Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 25 January 2018 [1]

Case C-671/16

Inter-Environnement Bruxelles ASBL,
Groupe d'Animation du Quartier Européen de la Ville de Bruxelles ASBL,
Association du Quartier Léopold ASBL,
Brusselse Raad voor het Leefmilieu ASBL,
Pierre Picard,
David Weytsman
v
Région de Bruxelles-Capitale

(Request for a preliminary ruling from the Conseil d'État (Council of State, Belgium))

(Request for a preliminary ruling — Environment — Directive 2001/42/EC — Assessment of the effects of certain plans and programmes on the environment — Plans and programmes — Definition — Regional zonal town planning regulations)

I. Introduction

1. To determine the scope of the directive on the assessment of the effects of certain plans and programmes on the environment [2] ('the SEA (Strategic Environmental Assessment) Directive'), the two terms 'plans and programmes' are of central importance. Although the Court has recently provided clarification on the interpretation of these terms, [3] there are still questions which need to be answered in this context, as is also shown by *Thybaut and Others* (C-160/17), in which I am also delivering my Opinion today.

2. The present case concerns regional zonal town planning regulations which contain certain requirements for carrying out construction projects in the European quarter in Brussels. However, Belgium, inter alia, is using these proceedings to insist that the SEA Directive be applied to quasi-legislative general provisions.

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 Judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 49).

II. Legal framework

A. EU law

3. The objectives of the SEA Directive are set out 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'.

4. Plans and programmes are defined in Article 2(a) of the SEA Directive:

'For the purposes of this Directive:

(a) "plans and programmes" shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

– which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

– which are required by legislative, regulatory or administrative provisions'.

5. In the present case, the obligation to carry out a strategic environmental assessment under Article 3(2)(a) is of particular interest:

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

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to [the EIA Directive[4]], ...'

B. National law

6. Articles 88 and 89 of the Code bruxellois de l'aménagement du territoire (Brussels Town and Country Planning Code) govern the subject matter and the adoption of town planning regulations.

III. Facts and the request for a preliminary ruling

7. The request for a preliminary ruling is based on an action brought by Inter-Environnement Bruxelles and Others against the decree of the Government of the Région de Bruxelles-Capitale (Brussels-Capital Region) (Belgium) of 12 December 2013 approving the regional zonal town planning regulations and the composition of the file of the application for a certificate and for planning permission for Rue de la Loi and its surrounding areas.

4 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), as last amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1).

8. The regional 'zonal' town planning regulations establish, in essence, for a given district of a city (a zone) the rules applicable to buildings (height, size, alignment, surface area, roof, aerials), construction-free spaces (minimum surface areas, facilities) and (public) open spaces.

9. On 12 December 2013, the Government of the Région de Bruxelles-Capitale adopted the regulations at issue in the present case.

10. On the same day, the Government adopted a decree relating to the implementation, by a specific land use plan, of a project defining an urban model for Rue de la Loi and its surrounding areas within the European quarter. That plan governs, inter alia, the areas to be dedicated to housing, offices, shops and the hotel industry and those to be used for community and public facilities. It also concerns travel, parking and access to the area. An action for annulment was brought against that decree, which was dismissed by a different judgment of the Belgian Conseil d'État (Council of State) (Belgium) of 14 December 2016.

11. In the present case, the Council of State has referred the following questions to the Court:

Must Article 2(a) of the SEA Directive be interpreted as including in the concept of 'plans and programmes' town planning regulations adopted by a regional authority:

– which contain a map setting out the area to which they apply, limited to a single district, and defining various islands within that area to which different rules apply as regards the location and height of buildings; and

– which also lay down specific planning provisions for areas situated in the areas around buildings, and precise indications on the spatial application of certain rules which they lay down taking into consideration the streets, straight lines traced perpendicular to those streets and distances in relation to the alignment of those streets; and

– which pursue the objective of transforming the district concerned; and

– which lay down the rules regarding the composition of the files of applications for planning permission subject to an environmental impact assessment in that district?

12. Written observations have been submitted by Inter-Environnement Bruxelles and Others, the Kingdom of Belgium, the Czech Republic and the European Commission. With the exception of the Czech Republic, those parties, together with the Kingdom of Denmark, participated at the hearing which took place on 30 November 2017 and which concerned both the present case, and Case C-160/17, *Thybaut and Others*.

IV. Legal assessment

13. The Council of State wishes to ascertain whether the zoned town planning regulations at issue are to be regarded as a plan or programme under Article 2(a) of the SEA Directive.

14. In that respect it is important first to consider briefly the 'definition' of plans and programmes given in Article 2(a) of the SEA Directive and then to examine the Court's interpretation of those two terms. Building on this, guidance can be given in order to assess whether the town planning regulations at issue are to be regarded as a plan or programme in accordance with that provision and, finally, the objections raised by Belgium in particular to the Court's case-law must be discussed.

A. Article 2(a) of the SEA Directive

15. Article 2(a) of the SEA Directive states that 'plans and programmes' means plans and programmes as well as any modifications to them which, *first*, are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which, *secondly*, are required by legislative, regulatory or administrative provisions.

16. Those two conditions are not disputed in the present case. The town planning regulations were adopted by a regional authority, namely the Government of the Région de Bruxelles-Capitale. And, as regards the second condition, although the request for a preliminary ruling contains no reference to a requirement to adopt town planning regulations, it is sufficient in that regard that a measure is regulated by national legislative or regulatory provisions which determine the competent authorities for adopting them and the procedure for preparing them.[5] Articles 88 and 89 of the Brussels Town and Country Planning Code, which are reproduced in the request for a preliminary ruling, contain rules to that effect regarding town planning regulations.

17. Consequently, the town planning regulations at issue satisfy the conditions laid down in Article 2(a) of the SEA Directive.

B. Interpretation of the two terms 'plans and programmes' in the light of the judgment in D'Oultremont

18. In reality, the Council of State's concern is not Article 2(a) of the SEA Directive, but rather whether there are other features that are of relevance when seeking to ascertain whether a measure such as the zoned town planning regulations at issue are a plan or a programme.

19. The starting point for the answer to this question is that the environmental assessment, as indicated in recital 4 of the SEA Directive, is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes.[6] In addition, the distinction between the two terms 'plans and programmes' and other measures not falling within the material scope of the directive must be drawn by reference to the specific objective laid down in Article 1 to the effect that plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment.[7] Therefore, the Court has held that, given the objective of that directive, which consists in providing for a high level of protection of the environment, the provisions which delimit its scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly.[8]

20. The case-law to date has essentially concerned plans and programmes for which an environmental assessment under Article 3(2)(a) of the SEA Directive applied. In accordance with that provision, an environmental assessment is to be carried out for all plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management,

5 Judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 31).

6 Judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 38).

7 Judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 39).

8 Judgments of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 37); of 10 September 2015, *Dimos Kropias Attikis* (C-473/14, EU:C:2015:582, paragraph 50); and of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 40).

telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of *projects* covered by the EIA Directive. Moreover, a framework for development consent of projects which are not covered by the EIA Directive may require an environmental assessment under Article 3(4) of the SEA Directive. [9]

21. The establishment of a framework for subsequent decisions is characteristic of measures which form part of a regulatory hierarchy. In that regard, the provisions are specified in increasingly greater detail in the run-up to the final decision on the individual case, for example a development consent. At the same time, however, any margins for manoeuvre in the decision on the individual case are, generally, already limited by higher-ranking measures; in the case of development consent, for example, rules on the possible development or use of certain areas. In this hierarchical model, the SEA Directive is intended to ensure that specifications which are likely to have significant effects on the environment are made only after those effects have been assessed. [10]

22. Against that background, the Court's ruling in *D'Oultremont* must be considered. In accordance with that judgment, the two terms 'plans and programmes' 'relate … to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment'. [11]

23. On the one hand, in a regulatory hierarchy, that interpretation of the two terms 'plans and programmes' in the judgment in *D'Oultremont* is intended to ensure that provisions which have significant effects on the environment are subject to an environmental assessment. On the other hand, for the purposes of a *de minimis* rule, it is also intended to prevent an environmental assessment being mandatory for individual criteria or rules which are determined in isolation.

24. Denmark therefore emphasises that a significant body of criteria and detailed rules implies a number of specifications and these specifications must also carry a certain weight.

25. However, I do not find a *quantitative* approach, which focuses on the number of specifications, convincing. For, the Court has also held that it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in the SEA Directive by splitting measures, thereby reducing the practical effect of that directive. [12]

26. Consequently, the clarification of the criterion of a 'significant body'should be aligned *qualitatively* to the specific objective laid down in Article 1 of the SEA Directive, inter alia, to subject plans and programmes which are likely to have significant effects on the environment to an environmental assessment. [13]

9 For the sake of completeness, however, it must be recalled that there is at least one other obligation to carry out an environmental assessment of plans and programmes which does not depend on a framework for development consent of projects, namely Article 3(2)(b) of the SEA Directive. In accordance with that provision, it is necessary to assess plans and programmes which are covered by the special impact assessment pursuant to Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), the Habitats Directive, which covers only part of the effects on the environment.

10 Proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment (COM(96) 511 final, p. 6) See, in this regard, my Opinion in Joined Cases *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:120, points 31 and 32) and my Opinion delivered today in *Thybaut and Others* (C-160/17, point 37).

11 Judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 49).

12 Judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 48).

13 See, to that effect, judgments of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11 (EU:C:2012:103, paragraph 40); of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 30); and of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 39).

27. The establishment of criteria and rules for the development consent and implementation of projects which are likely to have significant effects on the environment must therefore be regarded as a significant body and thus as a plan or programme if those environmental impacts of the projects derive precisely from the criteria and rules in question. However, if the criteria and detailed rules established cannot have significant effects on the environment, a significant body does not exist and, therefore, nor does a plan or programme.

28. When assessing whether a plan or a programme within the meaning of Article 2(a) of the SEA Directive exists, it is therefore necessary to ascertain whether the specifications in the measure in question are likely to have significant effects on the environment.

C. Application of the criteria for 'plans and programmes'

29. In the present case, it would be for the Council of State to determine whether the zoned town planning regulations at issue satisfy the criteria developed above.

30. In that assessment it should be relevant that, according to the request for a preliminary ruling, the zoned town planning regulations contain rules regarding the location and height of buildings and specific planning provisions for areas situated in the areas around the buildings and, as a whole, pursue the objective of transforming the district concerned. Depending on how those criteria and rules were defined, they may have significant effects on the urban environment, such as on the local climate and biodiversity.

31. Conversely, it is not immediately clear to what extent rules regarding the composition of the files of applications for planning permission subject to an environmental impact assessment in that district are capable of having any effect on the environment.

D. The objections raised by Belgium

32. Belgium, however, objects that the zoned town planning regulations at issue cannot be a 'plan or programme', not least because they are general rules which are legislative in nature.

33. In fact, it cannot be ruled out that even a law proposed by a government of a Member State which is passed by the Parliament satisfies all of the conditions laid down in Article 2(a) of the SEA Directive. After all, a law is regulated in national legislation, namely in the respective constitution which determines the competent 'authorities' for adopting them and the procedure for preparing them.

34. However, it should be recalled that the Court rightly refused both the categorical exclusion of legislative measures from the two terms 'plans and programmes' and an analogy with the categories of the Aarhus Convention [14] and the Kiev Protocol on strategic environmental assessment. [15] On the one hand, legislative measures are explicitly part of the definition of Article 2(a), first indent, of the SEA Directive [16] and, on the other, the SEA Directive differs from the Aarhus Convention and the Kiev Protocol inasmuch as that directive does not contain any special provisions in relation to policies or general legislation that calls for them to be distinguished from 'plans and programmes'. [17]

14 Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark, on 25 June 1998 (OJ 2005 L 124, p. 4), approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

15 Protocol on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context (OJ 2008 L 308, p. 35), approved by Council Decision 2008/871/EC of 20 October 2008 (OJ 2008 L 308, p. 33).

16 Judgments of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355, paragraph 47), and of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 52).

17 Judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 53).

35. Belgium's attempt to narrow down the two terms 'plans and programmes' further than in the judgment in *D'Oultremont* is also unconvincing.

36. Ultimately, Belgium wishes primarily to include concrete programmes by the local administration by means of which the authorities set specific objectives and define the resources to be used and the timeframes.

37. In response, it must be pointed out that the two terms 'plans and programmes' include not only programmes, but also plans. The latter could at most be integrated very indirectly in Belgium's programmatic approach, since, generally, they are intended to control not only the actions of the authorities, but above all, albeit indirectly with regard to the conditions under which consent is granted, the plans of private actors. This is illustrated in particular in Article 3(2)(a) and (4) of the SEA Directive. The primary concern of both variants of the obligation to carry out an assessment is not programmes, but in each case the framework for the grant of development consent for projects. After all, an objective of the SEA Directive is to ensure that planning provisions which determine projects covered by the EIA Directive are subject to an environmental assessment. [18]

38. Finally, Belgium emphasises the legal uncertainty resulting from the case-law of the Court as this case-law covers numerous general provisions which, since the expiry of the deadline for transposition of the SEA Directive, have been adopted without an environmental assessment.

39. However, this uncertainty is mitigated at least in part by the 2016 judgment in *Association France Nature Environnement*, which allows national courts, under certain conditions, provisionally to maintain the effects of measures which were adopted in breach of the SEA Directive. [19]

40. In summary it can therefore be concluded that Belgium's objections cannot be accepted.

41. However, I would note that the case-law of the Court may have in fact extended the scope of the SEA Directive further, as was intended by the legislature and the Member States were able to foresee. In my view, however, this does not follow from the definition of the two terms 'plans and programmes', but from the interpretation of the characteristic set out in Article 2(a), second indent, in accordance with which those plans and programmes must be required by legislative, regulatory or administrative provisions.

42. As has already been said, the fact that a measure is regulated by national legislative or regulatory provisions which determine the competent authorities for adopting them and the procedure for preparing them should be sufficient. [20] Therefore, a rather rare requirement to adopt the measure in question is not necessary; rather, it suffices if it is made available as a tool. This extends the obligation to carry out an environmental assessment significantly. As I have already stated, this interpretation that is based on the legitimate objective of applying an environmental assessment covering all relevant measures, [21] is contrary to the recognisable intention of the legislature. [22] The Supreme Court of the United Kingdom has therefore strongly criticised this, [23] without, however, making a request for a preliminary ruling to that effect to the Court.

43. This case-law is not called into question by the present request for a preliminary ruling or by the parties to the proceedings. Therefore, the Court should not address it and examine it on its own initiative; rather it should reserve this for a more appropriate case.

18 See the references in footnote 10.

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

20 Judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 31).

21 Judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 30).

22 Opinion in *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2011:755, points 18 and 19).

23 *HS2 Action Alliance Ltd, R (on the application of)* v *The Secretary of State for Transport & Anor* [2014] UKSC 3, paragraphs 175 to 189.

V. Conclusion

44. I therefore propose that the Court rule as follows:

When assessing whether a plan or a programme within the meaning of Article 2(a) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment exists, it is necessary to ascertain whether the specifications in the measure in question are likely to have significant effects on the environment.