according to paragraph 46 of the judgment in *Inter-Environnement Wallonie and Terre wallonne*, 'courts before which actions are brought in that regard must adopt, on the basis of their national law, measures *to suspend or annul the "plan" or "programme" adopted in breach of the obligation to carry out an environmental assessment* (see, by analogy, *Wells*, paragraph 65)' (emphasis added).

61. Lastly, in paragraph 47 of the judgment in *Inter-Environnement Wallonie and Terre wallonne*, the Court held that '[t]he fundamental objective of [the SEA Directive] would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are *appropriate for preventing such a plan* or programme, including projects to be realised under that programme, *from being implemented in the absence of an environmental assessment*' (emphasis added).

62. It is clear therefore that where the SEA Directive requires an assessment of the effects of a project on the environment and that assessment has not been carried out – as in the case in the main proceedings – it must be legally possible to prevent the plan concerned from being implemented.

63. Moreover, in *Wells*, in particular in paragraph 66, the Court held that the Member State was required to make good any harm caused by the unlawful failure to carry out an environmental impact assessment. [21]

64. I would also add, as the Court held in *Alassini and Others*, [22] that the 'requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual's rights under European Union law'.

65. Since the practical effect of the SEA Directive is frustrated by national provisions such as those at issue in the main proceedings concerning the maintaining in force of plans vitiated by irregularities, the principle of effectiveness is infringed, as is clear from the case-law of the Court cited in points 57 to 64 of this Opinion.

20 — Case C-201/02 [2004] ECR I-723.

21 — See paragraph 66 of that judgment. See also Case C-420/11 *Leth*, pending before the Court, which concerns in essence the question whether the total absence of an environmental assessment may give rise to rights to compensation by the State. See the Opinion of Advocate General Kokott in that case.

22 — Joined Cases C-317/08 to C-320/08 [2010] ECR I-2213, paragraph 49.

66. Indeed, as we have already seen, it is apparent from the documents submitted to the Court that Paragraph 214(2a)(1) of the BauGB makes it impossible in practice to exercise the rights conferred by the European Union legal order.

67. Bearing in mind the fact that, under Article 4(3) TEU, the Member States must facilitate the achievement of the European Union's tasks and refrain from any measure which could jeopardise the attainment of the European Union's objectives, it is also apparent from settled case-law that every national court, in a case within its jurisdiction, has, as an organ of a Member State, the obligation in application of the principle of sincere cooperation laid down in that article to apply in its entirety European Union law that is directly applicable and to protect rights which the latter confers on individuals, setting aside any provision of national law which may conflict with it, whether prior or subsequent to the rule of European Union law. [23]

68. In the present case, account must also be taken of the fact that the Court has established that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law. [24]

69. In the context of actions claiming irregularity or omission of environmental assessments, national courts must therefore be able to adopt, subject to the limits of procedural autonomy, measures that are appropriate for preventing a project from being implemented in the absence of an environmental assessment required under the SEA Directive. [25] Also, it is necessary, in the context of a consent procedure which does not, in principle, provide for an environmental assessment, to carry out at a later stage any assessment that was omitted during earlier procedures leading to the authorisation of the overall project. [26]

70. Last but not least, the principle of effective judicial protection is a general principle of European Union law [27] stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950. [28] That general principle of European Union law is now given expression by Article 47 of the Charter of Fundamental Rights of the European Union. [29]

71. Clearly, national provisions such as those at issue in the main proceedings do not comply with that general principle.

4. Final comments

72. In my final comments I shall now turn to the arguments of municipality M and the German Government.

23 — See, to that effect, inter alia Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 16 and 21, and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19.

24 — See inter alia *Simmenthal*, paragraphs 22 and 23, and *Factortame and Others*, paragraph 20.

25 — See to that effect *Inter-Environnement Wallonie and Terre wallonne* and point 39 of the Opinion of Advocate General Kokott in *Leth*.

26 — Case C-275/09 *Brussels Hoofdstedelijk Gewest and Others* [2011] ECR I-1753, paragraph 37, and point 39 of the Opinion of Advocate General Kokott in *Leth*.

27 — See inter alia Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; and Case C-226/99 *Siples* [2001] ECR I-277, paragraph 17.

28 — See inter alia *Heylens and Others*, paragraph 14, and Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 14.

29 — See Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 30 and 31; order in Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 25; and Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 49. See also Case C-199/11 *Otis and Others* [2012] ECR, paragraph 46 et seq.

73. First of all, the observations submitted by municipality M appear to me, in essence, merely to seek to minimise the number of cases in which Paragraph 214 of the BauGB might apply in the event of an incorrect assessment of the conditions laid down in Paragraph 13a(1) of the BauGB.

74. Municipality M essentially seeks to show that Paragraph 214 of the BauGB applies only where the error in the assessment of the concept of development within an urban area in Paragraph 13a(1) of the BauGB is objectively inconceivable, where the error has been committed in full knowledge of the facts or where there has not even been an assessment of the conditions for applying the accelerated procedure.

75. According to M, that is not so in the present case because there was no intention to commit an error – or indeed it was not even aware that it was committing an error – and any error that did exist was purely marginal and insignificant. That argument is also to be found in one form or another in the observations of the German Government.

76. The German Government claims that Paragraph 214(2a)(1) of the BauGB is seldom applied, inter alia because German municipalities are bound by the law and because there are other general programmatic provisions in German town-planning law which limit use of the accelerated procedure.

77. Suffice it to say that that argument is ineffective in the present case.[30] Moreover, the fact that it may be possible, as the German Government contends, to limit the situations in which Paragraph 214(2a)(1) of the BauGB allows a building plan for development within an urban area to remain in force is not in any event sufficient to ensure its compatibility with Article 3(5) of the SEA Directive.

78. The German Government adds that the error concerning satisfaction of the qualitative condition provided for in Paragraph 13a(1) of the BauGB must be 'manifest and serious', that there is no 'significant prejudice' to environmental interests or circumvention of the conditions of Paragraph 13a[31] and that it is necessary to 'counteract the proneness of urban development plans to error'.[32] The German Government contends that Paragraph 214(2a)(1) of the BauGB does not cover all infringements. Thus, it does not apply: (a) in the total absence of a specific situation in which development is within an urban area;[33] (b) where there is not at least an assessment of the factual situation with a view to development within an urban area;[34] (c) where the limit of understandable uncertainties and doubts has been exceeded;[35] (d) where the built-up area is overstepped to a not insignificant extent in terms of land area;[36] or (e) where the land areas concerned are not situated at the boundary between the built-up and unbuilt-up areas.[37]

79. It is clear that the German Government is attempting to show by means of all these arguments that, save where there is manifest error or error in full knowledge of the facts or where essential elements are affected, Paragraph 214(2a)(1) of the BauGB will not apply.

30 — See Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 57 et seq.

31 — See paragraph 31 of the German Government's observations.

32 — Ibid. (paragraph 43).

33 — Ibid. (paragraph 45).

34 — Ibid. (paragraph 48).

35 — Ibid. (paragraph 49).

36 — Idem.

37 — Ibid. (paragraph 50).

80. That interpretation of Paragraph 214 of the BauGB falls not within the jurisdiction of the Court of Justice but within that of the national court, although the latter gives no indication that it supports it. That said, even if the interpretation of municipality M and the German Government were correct, their arguments would be ineffective here since the question referred relates to all the types of errors that may be covered by Paragraph 214 of the BauGB.

81. It is clear in any event that Paragraph 214 of the BauGB is applicable where the qualitative condition in Paragraph 13a(1), second sentence, point 1, of the BauGB has been incorrectly assessed. According to the national court, in the circumstances of the case in the main proceedings, the plan includes development measures outside the urban area, which calls into question the very existence of a building plan for development within an urban area that would allow the accelerated procedure to be applied.

82. The German Government also contends [38] that a building plan for development within an urban area is a plan which determines 'the use of small areas at local level' and thus satisfies at the same time the central condition of Article 3(3) of the SEA Directive. It maintains that, by reason of the grounds for exclusion contained in Paragraph 13a(1), fourth and fifth sentences, of the BauGB, such a plan cannot, by definition, be a plan within the meaning of Article 3(2) of the SEA Directive, which the European Union legislature considered in principle to require an environmental assessment. Even if that observation is correct, it does not detract from the conclusions which I have reached concerning Paragraph 214 of the BauGB. The same applies regarding the German Government's remarks in paragraphs 74 to 81 of its written observations, since the issue – at least in the present case before the Court [39] – is not whether Paragraph 13a of the BauGB complies with the SEA Directive, but whether Paragraph 13a in conjunction with Paragraph 214 of the BauGB complies with that directive.

83. It is also true [40] that an infringement of the qualitative condition in Paragraph 13a of the BauGB does not systematically lead to significant environmental effects, but that does not alter the fact that the plan is no longer a building plan for development within an urban area.

84. It is also true, as the German Government contends, [41] that Paragraph 214 of the BauGB does not mean that errors of assessment with regard to the land area threshold are any less invalidating, although once again this is not the issue; [42] the issue lies rather in the fact that the failure to satisfy the basic qualitative condition has no effect regarding invalidity, an absence of legal effects pointed out by the German Government itself in paragraph 88 of its observations.

85. The German Government contends, lastly, that 'European Union law does not require that the sanction for a procedural irregularity should necessarily be nullity of the relevant legal measure, but it recognises as general principles of law the finality of administrative measures and the concern for legal certainty which underlies it'. [43]

86. Although European Union law does not stipulate a particular type of legal sanction, it does not accept that a directive should be deprived of practical effect. Whilst the legal consequence of a Member State exceeding the discretion conferred on it by the directive need not necessarily be the nullity of the legal measure giving expression to that exceeding of discretion, the legal consequence

38 — Ibid. (paragraph 73).

39 — See point 45 of this Opinion.

40 — See paragraph 83 of the German Government's observations.

41 — As stated in paragraph 87 of its observations.

42 — See the same argument in paragraph 90 of its observations.

43 — Ibid. (paragraph 100). The German Government refers to the following case-law: Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 24, and Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 37.

must at least be that the fruits of its being exceeded cannot be implemented or applied (whether it be, for example, suspension or a condition precedent for the implementation of a plan or, in the present case, a procedure in which the environmental assessment could still be carried out during the judicial proceedings).

87. In the light of all the above considerations, I am of the view that total exclusion of judicial protection and review in the case of an unlawful absence of an environmental impact assessment – as in the case in the main proceedings – deprives the SEA Directive of its practical effect,[44] does not comply with the principle of the effectiveness of national procedures ensuring the protection of citizens' rights and the principle of effective judicial protection, and conflicts with the principle of sincere cooperation whereby Member States are required to nullify the unlawful consequences of a breach of European Union law.[45]

IV – Conclusion

88. The question referred by the Verwaltungsgerichtshof Baden-Württemberg should therefore be answered as follows:

Article 3 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment and the principles of effectiveness, sincere cooperation and effective judicial protection preclude legislation of a Member State – such as the legislation in the main proceedings – under which infringement of a condition imposed by the provision transposing that directive, whereby the adoption of a particular type of building plan is exempt from a prior environmental assessment, cannot give rise to any judicial remedy since that legislation deprives the infringement concerned of any relevance for the legal validity of that building plan.

44 — See inter alia point 36 of this Opinion and the case-law cited.

45 — See inter alia *Wells*, paragraph 64.